ТЕОРИЯ И ИСТОРИЯ ГОСУДАРСТВА И ПРАВА, ФИЛОСОФИЯ ПРАВА

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THE RULE OF LAW IN THE CONDITIONS OF THREATS TO NATIONAL SECURITY

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SUMMARY

It is considered that the issues of national security are of priority importance above all other interests. It is impossible to save life without ensuring security. If preservation of life is not secured, all the other interests lose their sense. Preservation of the life of majority seems to be more important than the need to implement the rule of law principle.

On the basis of the results of the research, a conclusion may be drawn that compliance with the rule of law principle when threats to national security exist is obligatory, in spite of the possible consequences for the state of ensuring national security.

Key words: rule of law principle, ECHR, national security, local self-government bodies.

ВЕРХОВЕНСТВО ПРАВА В УМОВАХ ЗАГРОЗ НАЦІОНАЛЬНІЙ БЕЗПЕЦІ

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АНОТАЦІЯ

Вважається, що питання національної безпеки мають пріоритетне значення з-поміж інших інтересів. Урятувати життя без гарантування безпеки неможливо. Якщо збереження життя не забезпечене, усі інші інтереси втрачають сенс. Збереження життя більшості видається важливішим, ніж необхідність упровадження принципу верховенства права.

На основі результатів дослідження можна зробити висновок про необхідність дотримання принципу верховенства права, коли існують загрози національній безпеці, незважаючи на можливі наслідки для держави щодо гарантування національної безпеки.

Ключові слова: принцип верховенства права, ЄСПЛ, національна безпека, органи місцевого самоврядування.

Statement of the problem. Contradiction between the state interests and the task of complying with the rule of law principle in all the fields of Ukraine's societal life is one of the most topical problems, in particular, in the conditions of armed aggression against Ukraine. In what cases the state prefers security interests to the interests of compliance with the rule of law principle, how this priority is grounded and is it possible to achieve the balance between compliance with the rule of law principle and ensuring national security interests. Settlement of the above issues causes prevention of abuse by the state's authorities and protection of citizens from arbitrary will of the state authorities.

From the point of view of legislation and practice, there are problems and challenges in the application of the rule of law principle, in particular, in ensuring national security in the conditions of armed conflicts:

– organization and legal complexity of determining the requirements for state substantiation of the need to limit implementation of the rule of law principle for the sake of ensuring national security interests (for example, introduction of martial law or emergency state, prohibition of rallies and demonstrations, restriction of citizens mobility, taking special judicial procedures, application of tortures, etc.);

– determination of the measure of judicial control as the requirement of the rule of law principle, for the sake of avoiding bringing damage to national security interests;

– establishment of the forms of judicial control implementation by the periods and the scope of restrictive measure introduction over a special period, for the sake of ensuring national security interests;

– development of an exhaustive scope of mandate of the state authorities in relation to ensuring national security interests for the sake of counteracting their abuse of power in relation to citizens.

The relevance of the research topic is confirmed by the degree of non-disclosure of the topic contradiction between the state interests and the task of complying with the rule of law principle in all the fields of Ukraine's societal life is one of the most topical problems, in particular, in the conditions of armed aggression against Ukraine.

Status of research. Scientific analysis of the problems of The Rule of Law in the Conditions of Threats to National Security is maintaining a balance of human interests and ensuring national security.

The Object and Purpose of the Article. Implementation proposition of this article will allow to improve compliance with the rule of law principle when the state authorities are fulfilling their mandate, in the conditions when there is a need to counteract the threats posed to national security.

Presentation of the main material. It is considered that the issues of national security are of priority importance above

all other interests. It is impossible to save life without ensuring security. If preservation of life is not secured, all the other interests lose their sense. Preservation of the life of majority seems to be more important than the need to implement the rule of law principle (for instance, decision of the Chamber of Lords in the case *Liversidgevs Anderson*, 1942, in relation to exile of the residents of German origin during World War II, as well as the same actions taken by the US government in relation to citizens of Japanese origin).

Tom Bingham has indicated that the rule of law is the status when all individuals and authorities in the state, both public and private, must be interconnected and be entitled to use the laws publicly accepted, which refer to the future and are publicly performed in courts.

Since the examples of violations of the rule of law principle have found their reflection in the acts of the judiciary, let us focus on those sources since they constitute the result of law-enforcement activity and some of them have even become exemplary samples of such activity.

International courting its decisions in the case of *Nicaraguavs. The USA*, 1986, and in the case on the legitimacy of the threat with nuclear weapons or its application, 1996, indicates that proportionate measures of reacting to the attack that are necessary to counteract it are justified. Besides that, it is prohibited to attack a military target if accompanying damages brought to civil residents and civil facilities are excessive as compared to military benefits.

