



Case Note

THE RULE OF LAW PRINCIPLE IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

*Slinko Tetiana*¹

 t.m.slinko@nlu.edu.ua
 <https://orcid.org/0000-0001-8411-9655>



*Letniachyn Liubomyr*²

 l.i.letnyachyn@nlu.edu.ua
 <https://orcid.org/0000-0001-6495-9809>

*Bayrachna Larisa*³

 bayrachnayalara@gmail.com
 <https://orcid.org/0000-0002-0249-8207>

*Tkachenko Yevhenii*⁴

 ye.v.tkachenko@nlu.edu.ua
 <https://orcid.org/0000-0003-2510-5362>

1 Cand. of Science of Law (Equiv. Ph.D.), Professor, Department of Constitutional Law of Ukraine, Yaroslav Mudryi National Law University, Kharkiv, Ukraine t.m.slinko@nlu.edu.ua <https://orcid.org/0000-0001-8411-9655>

Corresponding author, responsible for conceptualization and methodology.

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2 Cand. of Science of Law (Equiv. Ph.D.), Assoc. Department of Constitutional Law, Yaroslav Mudryi National Law University, Kharkiv, Ukraine l.i.letnyachyn@nlu.edu.ua <https://orcid.org/0000-0001-6495-9809>

Co-author, responsible for writing and data curation.

Competing interests: No competing interests were disclosed.

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3 Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof. of the Department of Constitutional law of Ukraine of Yaroslav Mudryi National Law University, Kharkiv, Ukraine bayrachnayalara@gmail.com <https://orcid.org/0000-0002-0249-8207>

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Cand. of Science of Law (Equiv. Ph.D.), Assoc. Prof., Department of Constitutional Law of Ukraine, Yaroslav Mudryi National Law University, Kharkiv, Ukraine ye.v.tkachenko@nlu.edu.ua <https://orcid.org/0000-0003-2510-5362>

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Summary: 1. Introduction. – 2. Theoretical Fundamentals of Understanding the Principle of the Rule of Law. – 3. Components of the Principle of the Rule of Law in the Legal Positions of the Constitutional Court of Ukraine. – 4. The Rule of Law and the Principle of Direct Action of the Constitutional Norms. – 5. Conclusions.

Keywords: rule of law, constitutional state, human rights principle of proportionality, direct action of norms of the Constitution of Ukraine, Constitutional Court of Ukraine

ABSTRACT

Background: The Constitutional Court of Ukraine and courts of general jurisdiction play one of the main roles in the application of the rule of law. The article is devoted to the study of the constitutionalisation of the principle of the rule of law, as well as its constituent elements, in particular, the principle of legal certainty, proportionality, and direct action of the Constitution of Ukraine. The article analyses the legal positions of the Constitutional Court of Ukraine on the content of the above elements of the rule of law. It is emphasised that the principle of proportionality is fundamental to defining the limits of human rights. The content of this fundamental principle is manifested in the proportionally reasonable relation between the purpose of restricting a certain human right and the means used by the state to limit it. In addition, it is noted that the principle of direct action of the Constitution as an element of the rule of law has limited effect and relates mainly to provisions on human and civil rights and freedoms, as well as the provisions of new procedural codes introducing a novelty, which are generally perceived positively.

Methods: The paper used the following methods of analysis and synthesis to examine the main approaches to the definition of the rule of law and its individual elements: the system-structural method, which allowed us to give a structural description of the principle of the rule of law, as well as to analyse the content of its elements, and the logical-legal method, which provided an opportunity to clarify the content of the legal positions of the Constitutional Court of Ukraine on the interpretation of the rule of law.

Results and Conclusions: Theoretical and practical approaches to substantiating the nature of the rule of law and the content of its structural elements in the legal positions of the Constitutional Court of Ukraine were developed and analysed.

1 INTRODUCTION

The rule of law principle is the fundamental principle that guides the Constitutional Court of Ukraine in exercising constitutional control and is embodied in the principle of the rule of the constitution.⁵ In particular, the Constitutional Court of Ukraine emphasises the latter thesis, pointing out that by adopting the Law of Ukraine ‘On the All-Ukraine Referendum’, the Verkhovna Rada of Ukraine of the sixth convocation went beyond its constitutional powers, which is inconsistent with the rule of law. The Constitution of Ukraine is of the

5 As Yu.Todyka stated in this regard, ‘Consideration of the rule of law outside the rule of the Constitution and laws – is a way to lawlessness and permissiveness, and recognition only of the rule of law outside the systematic understanding of the rule of law – is a way to accept unjust, inhumane, undemocratic laws, other normative legal acts’ (Yu Todyka, *Fundamentals of the constitutional system of Ukraine* (Fact 1999) 67-68).

highest legal force. Laws and other normative legal acts are implemented according to the Constitution of Ukraine and must meet its norms by resolving issues in the constitutional petition.

