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Research Article

ARBITRARINESS PREVENTION IN THE CONTEXT OF ACHIEVING THE EFFICIENCY OF THE RULE OF LAW

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ABSTRACT

Background: *Countries of Western political and legal tradition and former socialist countries of Central and Eastern Europe need further arbitrariness prevention in order to establish the rule of law both logically and taxonomically: idea (ideal) – prerequisite (guarantee) – achieving the efficiency of the rule of law. They also require practical application, which reflects the priorities of national interests based on freedom and respect to human dignity. The article contextualises arbitrariness prevention as an applied instrumental concept, essential for bringing the rule of law to the state, which allows the prevention of undue public authorities' intervention in the process of their discretionary powers in particular spheres of human life. It also seeks the most appropriate approach to its use in combination with other standards and requirements in order to assess and summarise real daily practices of the rule of law existing in many modern societies and states. Functional application of arbitrariness prevention as a means of legal reasoning to access constitutional justice is substantiated. Concentration on the enhancement and implementation of the current Ukrainian mechanism to provide the monitoring of power use by the state and human immunity from arbitrary actions of the state authorities is gaining a real practical value. It is extremely relevant under the conditions of court control over the constitutionality of the state intervention in social and other types of human rights.*

Methods: *Research on arbitrariness prevention in the international and national political and legal context is based on the definition of the rule of law derived from the provisions of the dialectic correlation of natural law and the positivist legal approach. The potential of the latter approach for the provision of sufficient restriction of the power is also very important. Historic, hermeneutic, systemic, structural, axiological, and instrumental approaches promote arbitrariness prevention as a particular specific idea (ideal), which consolidate the advance of social and legal thought as well as the practices of public authority functioning. They also contribute to its superposition over state arbitrariness as a permanently active and clear requirement, instruction and conceptual component, principal rule (sub-rule), and commonly shaped standard, as well as one of non-disputable prerequisites and guarantees of a counter to malpractice of discretionary powers. In this article the theoretical and comparative generalisation of the traditions of the perception of the rule of law proves and confirms, on the ground of therelevant constitutional provisions, and specific court decisions resulted in quite clear reasoning in favour of their implementation in the real legal order and provided a person the possibility of exercising their guaranteed right to appeal to the court against the actions of the state within the scope of the activities of the Constitutional Court of Ukraine.*

Results and conclusions: *The content and meaning of arbitrariness prevention are presented. They reflect the value-normative potential of the rule of law and serve as the basis for the development of the entire set of national constitutional and legal structures, current legislation, mechanisms and procedures for its objective evaluation. The legal positions of the Constitutional Court of Ukraine regarding the introduction of the mechanism of ensuring control over the use of power by the state and protecting people from arbitrary actions of authorities as well as its subordination to achieving the effectiveness of the rule of law are examined in the given article.*

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1 INTRODUCTION

The promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and the building of effective, accountable and inclusive institutions at all levels are some of the global goals in the area of justice.[1] The last annual report of the human rights organisation Freedom House 'Freedom in the world 2022. The Global Expansion of Authoritarian Rule', shows the strengthening of power by authoritarian leaders and the acceleration of attacks on democracy and human rights. The high probability of the trend of autocracy overtaking democracy as a governance model is stressed. A significantly large number of countries at bordering and disputed territories of the former USSR have been demonstrating the deterioration of their indicators[2] since records began. The state of political rights and civil freedoms is monitored. In 2021 Ukraine's score according to 100-point scale of the report was 61, an improvement of its previous indicator of 60. Thus, it still remains partially free together with the countries which are considered free regarding their respective level for political rights and human freedoms, despite the fact that their established democratic standards are being questioned and destroyed. At the same time, Ukraine has also ranked with some non-free countries.[3]

In the report, published on February 24, 2022, democratic authorities claimed to be ready to collaborate in order to resist authoritarian abuses and support human rights defenders fighting for freedom around the world. Determined to move to a new stage of the expansion of the European Union (hereinafter the EU), the entire Ukrainian people are on the line of democracy defence with the motto 'Freedom or death'.[4] They are absorbed by the support for their EU membership and prognoses about Russia's war against Ukraine.[5]

In the last of twelve forecasts by American philosopher, political economist, and professor at Stanford university, Francis Fukuyama, on the results of the so called Russian invasion, we find some confidence that Russia's defeat makes it possible 'for new freedom to be born'.[6] It will also prevent the decline of global democracy.

