

# RULE OF LAW PRINCIPLE AS A PRINCIPLE OF CRIMINAL PROCEDURE (ON MATERIALS OF THE EUROPEAN COURT OF HUMAN RIGHTS)

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## ABSTRACT

*The urgency of the study is stipulated by the importance of the European Court of Human Rights practice studying in order to determine the content of the rule of law principle. The purpose of the article is to elucidate the rule of law principle as a principle of criminal procedure by means of the European Court of Human Rights practice. The study is based on the paradigm of human rights priority over positive law and understanding of law, formed within the natural law school, distinguishing between law and the law, and judicial precedent, legal doctrine and principles of law are recognized as the forms of law. The study of the European Court of Human Rights practice led to the use of content analysis method and the hermeneutic method. The article clarifies that the pluralism of approaches to understanding the rule of law does not preclude the identification of ideas constituting the rule of law and are named in most of the rule of law theories, including the following: no one can be punished other than for a crime; no one can be above the law, all people are equal before the law and the court; court practice, disclosing the content of legal requirements, is a source of law; it is substantiated that the provisions of the European Court of Human Rights on criminal proceedings reflect the commitment to democratic values, and their purpose is to ensure the rights and fundamental freedoms of subjects to criminal proceedings, prevent disproportionate interference with human rights by public authorities, and implement the rule of law principle. The materials of the article can be used to improve the public authority's activities in the field of crime prevention through the implementation of the following areas: study of the European Court of Human Rights practice by crime prevention bodies; constant monitoring of the European Court of Human Rights practice in order to improve national legislation.*

**Keywords:** Criminal Proceedings, Effective Investigation, European Court of Human Rights Practice, Human Rights, Rule of Law.

## INTRODUCTION

The rule of law is an integral part of modern international law, as well as of the legal system of a number of states. The rule of law is referred to as a value in a lot of sources of international law as a value of a democratic society, as well as human rights (Kuchuk et al.,

2019; Ivaniĭ et al., 2020; Saienko et al., 2020). One cannot disagree with Carothers (1998) that *“One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles”*. Kochura (2010) rightly points out that the rule of law is one of the crucial principles of any modern law-based democratic state legal system. Herewith, it is a basic principle, determining the conditions and the way of the legal system structure and functioning in general, as well as of its individual components.

Crime is a negative social phenomenon; therefore, each state takes active measures to counteract it, adopting, in particular, relevant legislation, and forming bodies to combat crime. Counteracting crime takes place mainly within the framework of criminal proceedings, as public authorities are obliged to respect human rights, including of those suspected of committing a crime or plead guilty to a crime. Herewith, public authorities do not always act lawfully, violating human rights. The European Court of Human Rights practice analysis, in particular, indicates it. In addition, the data on the rule of law index in the world are of concern. According to The World Justice Project Rule of Law (2020), the rule of law level has been declining over the past three years in various parts of the world. This shows the importance of studying the issue of compliance with the rule of law by public authorities, whose main function is to combat crime. Some aspects of the rule of law influence on the criminal process have been studied by Madsis (2017), Nurse (2020), Shytov & Duff (2019), but the issues identified by us remain unexplored.

The study of the rule of law as a principle of criminal proceedings is based on the paradigm of human rights priority over positive law and understanding of law, formed within the natural law school, distinguishing between law and the law, and judicial precedent and legal doctrine and principles of law are recognized as forms of law. The importance of the rule of law principle abundance in criminal proceedings is stipulated by the necessity for such proceedings to comply with the requirements of justice. And for the post-soviet states, this issue is also relevant in connection with the further departure from the state approach to understanding criminal proceedings, having an accusatory direction and implementation into the legal system of the constitutional provision on a person as a basic value, on human dignity and human rights as the basis of law and order.

Given the different perceptions of the European Court of Human Rights decisions' nature by lawyers, the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950) is considered as a source of law in our study, and herewith its provisions are revealed through the European Court of Human Rights practice. The provisions of the Convention are implicit in nature, as revealed by the European Court of Human Rights practice. The decisions of this Court contain legal provisions which are the basis for resolving similar cases in the future and affect the change of the legislation of the states-parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950).

The study of the European Court of Human Rights practice led to the use of the content analysis method and hermeneutic method, which ensured the objectivity of the results obtained. The European Court of Human Rights decisions' analysis was conducted using a systematic approach, which allowed obtaining a systematic vision of the criminal proceedings problems in

the Court's practice. The rule of law study (as well as of human rights) requires the use of an axiological approach. The rule of law can be adequately known only within the natural and law understanding.

### **The Principle of the Rule of Law as the Basis of the Modern Legal System**

The existence of the rule of law various theories does not allow to reduce its content to a single understanding. However, this does not preclude the identification of ideas constituting the rule of law and are referred to in most theories of the rule of law. There are the following (which are crucial in criminal proceedings) among them: no one can be punished other than for an offense committed defined by the law; no one can be above the law, all people are equal before the law and the court; court practice, disclosing the content of legal requirements, is a source of law. These ideas, gaining their development, are reflected in the European Court of Human Rights practice. The provisions of the European Court of Human Rights on criminal proceedings reflect a commitment to democratic values, and their purpose is to ensure the rights and fundamental freedoms of the subjects to criminal proceedings, to prevent disproportionate interference with human rights by public authorities, to implement the rule of law principle.