Let us now consider the characteristics of the rule of law principle.⁶

2 THEORETICAL FUNDAMENTALS OF UNDERSTANDING THE PRINCIPLE OF THE RULE OF LAW

It is generally accepted that the classical justification of the rule of law principle was made by a well-known English lawyer, A. V. Dicey, in the work *Introduction to the study of constitutional law* (1907). In his opinion, the basis of this principle is found in three provisions: 1) the absence of state arbitrariness; 2) the subordination of each to the ordinary law applied by the ordinary courts; 3) the general norms of constitutional law form the result of the common law of the state.⁷

According to Dicey, the first element is explained by the fact that 'no person can be punished and cannot pay personally or with his/her wealth other than for a violation of the law, which is confirmed by ordinary law before ordinary courts.' In this sense, 'the rule of law is opposed to any system of government based on the use of broad, arbitrary and discretionary restrictive powers by those in power'.⁸ The second element of the rule of law principle, according to Dicey, requires that 'everyone obey the common law applied by ordinary courts'.⁹ Dicey believed that the third element of the rule of law involves the recognition of general rules of constitutional law as a result of the common law of the state, which reflects the difference between the English constitution based on court decisions and written constitutions of other European states.¹⁰

According to F. Hayek, the general nature, equality, and certainty of the law, as well as the fact that the discretionary powers of administrative bodies to apply coercive measures (administrative interference with individuals and their property) can always be challenged in court, constitute in practice 'the very essence of the matter, the decisive point on which it depends whether the rule of law prevails or not'.¹¹

In modern legal literature, you can find many different definitions of the rule of law. But they all come down to two basic concepts of the rule of law – 'formal' and 'material'. The peculiarity of the material component is that it includes requirements for the content of the law (as a rule, it must be based on such fundamental legal and moral principles as freedom, equality, and justice); and the peculiarity of the formal is that it focuses on the external form of legality.¹²

6 Judgment of the Constitutional Court of Ukraine of 26 April 2018 no 4-r / 2018 in the case on the constitutional petition of 57 people's deputies of Ukraine on the compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine 'On All-Ukrainian Referendum' <<https://zakon.rada.gov.ua/laws/show/v004p710-18#Text>> accessed 10 November 2021.

7 A Dicey, *Fundamentals of public law in England. Introduction to the study of English constitutions* (Type of. comrade ID Sitina 1907) 212-231.

8 Ibid. 209-210.

9 Ibid. 216-217.

10 Ibid. 219-220.

11 B Leoni, *Freedom and the law* (IRISEN 2008) 308.

12 Tetiana Slin'ko, Yevhenii Tkachenko, 'Constitutional law and the constitutionality criterion of state bodies' acts' (2020) Band 3 Wissenschaftlich-Praktischer Sammelband zum 10-jährigen Jubiläum der DUJV 70-90; Iu Barabash, B Mokhonchuk, *The principle of the law-governed state in the constitutional doctrine of Ukraine. A new way to law* (Balja Publishing 2021) 162; H Berchenko, A Maryniv, S Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 2 Access to Justice in Eastern Europe 128-145; T Slinko, O Uvarova, 'Freedom of Expression in Ukraine: (Non) sustainable Constitutional Tradition' (2019) 9(3) Baltic Journal of European Studies 25-42.

B. Tamanaha, analysing the various definitions of the rule of law, distinguishes its formal and material components. Among the formal concepts, Tamanaha identifies such varieties as 1) government based on law, 2) formal legality, and 3) legality in combination with democracy, and among the material, he indicates 1) individual rights, 2) the right to dignity and/or justice, and 3) the welfare state.¹³

L. Fuller, in his famous work, *The Morality of Law* (2007), which is devoted to the analysis of external moral characteristics of natural law, emphasises the eight procedural requirements for the rules of law: 1) the existence of general rules of law; 2) promulgation and publication of such norms; 3) prohibition of retroactive effect of laws; 4) clarity and legibility of laws; 5) avoiding contradictions of laws; 6) a ban on passing laws that require the impossible things; 7) stability of laws over time; 8) correspondence between official actions and proclaimed rules. Failure in any of these eight areas means not just a bad legal system but leads to a situation that cannot be called a legal system at all.¹⁴

M. Radin formulates these requirements in a more generalised form: universality, general knowledge, prospects, clarity, consistency, conformity, stability, and congruence of legislation.¹⁵

R. Summers emphasises that the rule of law ideal is the empowered governance, at least in the sphere of basic social relations between citizens and between citizens and their government, as far as is possible through published formal norms that are properly interpreted and applied. Official law is subject to rules defining the manner and limits of its application, as well as sanctions or other compensation by citizens and officials for violations of norms applied only by impartial and independent courts or similar tribunals after proper notification and hearing.¹⁶

In his understanding of the rule of law, P. Gauder also distinguishes its material and formal concepts, emphasising equality as a key component:

1) The rule of law has a moral value, because it requires the state to treat subjects as equals (“the thesis of equality”). In particular, the rule of law promotes vertical equality between officials and ordinary people and horizontal equality among the latter.