This year presents quite new challenges (compared to the anti-values on which Putin's authoritarianism rests) that have arisen on Ukraine's way to ensure democracy level growth in the process of the EU extension to the east for the EU member-states. They include such questions as:

(1) Is there an independent judicial system in Ukraine?

(2) Is proper administration of justice in civil and criminal cases ensured?

(3) Is there any protection against the unlawful use of physical force, as well as freedom from war and unrest?

1 'The 17 Goals' (*The Global Goals*, 2015) <https://www.globalgoals.org/goals/16-peace-justice-and-strong-institutions> accessed 30 April 2022.

2 Freedom House, *Freedom in the World 2022: The Global Expansion of Authoritarian Rule* (Freedom House 2022) <https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf> accessed 30 April 2022.

3 'Countries and Territories' (*Freedom House*, 2022) <https://freedomhouse.org/uk/node/183> accessed 30 April 2022.

4 V Valle, 'Wake Up, the World! Ukraine is On the Defence Line of Democracy' (*Ukrajinsjkyj Interes*, 6 March 2022) <https://uain.press/articles/prokinsya-svite-ukrayina-na-liniyi-oboroni-demokratiyi-1553643> accessed 30 April 2022.

5 'Russia is headed for a complete defeat in Ukraine. – claims American philosopher, political economist, professor at Stanford University Francis Fukuyama in his article published on American Purpose. – There is no space for compromise acceptable for both Russia and Ukraine, taking into account the losses they have had at this stage'. See F Fukuyama, 'Preparing for Defeat' (*American Purpose*, 10 March 2022) <https://www.americanpurpose.com/blog/fukuyama/preparing-for-defeat> accessed 30 April 2022.

6 ibid.

(4) Do laws, policies and practices guarantee equal treatment of different sectors of society?[7]

There are views on limiting the supremacy of power (arbitrariness) and ensuring adequate protection against it.[8] They included with the aspirations to consider:

> The evolution and the state of the art of the rule of law in the EU is gained with the help of the evaluation of the progress that has been made since the beginning of democratic reforms in Central and Eastern Europe as well as the analysis of the latest trends in the deviations from the rule of law and open opposition to liberal and democratic values in some EU member-states. It helps draw attention to the variety of new available mechanisms to strengthen the rule of law in the EU and assess its potential for achieving steady positive changes in this direction.[9]

In this case, the focus is shifted from the formal possibility to be protected from authoritarian arbitrariness to the opportunity to be secured from it with the help of procedural guarantees of justice based on shared convictions of the highest human values and dignity.

2 THEORETICAL SUBSTANTIATION OF THE SIGNIFICANCE OF ARBITRARINESS PREVENTION AND ITS PRACTICAL APPLICATION

Systematic research in the area of the rule of law, which is treated as an invaluable outcome of the states sharing and promoting European values is gaining relevance and topicality nowadays.

This trend can be explained by the tough times for democracy all over the world, lack of confidence that the adoption of obligations to be guided by the rule of law delivers sufficient warnings against repeating the sad experience of totalitarianism or authoritarianism. Even though they are currently condemned by the electorate, the fear is that that 'people's ability to learn the lessons of history is limited'.[10]

The attempt to study deep basics for the substantiation of the rule of law,[11] its equivalents, traditionally represented by the German Rechtsstaat (in some sources – Rechtsstaatlichkeit) and the French Etat de Droit,[12] as well as the examination of theoretical and practical issues connected with the implementation of this principle as a preventer of infringements

7 'Freedom in the World 2022: Ukraine' (*Freedom House*, 2022) <https://freedomhouse.org/uk/country/ukraine/freedom-world/2022> accessed 30 April 2022.

8 N Arajärvi, 'The Core Requirements of the International Rule of Law in the Practice of States' (2021) 13 (1) HJRL 180, 185, 189.

9 A Engelbrekt, A Moberg and J Nergelius (eds), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (*Swedish Studies in European Law*, Bloomsbury Publishing 2021).