The fundamental ideas regarding criminal proceedings are contained in the decisions of the European Court of Human Rights under Art. 2, 3, 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950). The subjects to criminal proceedings should take into account that certain rights are absolute and cannot be limited under any circumstances. The waiver of a party to criminal proceedings should be voluntary and well-realized by a person. Subject of research elucidation requires clarification of the issue of the rule of law principle understanding. Since today there is no single understanding of it. It should be noted that the scientific substantiation of the rule of law, the conceptual design of the ideas that make it up, was carried out by the English lawyer Albert Venn Dicey (1885) and set out in the paper *"Introduction to the Study of the Law of the Constitution"*. According to Dicey (1885) the rule of law includes the following requirements:

1. No one shall be punished except for an offense committed, which is prescribed by law. In this case, the person's guilt should be proved in a competent court;
2. No one can be above the law, all people are equal before the law and the court; everyone, regardless of their status in society, should appear before the same court;
3. Legal provision is the result of the activity of courts, and is not such due to their formal enshrinement in the law.

Brian Tamanaha (2004) singled out two types of the rule of law theories: formal and material. The first focuses on the method of adoption and implementation of the law, on the legal requirements quality (whether the competent entity has adopted the law, whether the provisions of the law meet the legal certainty and the requirements of temporality). At the same time, the essential nature of the law is not important: whether it is fair, the main thing is compliance with formal requirements. Material theories focus on the substantive, essential characteristics of the rule of law. At the same time, it should be noted that material requirements do not deny the

existence of formal requirements, so it is advisable not to talk about “*material*” theories, but about “*essential*” ones. We should add that considerable attention to human rights is paid by “*formal*” theories of the rule of law. The rule of law exists where human rights are implemented.

The rule of law principle is recognized at the United Nations level. “*The rule of law is a concept that underlies the activities of the organization and provides for the subordination to the law of all individuals and legal entities, including the state. All subjects are responsible before the law, which should be duly promulgated, equally enforced and meets international law norms and human rights. This principle requires equality before the law, fair application of the law, legal certainty, separation of powers, as well as public participation in decision-making, prevention of arbitrariness, and public authorities activities’ openness*” these are the rule of law main characteristics, given in the Report of the Secretary-General “*The rule of law and transitional justice in conflict and post-conflict societies*” (United Nations, 2004). Taking into consideration the lack of a common rule of law understanding in European states, the Venice Commission (2011) prepared a Report on the rule of law. According to the Report, the rule of law includes the following requirements:

1. Legality, which also provides for a transparent, accountable and democratic law-making process;
2. Legal certainty;
3. Prohibition of arbitrariness;
4. Access to justice, which also includes the existence of an independent and impartial court;
5. Human rights adherence;
6. Equality and non-discrimination before the law.

The same understanding of the rule of law follows from the European Court of Human Rights practice.

### **Principle of the Rule of Law in the System of Principles of Criminal Proceedings**

To study the European Court of Human Rights practice under Art. 2, 3, 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950) is crucial within the framework of criminal proceedings. Let's start with Art. 2, in which the right to life is enshrined. This article covers not only premeditated murder, but also cases of lawful use of force that have resulted in deprivation of life because of negligence. For example, it could be the infliction of death by law enforcement agencies because of negligence in the case of abuse of power while apprehending criminals. The case of *Finogenov and Others v. Russia* (Cases, 2011) is quite illustrative in this context, which analyzed the circumstances of an operation as to hostages release in a terrorist-occupied theater. The law enforcement agencies used an unknown narcotic gas, which killed more than 100 hostages. The applicants complained, in particular, that the criminal investigation had focused on the hostage-taking. The actions of the authorities in the criminal proceedings were not investigated. Investigators did not try to establish the circumstances of the death of each hostage.

The following conclusions of the European Court of Human Rights are crucial for criminal proceedings. First, the Court has reaffirmed its practice of using evidence “beyond

reasonable doubt”, according to which evidence can be the result of a comparison of sufficiently clear and consistent conclusions or compelling presumptions, herewith it is important to take into account the conduct of the parties. Second, the Court emphasized that *“the use of lethal force by law-enforcement officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant them carte blanche. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights”* (Cases, 2011).

The next case, where a number of legal provisions defining the boundaries of criminal proceedings are formulated, is Geletay v. Ukraine case (Cases, 2018). The applicant complained of a violation of his right to a defense (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950)). In the case, the Court has systematically formulated criteria to be taken into account in assessing the impact of procedural deficiencies on the fairness of the proceedings. In the Court's view, these criteria include the following:

1. The applicant's being in a vulnerable position (for example, due to mental condition, age);
2. Whether the requirements of the legislation on the procedure of pre-trial investigation and admissibility of evidence were observed;
3. The applicant's ability to challenge the admissibility of the evidence;
4. Quality of evidence, their reliability;
5. Obtaining evidence legally;
6. Whether the applicant refuses the previous testimony or changes it frequently;
7. Evidence method of use and strength etc.