2) States adhere to the rule of law to the extent that they meet three conditions (“three principles” thesis):

Settlement: officials are reliably restricted in the use of coercive state power only when the latter is applied with due purpose and on the basis of a reasonable interpretation of specific rules of law.

Publicity: subjects of law have the opportunity to familiarize themselves with the rules referred to by officials to justify coercion; upon due request, the officials explain their application in a particular case of rules that allow coercion; officials invite those who are coerced to provide arguments regarding the application of legal rules in their situation; the public can hear about these considerations and arguments in their favor.

Generality: neither the rules under which officials exercise coercion nor the exercise by officials of the discretion provided for in those rules constitute an unjustified difference between subjects of law; the difference is unjustified if it is not justified on public grounds for all concerned.¹⁷

T. Bingham believes that the requirements of the rule of law apply to both public and private persons and provide: 1) accessibility of the law, i.e., its clarity, legibility, and predictability;

13 B Tamanaha, *The rule of law: history, politics, theory* (Kiev-Mohyla Academy 2007) 106-107.

14 Lon L Fuller, *The Morality of Law* (IRISEN 2007) 53.

15 MJ Radin, ‘Reconsidering the Rule of Law’ (1989) 69 Boston University Law Review 785.

16 RS Summers, ‘A Formal Theory of the Rule of Law’ (1993) 6(27) Ratio Juris 127-142.

17 P Gauder, *The rule of law in the real world* (Pravo 2018) 33.

2) settlement of human rights issues according to the rule of law, and not on the basis of discretion; 3) equality before the law; 4) exercise of power in a lawful, fair and reasonable manner; 5) protection of human rights; 6) providing means for resolving disputes without excessive material costs or excessive duration; 7) justice of the court; 8) observance by the state of international legal obligations and obligations arising from national law.¹⁸

S. Pogrebnyyak also highlights the formal and material aspects of the rule of law. In particular, the last aspect of the rule of law provides for the following requirements: 1) the rules of law must meet the standards of fundamental human and civil rights and freedoms; 2) the rules of law must comply with the general principles of law, other principles of natural law.¹⁹ As the Constitutional Court of Ukraine (CCU) noted in the case of a milder sentence imposed by a court, the rule of law requires the state to implement it in law-making and law enforcement activities, namely, the content of laws should be permeated primarily by the ideas of social justice, freedom, equality, and so on.

A report by the Venice Commission on the rule of law of 25-26 March 2011 states that the rule of law is a key feature of the state in many constitutions of the former socialist countries of Central and Eastern Europe and is much less common in the constitutions of old democracies. Despite all this, a consensus has been reached in modern Europe on the key importance of the concept of rule of law and on the elements covered by it. These elements are not only formal but also material (substantial).

The experts of the Venice Commission include the main material and formal elements of the principle of the rule of law:

legality (rule of law), which applies to individuals, as well as to government agencies, public and private entities. Legal certainty, which means the availability of the text of laws, the accuracy and clarity of their content. Prohibition of arbitrariness, in which discretionary powers, although necessary for the exercise of the full range of functions of power in today's complex societies, these powers should not be exercised arbitrarily. Independent and impartial courts provide access to justice. Respect for human rights. Prohibition of discrimination and equality before the law.²⁰

3 COMPONENTS OF THE PRINCIPLE OF THE RULE OF LAW IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

The principle of the rule of law and its components have been repeatedly considered by the Constitutional Court of Ukraine (CCU). For example, the Court stated that in accordance with Part 1 of Art. 8 of the Constitution of Ukraine, Ukraine recognises and enacts the rule of law. The rule of law is the supremacy of law in society (p. 4.1).²¹

The Court also identified the material components of the rule of law, namely, that the state must implement the rule of law in law-making and law enforcement actions, especially in laws infused by the ideas of social justice, freedom, equality, etc. And since these categories

18 T Bingham, *The Rule of Law* (Penguin Books 2010) 37-132.

19 S Pogrebnyyak, *Fundamental principles of law (substantive characteristics)* (Pravo 2008) 148-178.

20 Rule of Law Report no 512/2009, approved by the Venice Commission at the 86th plenary session of 25-26 March 2011, Law of Ukraine 10, 168-184.