10 E Hobsbaum, 'Level of Post-Communist Disaster is Not Understood Outside of Russia' (2004) 12 Svobodnaya mysl'-XXI 3.

11 A Dicey, *Basics of State Law of England (Introduction to the Study of the Law of the Constitution): Introduction to the Law of English Constitution (OV Poltorackaya tr, Publication of LF Panteleev 1891)* 152; T Bingham, 'The Rule of Law: The Sixth Sir David Williams Lecture' (*University of Cambridge*, 16 November 2006) <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law> accessed 15 April 2022; S Holovatyi, *The Rule of Law*, pt 1 *From an Idea – to a Doctrine* (Pheniks 2006); B Tamanaha, *The Rule of Law: History, Politics, Theory* (A Ishchenko tr, Kyiv-Mohyla Academy 2007).

12 S Holovatyi, *The Rule of Law*, pt 3 *Ukrainian Experience* (Pheniks 2006); S Holovatyi, ' "The Rule of Law" Doesn't Work: Explanatory Note on the Text of the Document of Venetian Commission 'Report on the Rule of Law', which was accepted on 86th plenary meeting on 25–26 March 2011 (CDL-AD (2011)003re)' (2019) 11 Law of Ukraine 41–2.

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and disproportionate restriction on human rights[13] in law-making and law-enforcement activities,[14] resulted in almost unconditional acceptance of the significance of arbitrariness prevention. (in other words – prohibition of arbitrariness, avoidance of arbitrariness, counteraction to arbitrariness and public powers abuse (prevention of power abuse) conscientiousness of public authorities (the conscientious implementation by public authorities of the powers granted to them)).

In the vein of modern trends, closely connected with the European integration processes and ECtHR and ECJ, and concurrent consolidation of the rule of law ideal, value or principle commonly applicable for any national legal system,[15] arbitrariness prohibition is advocated, in authors' comments in Reports on the Rule of Law, adopted by the European Commission "For Democracy through Law" (The Venice Commission) (hereinafter Report CDL-AD(2011)003rev),[16] in the translation-interpretation based on and developed from this Report of specific research "Rule of Law Checklist".[17]

The interpretation of the existing constitutional principle of the rule of law (developed by Thomas Bingham and based on the consensus of a sufficient list of components of the rule of law as well as the same components of the "Rechtsstaat" concept, which are not only formal but substantive or material - materieller Rechtsstaatbegriff)[18] crucially impacts the current state and further role of arbitrariness prohibition in both international and national court rulings as well as international legal documents. Bingham's vision of the volume and consequences of this principle application (his explanation made with the help of the series of eight sub rules) appears to be so 'adequate', inspires confidence that 'more brilliant minds'[19] 'could offer some better additional sub-rules or save the quantity'[20], and is prophetic, in that it still serves the basis for:

(1) Legality, including transparent, grounded, explained subordinate and democratic procedure of giving legal force to acts of law;

(2) Legal certainty;

13 Akademiia Folke Bernadotta (FBA), *User's Manual for Assessment of Following of the Rule of Law in Public Administration* (FBA, Sida 2016) <https://fba.se/contentassets/fa15ae1001e945e5bff1ef839006ff16/users-guide-ukrainian.pdf> accessed 30 April 2022; E Tseller, R Kuibida and R Melnyk, *Discretion of Administrative Organs and Judicial Control of its Implementation* (Project) (Pravo-Justice, EU 2020) <https://court.gov.ua/userfiles/media/new_folder_for_uploads/sud4857/zvit_dyskreciia.pdf> accessed 30 April 2022.

14 P Rabinovych and others, *The Principle of the Rule of Law: Theoretical and Practical Issues* (Proceedings of Lviv Laboratory of Human and Citizen Rights, Research and Essays, Spolom, 2016); V Smorodynskyi, 'Constitutional justice in the framework of the Rule of Law' in *Mutual Outcomes of the European Commission 'For Democracy Through Law' and the Bodies of Constitutional Justice and Interpretation Problems in Constitutional Justice: Proceedings of International online conference, Kyiv, 25 June 2020* (BAITE 2020) 303; T Slinko, L Letnianchyn, L Bairachna and Ye Tkachenko, 'The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine' (2022) 1 (13) AJEE 165.