The European Court of Human Rights in this case also formulated the following legal provision: the right to a guarantee of a fair trial is relative, and therefore no one prevents a person from waiving it. This also applies to the right to legal aid. However, this refusal should be voluntary, conscious and reasonable: the applicant should foresee the consequences of his refusal. The refusal must not be contrary to the public interest. The European Court of Human Rights practice often deals with cases involving persons, suspected of committing crimes, torture and other inhuman treatment. The prohibition of misconduct is contained in Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950).

Analysis of the European Court of Human Rights decisions in the cases *“Aleksakhin v. Ukraine”* (Cases, 2012), *“Basenko v. Ukraine”* (Cases, 2015), *“Kalashnikov v. Russia”* (Cases, 2002), *“Nechiporuk and Yonkalo v. Ukraine”* (Cases, 2011), *“Selmouni v. France”* (Cases, 1999), *“Tomasi v. France”* (Cases, 1992), *“Ushakov and Ushakova v. Ukraine”* (Cases, 2015) allows us to conclude about the following requirements for an effective investigation, formulated by the Court: efficiency, diligence, independence, the ability to identify the offender and bring him to justice, the investigation should be under public control. Investigative agencies should always try to exercise their powers in good faith to achieve the purpose of the criminal proceedings, not to rely on hasty conclusions, closing the case. State bodies' decisions should be reasoned.

The European Court of Human Rights (2012) has emphasized that when a representative of a State accused of torture or ill-treatment is charged with a crime, amnesty and pardon are not allowed. This is stipulated, in particular, by the fact that Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950) embody the fundamental value of a democratic society, and, therefore, a particularly thorough analysis of the circumstances of the case should be carried out in such cases. The European Court of Human Rights practice under Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), which enshrines the right to liberty and inviolability of person (although it should be noted that this article also applies to administrative legal relations related to the detention of a person) is directly related to criminal proceedings.

According to the established practice of the European Court of Human Rights, any deprivation of liberty should be based on the grounds set out in subparagraphs “a” to “f” of Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950), and should meet the criterion of legality. Herewith, legality presupposes not only that the procedure for deprivation of liberty established by the law should be observed, but also that the law itself must comply with the quality of the law, be fair and not violate the rule of law (Cases, 2013). The European Court of Human Rights has repeatedly stated that the length of detention should be justified, and that this issue cannot be addressed in abstracto. This issue should be decided in each case, taking into account the specific circumstances, the grounds on which the national authorities motivated their decisions and the duly documented facts relied on by the applicant in his requests for release from custody. Extension of detention may be justified in a particular case only if there are clear indications that the true needs of the public interest so require, despite the existence of a presumption of innocence, outbalance the requirement of respect for personal liberty (Cases, 2011).

The European Court of Human Rights has also paid considerable attention to the issue of extending detention. The gravity of the crime, in the commission of which the person is suspected, being the basis for the decision to elect a measure of restraint against the applicant, ceases to be such a basis after the expiration of the term. Therefore, public authorities, extending a person's detention, are obliged to provide other grounds for justifying such a decision (Cases, 2000). Herewith, the new grounds should be clearly stated in the decisions of national courts (Cases, 2001). In addition, the European Court of Human Rights noted that the practice of detaining defendants without a specific legal basis and in the absence of clear rules governing the legal status of defendants violates the principle of legal certainty and the rule of law principle (Cases, 2015).

## CONCLUSION AND RECOMMENDATION

Thus, the European Court of Human Rights practice analysis allows us to formulate a number of provisions defining the boundaries and basic provisions of criminal proceedings within the member states of the Convention for the Protection of Human Rights and Fundamental Freedoms. The most instructive in this aspect is the practice under Art. 2, 3, 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Herewith, the

prohibition of misconduct is absolute and cannot be violated even in the face of a threat to the life of the nation. A person's waiver of his or her rights (for example, the right to defense by a lawyer) as a participant in criminal proceedings should be voluntary and well-realized by a person.

The legal provisions formulated by the European Court of Human Rights concerning criminal proceedings reflect a commitment to democratic values (human dignity, human rights, and the rule of law). Their purpose is to ensure the rights and fundamental freedoms of the subjects of criminal proceedings, to prevent disproportionate interference of the public authorities in human rights, to implement the principle of the rule of law. The rule of law in criminal proceedings provides, inter alia, the following provisions: no one may be punished other than for an offense specified by the law; no one can be above the law, all people are equal before the law and the court; court practice, disclosing the content of legal requirements, is a source of law. Given the importance of compliance with the requirements of the rule of law in criminal proceedings, which ensures the legitimacy of decisions taken in the proceedings, it is appropriate to formulate the following recommendations:

1. Provide for the mandatory study of the European Court of Human Rights practice by agencies counteracting crime (in the process of training, retraining, etc.);
2. It is appropriate for specially authorized public authorities to monitor the European Court of Human Rights practice and to make suggestions for national legislation improvement.

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