21 Judgment of the Constitutional Court of Ukraine of 2 November 2004 no 15-rp / 2004 (case on imposition of a milder punishment by a court) <<https://zakon.rada.gov.ua/laws/show/v015p710-04#Text>> accessed 10 November 2021.

are not only legal but also moral, the CCU concluded that the law is not restricted only to law-making but also includes other social regulators, including morals, traditions, customs, etc., achieved and legitimised by society. That is why such a definition of the law does not provide a basis for its identification with the law, which can sometimes be unfair, including restricting the freedom and equality of the individual.

In another decision, the CCU defined the rule of law as a mechanism to ensure control over the use of state power and protect people from arbitrary actions of state power. The Court stressed that the principle of the rule of law is a normative ideal towards which every system of law should strive, and it should be considered a universal and integral principle of law, in particular, in the context of its fundamental components: the principle of legality, the principle of separation of power, the principle of democracy, the principle of legal certainty, and the principle of a fair trial (p. 4).²²

Thus, the fundamental component of the material concept of the rule of law is respect for human rights. As T. Allan correctly points out,

the core of the analysis of the rule of law as an ideal of the constitutional system of government is a clearly defined concept of law. From this point of view, human dignity and individual autonomy are basic values and, therefore, integral prerequisites of any law: accordingly, we reject the “positivist” understanding of law as a certain condition or requirement at the state level imposed by any power source, regardless of the nature of his rise.²³

After all, human rights are an integral part of law – their existence outside the law is impossible, just as law cannot exist without human rights. Through the catalogue of human rights, and above all constitutional rights, the ideas of equality, freedom, and justice are embodied and guaranteed.

This idea is also embodied in the national law. In particular, part 1 of Art. 6 of the Code of Administrative Procedure states that the court in decision-making on the case is guided by the principle of the rule of law, according to which, in particular, human rights and freedoms are recognised as the highest values and determine the content and direction of the state.

One of the requirements of the material aspect of the rule of law is the establishment of clear rules for the restriction of human rights in law-making and law enforcement practice. In the practice of the body of constitutional jurisdiction on this issue, the following fundamental ideas have been developed. In particular, the CCU, in the argumentation of the motivating part of its decision, linked the understanding of Part 1 of Art. 29 of the Constitution of Ukraine (right to liberty and security of person) with the rule of law.²⁴

To this end, the CCU outlined the content of freedom:

The Constitutional Court of Ukraine proceeds from the fact that among the fundamental values of an effective constitutional democracy is freedom. The existence of freedom inside the person is one of the prerequisites for his/her development and socialization. The right to liberty is an inalienable constitutional human right and gives the opportunity to freely choose behavior and comprehensive development, to act independently in accordance with own decisions and intentions, to set priorities,

22 Judgment of the Constitutional Court of Ukraine of 20 June 2019 no 6-r / 2019 <<https://zakon.rada.gov.ua/laws/show/v006p710-19#Text>> accessed 10 November 2021.

23 T Allan, Constitutional justice. *Liberal theory of the rule of law* (Kyiv-Mohyla. Acad. 2008) 14-15.

24 Judgment of the Constitutional Court of Ukraine 1 June 2016 p. №2-пн/2016 <https://zakon.rada.gov.ua/laws/show/v002p710-16#Text> accessed 10 November 2021.

to do everything not prohibited by law, to move freely throughout the territory of the state, choose a place of residence, etc. The right to liberty means that a person is free in his or her activities from outside interference, except for the restrictions established by the Constitution and laws of Ukraine (p. 2.3).²⁵

The court concluded that in accordance with Art. 8 of the Basic Law (rule of law), this principle provides for judicial control over interference with the right of everyone to liberty – the constitutional human right to judicial protection is a guarantee of all human and civil rights and freedoms (p. 2.5²⁶).

The restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unjust – they must be set exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal, be conditioned by the public need to achieve this goal, be proportionate and reasonable, and are obliged to show such a legal regulation that will allow a person to achieve a legitimate goal with minimal interference in the exercise of this right or freedom and not to violate the essential content of such a right.