15 M Koziubra (ed) *Rule of Law Checklist at National Level: case of Ukraine* (EU, Research Center for the Rule of Law and its Implementation in Ukraine NaUKMA 2021) 16, 18.

16 Holovatyi (n 13, 2019).

17 S Holovatyi (tr, comment), *European Commission "For Democracy Through the Law" (Venice Commission) Rule of Law Checklist. Commentary. Glossary* (USAID 2017) <https://newjustice.org.ua/wp-content/uploads/2017/09/Rule_of_Law_Checklist_UKR.pdf> accessed 30 April 2022.

18 European Commission "For democracy through the law" (Venice Commission), 'The Rule of Law: Report accepted on 86th plenary meeting, 25–26 March 2011' (2011) 10 Law of Ukraine 177; European Commission "For Democracy Through the Law" (Venice Commission), 'The Rule of Law: Report accepted on 86th plenary meeting (CDL-AD(2011)003rev), Venice, 25–26 March 2011' (2019) 11 Law of Ukraine 28.

19 Bingham (n 12).

20 ibid.

(3) Arbitrariness prohibition;

(4) Access to justice provided by independent and impartial courts, including those performing judicial supervision of administrative activities;

(5) Respect for human rights;

(6) Non-discrimination and equality before the law.[21]

The complexity of the constitutional principle of the rule of law, enrolment of the closely interrelated absolute components (according to some other ideas – heterogeneous sub-principles/requirements,[22] defining sub-principles/criteria), and principles varying on the context basis,[23] influence the practical aspect of the Rule of Law checklist to assess its state in a particular country (in the updated translated version it is named as 'the Rule of Law checklist for particular state'),[24] detailed sample texts.[25]

This, in its turn, generates some common arguments to develop each particular component or "ingredient" of the rule of law.

Concern that '"the rule of law" does not work' (or even more the attempt to understand and explain the content of recently strange for domestic theory and practice English term "the Rule of Law"),[26] as well the attempt "to measure the unmeasurable", are inevitably accompanied with some theoretical reasoning on it as 'a doctrine, principles, institutions and procedures, vitally important for the protection of a human against state arbitrariness and human right to dignity'.[27] The scientists support the possibility of real efficiency in the rule of law enshrined in the Constitution of Ukraine, taking into account the introduction and development of a domestic project directed towards a further refinement of 'the system of clear rules of law guaranteeing the right to dignified equal and fair conduct as well as the right to appeal to an independent court to everyone according to fair procedures'.[28]

One of the versions of this project known as "*The Rule of Law at the National Level*" *("National Checklist")* and approved as a complex and detailed tool for practical measurement of the rule of state law, both in law-making and law-enforcing activities,[29] stipulates the list of the main components of the rule of law and their elements with the highest priority specifically for Ukrainian conditions: legality, legal certainty, equality before the law, equality (non-discrimination), appropriateness (proportionality), prevention of abuse of power, and access to justice. In this key, the approach to the interpretation of one of them, namely the prevention of abuse of power and changes, special attention is paid to the detailed theoretical component concerning the restrictions of discretionary power of public authority, as well as the system to prevent their abuse.

21 Venice Commission (n 19, 2019).

22 M Koziubra, 'The Rule of Law and Ukraine' (2012) 1/2 Law of Ukraine 30.

23 In order to examine the rule of law as a *legal principle*, Serhii Holovatyi had to show the process of this principle formation and reveal its content in universal (global), regional (European) and national (Ukrainian) contexts. See SP Holovatyi, 'The Rule of Law: Idea, Doctrine, Principle' (DPhil (Law) abstr thesis, Legislation Institute of The Verkhovna Rada of Ukraine 2008) 4.

24 Venice Commission (n 19, 2011) 183–4; ibid (2019) 36–8.

25 Holovatyi (n 18) 15–46.

26 Holovatyi, (n 13, 2019) 82.

27 Koziubra (n 16) 21.

28 ibid.

29 ibid.