Inter-American Court of Human Rights in the case *Velasces Rodriges vs. Honduras*, 1988, claimed that the state power is not unlimited and the state is not entitled to use any measures to achieveits goals.

In the case *Aksoyvs. Turkey*, 1996, the European Court of Human Rights (hereinafter referred to as the ECHR) reminded that the state is responsible "for the life of the nation" and for ensuring proportionate and adequate nature of "emergency measures" and their scope. Besides, the ECtHR differentiates between cases connected with ensuring national security, including terrorism, by the following types: cases related to deviation from commitments during the emergency status (*Lowless vs. Ireland*, *Ireland vs. the UK, Brannigan and McBride vs. the UK, Aksoy vs. Turkey, A. and other vs. the UK*); cases related to suspects who are terrorists: ban on torturing and inhuman or degrading treatment or punishment (*Martines Sala vs. Spain, Ocalan vs. Turkey, Ramires Sanches vs. France, Frero vs. France*), cruel treatment of the person being kept in solitary incarceration in the police (*Etxebarria Caballero vs. Spain, and Ataun Rojo vs. Spain, Beortegui Martinez vs. Spain, Portu Juanenea and Sarasola Yarzabal vs. Spain*), on the risk of cruel treatment in case of deportation/extradition (*Chahal vs. the UK, Shamayev and others vs. Georgia and Russia, Saadi vs. Italy, Daudi vs. France, Omar Osman vs. the UK, Babar Ahmad and others vs. the UK, Asvat vs. the UK, H. vs. Germany, Saidani vs. Germany*), cases in which the state made extradition/deportation of those suspected of terrorism in spite of the ECtHR's indication under the rule of Art. 39 of the Court Rules not to take those actions (*Mamatkulov and Askarov vs. Turkey, Ban Cemais vs. Italy, Labsi vs. Slovakia, Trabelsi vs. Belgium, etc.*), cases on covert operations of "extradition of a criminal to a foreign state" (*El-Masri vs. the Former Yugoslavian Republic of Macedonia, Al Nashyri vs. Poland and Khusayn (Abu Zubaydu) vs. Poland, Nasr and Galivs. Italy,* Abu Zubayda vs. Lithuania, Al Nashyri vs. Romania), cases on the right to freedom and personal immunity (*Fox, Campbell and Hartley vs. the UK, etc.*), cases on detaining for an indefinite period and observing of the right to immediately appear before court (*A. and others vs. the UK, Brannigan and McBride vs. the UK*), cases on the right to court consideration within a reasonable period (*M.S. vs. Belgium, Sher et al. vs. the UK, etc.*), cases on the right to a fair trial (*Heaney and McGuinness vs. Ireland, Salduz vs. Turkey, El Haski vs. Belgium, Abdulla Ali vs. the UK, Ibragim and others vs. the UK, Ramda vs. France, Otegi Mondragon and others vs. Spain, Murtazaliyeva vs. Russia*), cases on absence of punishment without law (*Arrozpid Sarasola and others vs. Spain, Del Rio Prada vs. Spain*), cases on violation of the right to private and family life (*Sabanchiyeva and others vs. Russia, Finogenov and others vs. Russia, Tagayeva and others vs. Russia, MacCann and others vs. the UK, Armani da Silva vs. the UK, etc.*), cases on the freedom of view expression (*Stomakhin vs. Russia, Donnet and others vs. Turkey, etc.*), cases on the freedom of assembly and associations (*the United Communist Party of Turkey and others vs. Turkey, Herri Batasuna and Batasuna vs. Spain, Guldju vs. Turkey*).

In all cases the ECHR kept to the standpoint of application of the rule of law principle during the need to ensurenational security, in terms of legitimacy, legal determination, ban on abuse of power, access to justice, compliance with human rights, non-discrimination and equality to the law.

Special attention should also be paid to the judgments of the Supreme Court of Israel. In the decision *Ressler vs. Minister of Defense*, judge A. Barackstates: "In its decisions the Supreme Court has declared on numerous occasions that the army" consideration as to defense – in relation both to Israel and Judea, Samaria and the Gaza Strip – are within judicial control, and this control shall be valid not just for the issues of the mandate to pass decisions or the possibility to be guided by the considerations of defense, but for all the aspects of such decisions, including the issues of adequacy of this or that evidence". In the decisions based on Shnitser's claim against the chief military censor, judge A. Barack stated that decisions in the field of security do not differ from other ones, and the principle of power distribution makes it binding for the court to control legitimacy of decisions, therefore such decisions shall be subject to judicial control.