Thus, one of the principles that are fundamental to defining the limits of human rights is the principle of proportionality. The content of this fundamental principle is manifested in a proportionally reasonable relation between the purpose of restricting a certain human right and the means used by the state to limit it. S. Shevchuk emphasises the origin of the principle of proportionality from the principle of the rule of law and the concept of liberal democratic statehood, pointing out that in the most general form, the principle of proportionality requires that the measure taken by the state be proportional to the purpose of this measure. According to Shevchuk, this principle is aimed at protecting the rights and interests of citizens *vis-à-vis* public authorities, requiring that state intervention through the adoption and application of legal acts meet its purpose.²⁷

According to S. Pogrebnyak, this principle is aimed at ensuring a reasonable balance of private and public interests in the legal regulation, according to which the goals of restrictions should be significant, and the means to achieve them should be reasonable and minimally burdensome for persons whose rights are limited.²⁸

Representatives of the science of constitutional law in Germany understand the principle of balance as one of the manifestations of a more general principle, namely, the principle of proportionality. Thus, R. Alexi believes that the principle of proportionality includes three elements (subprinciples): admissibility, necessity, and proportionality in its narrow sense, which together express the idea of optimisation. The interpretation of constitutional rights in light of the concept of proportionality means their interpretation as prerequisites for optimisation, i.e., as principles, not just ordinary norms. As a prerequisite for optimisation, principles are norms that require that everything that is highly possible be given factual and legal expression. The principles of admissibility and necessity contribute to optimisation by determining what is possible in reality. Thus, they express the idea of Pareto optimality. The third subprinciple – proportionality in its narrow sense – relates to the concept of optimisation in terms of determining the legal possibility. Since legal opportunity is based on competition principles, achieving balance is nothing more than optimising the connection between these competing principles. Therefore, the third sub-principle can be expressed as

25 Judgment of the Constitutional Court of Ukraine 1 June 2016 p. №2-pn/2016 <https://zakon.rada.gov.ua/laws/show/v002p710-16#Text> accessed 10 November 2021.

26 Judgment of the Constitutional Court of Ukraine 1 June 2016 p. №2-pn/2016 <https://zakon.rada.gov.ua/laws/show/v002p710-16#Text> accessed 10 November 2021.

27 S Shevchuk, *Judicial law-making: world experience and prospects in Ukraine* (Abstract 2007) 315-316.

28 Pogrebnyak (n 19) 204.

the following rule: the greater the degree of dissatisfaction or violation of one principle, the more important it is to adhere to another.²⁹

In its practice, the CCU has repeatedly defined the content of the principle of proportionality and, based on the understanding of its content, has recognised the norms of law that were the subject of its consideration as unconstitutional.³⁰ In particular, the Court noted that for compliance with the constitutional principles of social and legal states, the rule of law requires the implementation of legislative regulation of public relations on the basis of justice and proportionality, taking into account the obligation of the state to provide decent living conditions for every citizen of Ukraine (p. 2.1).³¹

The CCU also defined the understanding of the principle of proportionality, stating that when introducing additional responsibilities for citizens related to the right to freedom of association, the legislator must ensure a fair balance between the interests of persons exercising their right to freedom of association, the associations themselves, and the interests of national security and public order, public health, or the protection of the rights and freedoms of others. Based on this, the provisions of part one Art. 36 of the Basic Law of Ukraine allows certain legislative restrictions on the exercise of this constitutional right. The need for the legislator to apply the relevant restrictions on the constitutional right to freedom of association must be carefully weighed and supported by convincing grounds that, under any circumstances, preference will be given to measures with minimal restrictive effects and that these restrictions will apply in a narrow area (p. 3.1)³².

In another decision, the CCU stressed that the right to liberty and security of person may be restricted, but such restriction must be exercised in compliance with constitutional guarantees of protection of human and civil rights and freedoms, principles of justice, equality, and proportionality, ensuring a fair balance of interests of the individual and society, on the basis and in the manner prescribed by the laws of Ukraine, taking into account international law, the position of the European Court of Human Rights, and the reasoned decision of the court (p. 2.2)³³.

In the same judgment, the Court noted that the scope of the right to an appellate review, determined by law, should guarantee a person the effective exercise of the right to judicial protection to achieve the objectives of justice, ensuring the protection of other constitutional

29 R Alexi, 'Balance, constitutional control and representation' (2006) 2 Comparative Constitutional Review 113; S Maksimov, Robert Alexi, 'Constitutional rights and constitutional control' (2015) Volume 1-2 Philosophy of Law and General Theory of Law 446-456.

30 Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of 56 people's deputies of Ukraine on the constitutionality of the provision of the second paragraph of the first part of Art. 39 of the Law of Ukraine 'On Higher Education' (case on the age limit of a candidate July 2004 no 14 rp / 2004 <<https://zakon.rada.gov.ua/laws/show/v014p710-04#Text>> accessed 10 November 2021; Judgment of the Constitutional Court of Ukraine in the case of the constitutional appeal of Kirovogradoblenerho Open Joint-Stock Company on the official interpretation of the provisions of Part 8 of Art. 5 of the Law of Ukraine 'On Restoration of Debtor's Solvency or Recognition of Debtor's Bankruptcy' no 5rp / 2007 <<https://zakon.rada.gov.ua/laws/show/v005p710-07#Text>> accessed 10 November 2021; Judgment of the Constitutional Court of Ukraine of June 1, 2016 no 2-rp (case on judicial control over the hospitalization of incapacitated persons in a psychiatric institution) <<https://zakon.rada.gov.ua/laws/show/v002p710-16#Text>> accessed 10 November 2021, and others.