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'This system must operate efficiently in practice. It should not be just declarative. It should stipulate the achievement of the state of inevitability of punishment for unlawful use of discretionary powers.'[30]

From the viewpoint of an outside observer, and following the support and promotion of varied ideas of the rule of law by the academic community and "expert community of development" (World Bank, International Monetary Fund, etc.), Professor at University of Iowa, Paul Gowde, suggests it is defined as:

> The normative principle of political state regulation according to which coercive power in the first weaker rule of law should be used in line with the rules, which provide the one for whom this power is executed with the opportunity to bring the power bearers to justice on reasonable grounds. According to the second stronger version of the rule of law, these rules should be justified on all the reasonable grounds compatible with the equality of all men [31]

It is concurrently compatible with the explanations of scientists in social studies regarding the incorporation of a standard-valuable component into the content of the rule of law.[32]

Gowde's recognition of this strategy (concept), commonly known as the transition to the rule of law according to the Bottom-up principle ("The Rule of law from Below"[33]), allows concentration within this strategy on 'the promoting of equal rights in order to win the commitment of the people who are subject to these rights, and on the institutions, needed to coordinate the efforts to put this commitment into effect'[34] as well as a focus on the development of a new strategy to measure the rule of law. It can be represented by an experimental one-dimensional scale of the rule of law, which is applied to the local context or to a more comprehensive array of data respectively.[35]

Thus, consecutive analysis of arbitrariness prevention as an idea (ideal) and obligatory condition (guarantee) to achieve the efficiency of the rule of law in international and national political and legal contexts is still relevant and topical.

3 RESEARCH AIM AND METHODS OF ARBITRARINESS PREVENTION AND ITS MANIFESTATIONS

Examination of arbitrariness prevention aimed at its contextualisation as the concept of applied purposes, which is essential for bringing the rule of law to the state and to prevent excessive public authority interference when exercising their discretionary powers in certain spheres of human life, will open opportunities for seeking the most appropriate ways for its use in combination with the other standard requirements for the need for generalisation and evaluation of real daily practices of the rule of law in many modern societies and states. Extensive review of functional purposes of arbitrariness prevention as the mandatory condition and guarantee for the achievement of rule of law efficiency as well as the means of legal reasoning to access constitutional justice in Ukraine appears to be of the highest relevance and topicality.

30 M Koziubra (ed) *Rule of Law Checklist at National Level: Case of Ukraine* (Research Center for the Rule of Law and its Implementation in Ukraine NaUKMA 2020) 5–6, 105–19; Koziubra (n 16) 115–29.

31 P Gowde, *The Rule of Law in the Real World* (Pravo 2018) 29.

32 ibid.

33 A Buyse, K Fortin, B Leyh and J Fraser, 'The Rule of Law from Below – A Concept Under Development' (2021) 17(2) Utrecht Law Review 1.

34 Gowde (n 32).

35 ibid 31.

The definition of the rule of law based on the provisions of dialectical correlation of natural law and positivist law approaches as well as the way in which it manifests in the context of legal restrictions of power and its exact opposite - despotic rule - serves the ground for the contextualisation of arbitrariness prevention.[36] The provisions of histori, hermeneutic, system, structural, axiological, and instrumental approaches promote the prevention of arbitrary mercenary or groundless power execution as a specific idea (ideal). It has incorporated the achievements of social and legal thought and practice of public authority operation and functioning. The exaltation of this idea over 'a specific social regulator (not legal and normative) – state arbitrariness'[37] is quite possible. Theoretical discourse devoted to arbitrariness prevention, which always represents active and clear requirements, guidance, conceptual components, principal rules (sub-rules), and commonly shaped standards appears quite prospective. This feature is one of the indisputable conditions and guarantees for the efficiency of the rule of law.

The consistency of the concept interpretations is achieved as a result of theoretical and comparative generalisation of the traditions of rule of law perceptions in different legal systems, attention to constitutional provisions[38], and the studies of specific court rulings. They link rule of law content with real daily practices of the restrictions of public authorities and independent control over its execution. When the statement of its essential qualities (in other words of the key structural elements, positive aspects[39] (benefits)[40], core features, and characteristics) gets its reflection in the interpretation of the rule of law in some dimension ("keys", contexts or senses), the reasoning in favour of relevant control (monitoring) tools gets its special value. However, it happens only in case of studies of the rule of law itself as a procedural and processional one. It is claimed that from the viewpoint of the general public, but not theoreticians, formal elements of the rule of law are subordinated to procedural elements. The latter include court independence and procedural rights.[41] Under the terms of martial law in the territory of Ukraine more attention is paid to the procedural elements of preventing the restrictions of the constitutional right of all persons to judicial protection[42] rather than the requirements of the rule of law for the restrictions of the power rule (arbitrariness).