In 1999 the Supreme Court of Israel passed decision in the case *Public Committee against Tortures vs. the Government of Israel*, which determines that application of moderate physical pressure does not belong to legal methods, and the argument of "state necessity" cannot be used to justify such actions. In 2005, confirming its practice, the Supreme Court stated that it is necessary to strike the balance between security needs and individual rights.

In February 2018 the Supreme Court of Israel passed a decision in the case based on the claim of the Public Committee against Tortures in the interests of the Palestinian prisoner Asad Abu Gosh, which allowed, unlike its previous decisions, measures of moderate physical pressure on the prisoners, actually legalizing application of tortures in the interests of national security.

At the national level, as an example, there deserves attention the decision of the Grand Chamber of the Supreme Court on pension provision for internally displaced persons, which confirms that requirements for inspections Resolution of the Cabinet of Ministers of Ukraine № 365 dated 2016 contains (which envisaged extraordinary inspections of the place of residence of internally displaced persons) do not constitute the legal grounds for termination of pension payment. Therefore, decision of the Pension Fund of Ukraine on termination of pension payment on the basis of the inspection results was acknowledged illegal.

In order to reduce to the minimum the threat of application of the mandate provided for the protection of national interests by state authorities they can use for other purposes or / and will apply excessively without any proper justification, at the expense of other interests and / or on the basis of the results of its application, when no adequate balance between the interests of the nation and human rights will be kept, in our opinion, it is

№	Activity name
	internationally
1.	Monitoring of the violations of the rule of law principles in the countries that are now or / and have been in the state where there national security was threatened *(it is suggested to make analysis by countries and by the criteria of following legitimacy, legal certainty, ban on abuse of power, access to justice, observance of human rights, non-discrimination and equality to the law).*
2.	Determination of the ways of reacting to identified violations (by judges, the state, international institutions and civil society institutions).
3.	Generalization of the results obtained and getting of independent reviews from expert institutions.
	nationally
1.	Generalization of regulatory legal acts that regulate the mandate of state authorities and local self-government bodies in the conditions of state of emergency (military aggression) and their grouping by their influence on the elements of the rule of law principle.
2.	Determination of the degree of influence of the regulatory legal acts adopted for the sake of reducing/removing threats to national security on the condition of ensuring implementation of the rule of law principle.
3.	Generalization of the results obtained and reviewing of the results by independent experts.
4.	Determination of the list of requirements set for substantiation of the need to limit implementation of the rule of law principle for the sake of ensuring national security interests by the state.
5.	Development of recommendations on exercising judicial control in considering issues related to national security.
6.	Making propos also namending the scope of mandate of state authorities as to ensuring of national security interests for the sake of counteracting their abuse of power to wards citizens.

necessary: first, to determine the limits of the granted mandate; secondly, to introduce the mechanism of external control that would enable to efficiently revise the mandate application and to establish whether it was legal; third, to determine the criteria and approaches to possible limitation of the implementation of the rule of law principle and priority of national security interests. In this case the statement made by A. Barack should be mentioned: "If there takes place "face-to-face" collision of two values and it is impossible to act on the basis of one value without violating the other one, state security should be the preference".

Development of the requirements for the substantiation of the need to restrict implementation of the rule of law principle by the state for the sake of ensuring national security interests, the mechanism of external control should lie with the bodies of judicial, legal and prosecutor's self-government, and state authorities, local self-government bodies and civil society institutions should be involved in the discussion.

Determination of the forms of judicial control over the periods and the scope of restrictive activities over a special period for the sake of ensuring national security interests shouldlie with judicial self-government bodies, while state authorities, local self-government bodies and civil society institutions should be involved in the discussion.

Development of an exhaustive scope of mandate of the state authorities on ensuring national security interests for the sake of counteracting abuse of power manifested by them to wards citizens should lie with the respective central state authorities, while state authorities, local self-government bodies and civil society institutions should be involved in the discussion.

Activity to implement a policy of maintaining the balance of the rule of law in the face of threats to national security.

Conclusion. On the basis of the results of the research, a conclusion may be drawn that compliance with the rule of law principle when threats to national security exist is obligatory, in spite of the possible consequences for the state of ensuring national security.

The authorities, both in general, and in the field of national security, are subordinated to the law. And one may not disagree with the statement made by the former President of the Supreme Court of Israel Meir Shamgar, that runs as follows: "National security is also law-based", and further on judge A. Barack added: "There is no security beyond the law. The power of the law is a component of national security".

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