31 Judgment of the Constitutional Court of Ukraine in the case on constitutional petitions of 49 people's deputies of Ukraine, 53 people's deputies of Ukraine and 56 people's deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with para. 4 of section VII 'Final Provisions' of the Law of Ukraine 'On State Budget of Ukraine 2011' 26 December 2011 no 20-rp / 2011 <<https://zakon.rada.gov.ua/laws/show/v020p710-11#Text>> accessed 10 November 2021.

32 Judgment of the Constitutional Court of Ukraine 6 June 2019 № 3-r/2019 <https://zakon.rada.gov.ua/laws/show/v003p710-19#Text> accessed 10 November 2021.

33 Judgment of the Constitutional Court of Ukraine 13 June 2019 № 4-r/2019 https://zakononline.com.ua/documents/show/380283___380348 accessed 10 November 2021.

rights and freedoms. Restriction of access to the appellate court as a component of the right to judicial protection is possible only with the mandatory observance of constitutional norms and principles, namely, the priority of protection of fundamental human and civil rights and freedoms, as well as the rule of law. Such an appellate review procedure, which would ensure the effectiveness of the right to judicial protection at this stage of the proceedings, in particular, would allow the Court to restore the violated rights and freedoms of the person and prevent negative individual consequences of a possible miscarriage of justice (p. 2.4)³⁴.

Thus, in the opinion of the CCU, the provisions of the second part of Art. 392 of the Code regarding the impossibility of a separate appeal against the decision of the court of first instance to extend detention do not guarantee a person effective exercise of his/her constitutional right to judicial protection, do not ensure a fair balance of interests of the individual and society and therefore contradict the requirements of Arts. 1, 3, 8, 21, 29, part one of Art. 55 of the Basic Law of Ukraine (p. 2.4)³⁵.

Thus, the purpose of proportionality as a component of the rule of law is manifested in limiting state interference in human rights and balancing public and private interests, so the goals of human rights restrictions must be substantial, and the means to achieve them must be reasonable and minimally burdensome for those whose rights are limited.

As mentioned above, one of the elements of the formal concept of the rule of law is the principle of legal certainty. The CCU also reveals the content of legal certainty in its legal positions. From the content of the constitutional principles of equality and justice follows the requirement of certainty, clarity, and unambiguity of the rule of law. Otherwise, uniform application is not ensured, unrestricted interpretation in law enforcement practice is not precluded, and this inevitably leads to arbitrariness (p. 5.4).³⁶

The principle of legal certainty as an element of the rule of law states that the restriction of fundamental human rights and the implementation of these restrictions in practice is possible only if the predictability of the application of legal norms established by such restrictions is ensured. In the Court's view, this means that the restriction of any right must be based on criteria that will enable a person to distinguish lawful conduct from unlawful conduct and to anticipate the legal consequences of his/her conduct (p. 3.1).³⁷

4 THE RULE OF LAW AND THE PRINCIPLE OF DIRECT ACTION OF THE CONSTITUTIONAL NORMS

One of the key elements of the rule of law is the principle of direct action of the constitutional norms. It was embodied in the third part of Art. 8 of the Basic Law of Ukraine, which states

34 Judgment of the Constitutional Court of Ukraine 13 June 2019 № 4-р/2019 https://zakononline.com.ua/documents/show/380283__380348 accessed 10 November 2021.

35 Judgment of the Constitutional Court of Ukraine 13 June 2019 № 4-р/2019 https://zakononline.com.ua/documents/show/380283__380348 accessed 10 November 2021.

36 Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of 51 people's deputies of Ukraine on the constitutionality of the provisions of Art. 92, para. 6 of Section X 'Transitional Provisions' of the Land Code of Ukraine (case on permanent land use) of 22 September 2005 no 5 -rp / 2005 <<https://zakon.rada.gov.ua/laws/show/v005p710-05#Text>> accessed 10 November 2021.

37 Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights regarding the compliance of the Constitution of Ukraine (constitutionality) with the eighth paragraph of item 8 of part one of Art. 11 of the Law of Ukraine 'On the Police' of 29 June 2010 no 17-rp / 2010 <<https://zakon.rada.gov.ua/laws/show/v017p710-10#Text>> accessed 10 November 2021.

that the provisions of the Constitution of Ukraine are the norms of direct action. Thus, recourse to the court for the protection of constitutional rights and freedoms directly on the basis of the Constitution of Ukraine is guaranteed.