36 CH Mcllwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1947, Great Seal Books 1958) 21.

37 Smorodynskyi (n 15) 308.

38 The rule of law acquires quite practical value, taking into account the innovations of the constitutional justice reform in 2016 concerning the amendments to the provisions of Article 129 of the Constitution of Ukraine: its initial version stipulated that "administering justice the judges are independent and subject to the law only", while the version of the Law of June 2, 2016 №1401-VIII reads: "the judge administering justice is independent and should find guidance in the rule of law". See Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (as amended of the Law of Ukraine No 1401-VIII of 2 June 2016) [2016] Vidomosti of the Verkhovna Rada 28/532.

39 According to Thomas Bingham, Joseph Raz has commented on the trend to use the rule of law as the compressed description of positive aspects of any political system, while John Finnis has described the rule of the law as "the term used to denote the state of healthy legal system". See Bingham (n 12).

40 J Raz, 'The Law's Own Virtue' (2019) 39 (1) OJLS 1.

41 J Waldron, 'The Concept and the Rule of Law' (2008) 43 (1) Georgia Law Review 9.

42 'Peculiarities of Administering Justice at the Territory under Martial Law' (*Supreme Court*, 4 March 2022) <https://supreme.court.gov.ua/supreme/pres-centr/news/1261727> accessed 30 April 2022.

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4 ARBITRARINESS PREVENTION IN THE LIGHT OF CLASSICAL CONCEPT (DOCTRINE) OF THE RULE OF LAW AND THE ADVICE OF THE VENICE COMMISSION

The last annual report of the human rights organisation Freedom House 'Freedom in the world 2022. The Global Expansion of Authoritarian Rule'43 contains unexpectedly relevant and topical content for Ukrainian political and legal realities since we are talking about the current level of the provisions, principles, democratic paradigm and liberal regime of government in the country, which had totalitarianism not so long ago.

Since the very beginning of the full-scale Russian invasion on February 24, 2022, Ukraine, together with the rest of the countries of Eastern Europe and the whole world (whose governments adopted the expression "to be Ukrained", to mean when you are Russia and you invade a country and the response is humiliation on a global forum) have been working on ensuring the protection and resumption of political and civil rights to counter the manifestations of aggression and genocide. Ukraine responds to the call to become 'a promising example of the rule of law in dark times'.[44] 'Its effort to strengthen its own potential'[45] in order to 'start a chain reaction of the rule of law and help the rest of the world to find its own way' is a proven fact.[46]

In order to examine the ongoing trends in the rule of law in the countries of the world according to the indicators of ensuring the context based on the constitutional provisions for both private and public autonomy of human rights (as per the indicators of World Justice Project (WJP) Rule of Law Index)[47] and other data[48], as well as to assess the state of the rule of law in practice in the national political and legal contexts[49], or to draft the list of other important issues for its enhancement indicators[50], the tools containing the most important content (and as a result the whole concept of the rule of law by authoritative English scientist representing the constitutional approach, Albert Dicey) are used.

This concept was presented in 1885 in his fundamental work.[51] The meaning of the existing constitutional principle of the rule of law and its brief discussion as per eight rules (sub-rules) were presented in the speech of Sir David Williams.[52] Later on, other meanings attributed to the constitutional principle of the rule of law by the most outstanding lawyers and judges of modern times were included in the pages of a short book.[53]

Under the rapprochement of the leading legal systems, accompanied by the strengthening of mutual influence of the theoretical positions of the founders of the constitutional principle of

43 Freedom House (n 2).

44 Gowde (n 32) 21.

45 ibid.

46 ibid.

47 Ukraine itself took the 74th position out of 139 countries of the world according to the WJP Rule of Law Index in 2020-2021 having improved its position by five. See World Justice Project (WJP), *Rule of Law Index 2021* (WJP 2021) <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> accessed 30 April 2022.