The direct action of the norms of the constitution is a multifaceted category and is considered an element of the principle of the rule of law,³⁸ a legal property of the Constitution of Ukraine,³⁹ and a constitutional principle or the principle of constitutional order.

In our opinion, the direct action of the Constitution of Ukraine is addressed primarily to ordinary people and allows them to require the state to provide the opportunity using the norm included in the text of the Constitution, and the state is obliged to comply with this requirement. After all, according to Art. 3 of the Basic Law of Ukraine, it is human rights and freedoms and their guarantees that determine the content and direction of the state, and their approval and provision is the main duty of the state. At the same time, the key role in approving the direct action of the Constitution belongs to the court, the appeal to which is guaranteed for the protection of constitutional rights and freedoms (Part 3 of Art. 8 of the Constitution). According to V. Rechytsky, the direct effect of the Constitution means that the implementation of the Basic Law must be ensured both in the presence and in the absence of indirect legislation. And this takes place even when the Constitution of Ukraine directly indicates such indirect legislation (laws). If there is no relevant procedural law, the necessary actions must be taken on the basis of the Constitution. 'Straight' means without an intermediary at the level of law.⁴⁰

The CCU adheres to a broad approach to the interpretation of the principle of direct effect of the Constitution and tends to consider all provisions of the Constitution of Ukraine, including those on the status of special entities – public authorities and their officials, specific subjects of power – as having a direct effect.

Thus, the decision draws attention to the fact that the absence of a legislative procedure for consideration of urgent bills 'cannot be the basis for non-compliance with the second part of Art. 93 of the Constitution of Ukraine since the norms of the Constitution of Ukraine are the norms of direct action (part three of Art. 8 of the Constitution of Ukraine)' (p. 3)⁴¹. In a decision of January 25, 2009 no. 2-rp / 2009, the Court granted the provisions of the Constitution of Ukraine, which establish the powers of the President of Ukraine and other subjects of foreign policy, the nature of the rules of direct action (p. 3.1)⁴². The Court tends to consider all provisions of the Constitution of Ukraine, including those devoted to the status of special subjects – public authorities and their officials, specific subjects of power – as having direct effect.

In another decision, the Court granted the provisions of the Constitution of Ukraine, which establish the powers of the President of Ukraine and other subjects of foreign policy, the nature of the rules of direct action (p. 3.1)⁴³. According to the Basic Law of Ukraine, the provision 'everyone has the right to legal aid' (Part 1 of Art. 59) is a rule of direct action

38 Pogrebnyak (n 19).

39 O. Onishchenko, 'Direct effect of the norms of the Constitution of Ukraine' (2004) 5 Entrepreneurship, Economy and Law 90-93; O. Nikolskaya, 'Direct effect of the Constitution of Ukraine as its legal property' (2009) 7 Legal Ukraine 40-44.

40 V. Butkevych, V. Rechytsky, 'Implementation of constitutional reform: the vision of experts' (2015) 4-5 Rights and freedoms and responsibilities of man and citizen. National Security and Defense 44-48.

41 Judgment of the Constitutional Court of Ukraine 28 March 2001 №2-rr <https://zakon.rada.gov.ua/laws/show/v002p710-01#Text> accessed 10 November 2021.

42 Judgment of the Constitutional Court of Ukraine 25 January 2009 №2-rr/2009 <https://zakon.rada.gov.ua/laws/show/v002p710-09#Text> accessed 10 November 2021.

43 Judgment of the Constitutional Court of Ukraine 25 January 2009 №2-rr/2009 <https://zakon.rada.gov.ua/laws/show/v002p710-09#Text> accessed 10 November 2021.

(Part 3 of Art. 8), and even if this right is not provided by relevant laws of Ukraine or other legal acts, a person cannot be restricted in its implementation. This applies, in particular, to the right of a witness to receive legal assistance during interrogation in criminal proceedings and the right of a person to provide explanations in state bodies (p. 4 (case on the right to legal aid))⁴⁴. The direct effect of the norms of the Constitution of Ukraine means that these norms are directly applicable.

Laws of Ukraine and other normative legal acts are applied only in the part that does not contradict the Constitution of Ukraine (p. 2.1)⁴⁵.

The ideal of human rights and freedoms was the following decision: 'Constitutional norms could not be applied in resolving the issue of accepting the relevant complaint due to the fact that the Constitution of Ukraine was published on July 13, 1996'. This interpreted human rights and freedoms embodied by the Constitution as a directly applicable right and, at the same time, the source of the Constitution of Ukraine itself, the implementation of which in this part was direct. This interpretation of the Constitution of Ukraine corresponded to the classical notion of the rule of law, according to which human rights are the source and not the consequence of the Constitution.

A notable step aimed at establishing the principle of direct effect of the Constitution of Ukraine in the courts was the legislative amendment, which was reflected in the new edition of Procedural Codes.⁴⁶

Art. 47 of the new Code of Administrative Procedure of Ukraine says:

If a court concludes that a law or other legal act contradicts the Constitution of Ukraine, the court should not apply such law or other legal act, but should apply the norms of the Constitution of Ukraine as norms of direct action. In such a case, the court, after making a decision in the case, appeals to the Supreme Court to resolve the issue of submitting to the Constitutional Court of Ukraine a petition on the constitutionality of a law or other legal act under the jurisdiction of the Constitutional Court of Ukraine. Thus, this norm encourages courts of general jurisdiction to take initiative, responsibility and creativity in the direct implementation of the Constitution of Ukraine in a particular case, and only then apply to the Supreme Court to submit a petition to the Court to resolve the constitutionality of the applicable legal act.

The practical implementation of the direct action of constitutional norms on constitutional rights and freedoms must take into account the different legal nature of civil and political rights and freedoms, on the one hand, and social, economic, and cultural, on the other. The first group of constitutional rights and freedoms interpreted in the literature as 'natural' must be exercised and defended in court under any circumstances, and the full realisation and protection of the second group of rights depend on the socio-economic situation in the country and the financial and material capabilities.

A striking example of the direct effect of constitutional norms on civil and political rights is the implementation by citizens of Ukraine of the guaranteed in Art. 39 of the right to assemble peacefully and weapon-free and to hold meetings, rallies, marches, and demonstrations, regarding which the executive authorities or local self-government bodies should be notified in advance. A law defining the procedural mechanism for exercising this right has not yet been

44 Judgment of the Constitutional Court of Ukraine 30 September 2009 №23-rr / 2009 <https://zakon.rada.gov.ua/laws/show/v023p710-09#Text> accessed 10 November 2021.

45 Judgment of the Constitutional Court of Ukraine 8 September 2016 № 6-rr <https://zakon.rada.gov.ua/laws/show/v006p710-16#Text> accessed 10 November 2021.

46 Civil Procedure Code, Commercial Procedure Code and Code of Administrative Procedure of Ukraine, approved by the Parliament of Ukraine on 3 October 2017.

adopted. On the other hand, the peculiarity of the nature of social, economic, and cultural rights and freedoms was taken into account by the CCU in decisions, according to which 'statutory socio-economic rights are not absolute', 'the exercise of socio-economic human rights largely depends on the situation in states, especially financial one', and 'courts are guided, in particular, by the principle of legality when deciding on social protection cases'.

This principle provides for the application by courts of the laws of Ukraine, as well as normative legal acts of the relevant state authorities – including normative legal acts of the Cabinet of Ministers of Ukraine issued within its competence.

5 CONCLUSIONS

The study allows us to draw the following conclusions. The fundamental principle (criterion of constitutionality of regulations) that governs the Constitutional Court of Ukraine, exercising constitutional control is the principle of the rule of law, which is embodied in the rule of the constitution. In particular, the Constitutional Court of Ukraine emphasises the latter thesis, pointing out that by adopting the Law of Ukraine 'On the All-Ukrainian Referendum', the Verkhovna Rada of Ukraine of the sixth convocation went beyond its constitutional powers, which is inconsistent with the rule of law. The Constitution of Ukraine has the highest level of legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must meet it by resolving issues raised in the constitutional petition.

Based on the analysis of the works of national and international scholars and the legal positions of the Constitutional Court of Ukraine, it is concluded that the understanding of the criteria of the constitutionality of acts of public authorities should be based on the main material and procedural components of the rule of law (constitutional legality, legal certainty, access to justice, observance of fundamental human freedoms).

It should also be noted that one of the components of the criterion of 'respect for human rights' is the principle of proportionality, which is fundamental in determining the limits of human rights. The content of this fundamental principle is manifested in the proportionally reasonable relationship between the purpose of restricting a particular human right and the means used by the state to limit it.

The following provisions belong to the constitutional and legal mechanisms: a) the norms of direct action in the Constitution are mainly the provisions concerning the constitutional rights and freedoms of man and citizen; b) recourse to the courts directly on the basis of constitutional norms of direct action must be guaranteed, first and foremost, for the protection of human and civil rights and freedoms; c) direct action of the Constitution of Ukraine, if the court concludes that a law or other legal act contradicts the Constitution of Ukraine; d) appeal to the Supreme Court for further decision by the Court on the constitutionality of the relevant act.

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