48 J Beqiraj and L Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) 14 HJRL 139.

49 Koziubra (n 31) 114; Koziubra (n 16).

50 FBA (n 14); Tseller, Kuibida and Melnyk (n 14).

51 Dicey (n 12).

52 Bingham (n 12).

53 T Bingham, *The Rule of Law* (Penguin Books 2011).

the rule of law, specific interpretations, "sensitive" from the viewpoint of the institution value, including the Council of Europe, the role of the occurrence of the provisions (components) important in terms of this principle efficiency, the perception of the aforementioned standards is growing greatly. It should be stressed that each of them can be concurrently applied to different legal and political situations. The specific features caused by the real implementation of the idea of weakening the authority, which gets priority in combination with other typical rule of law components, gradually become the object of empirical studies and contribute to the development of modern control (monitoring) tools. They still can be applied to the process of implementation of institutional, procedural and political practices of the rule of law in different contexts.

According to the second sub-rule of the constitutional principle of the rule of law by Thomas Bingham, full rejection of the application of free judgement of the state authorities as outlined by Albert Dicey appears to be quite disputable. Attention is drawn to the fact that the true proof of his opinions is confirmed only by the existence of specific regularity:

> The wider and less specified the powers are, being based on the free judgement and delegated to the official or judge, the wider range of subjectivity and possible arbitrariness opposed to the rule of law is.[54]

According to one out of six aspects, the rule of law (3) Prohibition of arbitrariness, which was presented by The Venice Commission in Report CDL-AD(2011)003rev, 'discretionary powers are needed for performing some specific tasks in modern complicated societies'.[55] At the same time, as required by the provisions derived from the ideas by Thomas Bingham, 'they should not be administered in an arbitrary way'.[56] Moreover, their administering in such a way 'gives opportunity to make essentially unfair, unjustified and irrational, even despotic judgements, incompatible with the principle of the rule of law'.[57]

The specific research prepared on the basis of the report in order to develop and refine its findings, approved by the Venice Commission at its 106th Plenary meeting, presents a checklist of the questions to be used for the assessment of the compliance with the rule of law. With their help, we may receive answers shedding light on the efficiency of the prevention of the abuse of authority in a specific society. The sample tests of this research by the Venice Commission contained such questions as 'Does the public government guarantee the counter to the arbitrariness and abuse of the authorities (détournement de pouvoir)?'[58] It urges confirmation of the interpretation of the rule of law as:

> The set of principles, institutions and procedures (which are similar but not always identical). Since the experience and traditions of the lawyers from different countries of the world (characterised by different political and economic systems) prove their importance for the protection of a human against arbitrary power of the state and give a person an opportunity to possess their human dignity,[59] as well as readiness to introduce and apply such principles, institutions and procedures.

When the efficiency of the prevention of power abuse is studied, this issue concerns principal provisions for:

54 Bingham (n 12).
55 Venice Commission (n 19, 2019) 31.
56 ibid.
57 ibid.
58 Holovatyi (n 18) 25.
59 ibid 92.

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> Administering power which leads to clearly unfair, unjustified irrational and despotic decisions. It should be treated as the breaching of the rule of law as well as the wildness of the executive authorities while administering discretionary power contradicting the rule of law. That is why, in order to provide some protection from the arbitrariness, legal acts should identify the extent of each discretionary responsibility and power. [60]

The Ukrainian national legal system guarantees the provision as follows: 'discretionary power abuse should be subject to court or any other independent control, while the available legal tools should be clear and precise'.[61] Relevant duties connected with the reproduction of such provisions in the legislation are still granted to the state.

In general, sample tests as well as the whole investigation, called by the author 'The Rule of Law Checklist', use the prevention of discretionary power abuse as the basic principle for the restriction of pubic power and its independent control. It is aimed at the practical application of the need for the assessment of the state of the rule of law in specific countries, rather than a factor for decision-making.

5 PROPOSALS OF THE CONSTITUTIONAL COURT OF UKRAINE REGARDING NATIONAL CONTROL TOOLS FOR ACHIEVING THE EFFECTIVENESS OF THE RULE OF LAW

At the same time, the interpretation of the restriction of the government institution powers (even in case of the lack of its final term identifier) are actively disputed in 'significantly different systems of state and law'[62] of former socialist countries of Central and Eastern Europe. At first they are used for the value of the exact implementation of the laws and are supported by daily social practices. The arrival of the opportunity to agree upon the universal components of the rule of law, as well as Rechtsstaat/Etat de Droit and other traditions of the restriction of government institutional power, allows the formulation of the requirement for arbitrariness prohibition when it becomes the content component or practical aspect of relevant concepts (doctrines).

Being combined with some other criteria (parameters), however, prescribed by the Rule of Law Checklist to the prevention of power abuse, the restriction of institutional power is being used as a delicate tool to assess the state rule of law, especially in countries where many people identified this principle, if not with the rule of law then at least with the principles of a legal state.[63] Anticipating the arrival of 'common approaches to the basics which will define the face of the national legal system'[64] and being aware that the rule of law requires its implementation in law-making and law-enforcing activities at the state level, providing some mechanisms for ensuring control over state power use and human protection against arbitrary actions of the state authorities,[65] some countries claim the rule of law to be a normative ideal. Every legal system should strive to it.

60 ibid 25.

61 ibid.

62 Venice Commission (n 19, 2019) 28.

63 V Veremko, 'Standard for the Main Principle: The Standards for the Rule of Law are Set: now in Ukrainian' *Zakon i Biznes* (Kyjiv 1–7 July 2017).

64 ibid.

65 Decision No 1-p/2018 in Case No 1-6/2018 (Constitutional Court of Ukraine, 27 February 2018) <https://zakon.rada.gov.ua/laws/show/v001p710-18> accessed 30 April 2022; Decision No 6-p/2019 in Case No 1-152/2019(3426/19) (Constitutional Court of Ukraine, 20 June 2019) <https://zakon.rada.gov.ua/laws/show/v006p710-19> accessed 30 April 2022.

It should be treated as a universal and integral legal principle containing such components as the principle of legality, the principle of separation of powers, the principle of popular sovereignty, the principle of democracy, the principle of legal certainty, and the principle of a fair trial.[66] In order to support the ruling of the Constitutional Court in June 2019 and January 2020, the awareness of the necessity to implement the rule of law into law-making and law-enforcing activities and restrict government authority power in their arbitrary actions with 'priorly regulated and announced rules'[67] is subordinated to the main purpose of the rule of law. These rules enable us 'to foresee the measures to be taken in a specific legal relationship', [68] as well as the opportunity of the subject to enforce the law. A person will get the opportunity 'to forecast and plan their actions and to expect predictable results.'[69] The main purpose of the rule of law is the restriction of state power and ensuring against the arbitrary interference of the state and its authorities in specific spheres of human life.[70]

It should be noted that the principle of the rule of law guaranteed by the Constitution of Ukraine[71] actually stipulates, quite acceptable from the viewpoint of a person, a guaranteed right to appeal the state actions in the court, and state obligations not to take discretionary actions.[72]

The specific features of judicial control over the constitutionality of state interference in human social rights, defined by the Judge of the Constitutional Court of Ukraine Vasyl Lemak, were set in view of the fact that the rulings on social rights actually concern the redistribution of resources, which are always limited. In this case primary attention should be paid to balancing out the individual interests of every person which can be arbitrarily infringed as a result of an unacceptable reduction of standards caused by meeting the taxpaying public's interests. [73]

Lemak asserts the necessity of singling out a set of criteria to evaluate the constitutionality of state interference in human social rights in order to 'provide the law-maker or government having constitutional authority with the possibility to regulate the process of exercising social rights',[74] and doing it 'non-arbitrarily'.[75] According to the Judge of the Constitutional Court, the law-maker

> 'Can regulate the volume and mode of the exercise of social rights. However, he is not able to deny them or restrict their content in critical and discretionary ways. Thus, arbitrariness is prohibited by the means selected for regulation'.[76]

Their trial and testing are inevitable from the viewpoint of their constitutionality. For this purpose, rationality and proportionality tests in their classical formulation provide a sufficient

66 Decision No 1-p/2020 in Case No 1-5/2018(746/15) (Constitutional Court of Ukraine, 23 January 2020) <https://zakon.rada.gov.ua/laws/show/v001p710-20> accessed 30 April 2022.

67 Decision No 6-p/2019 in Case No 1-152/2019(3426/19) (Constitutional Court of Ukraine, 20 January 2019) <https://zakon.rada.gov.ua/laws/show/v006p710-19> accessed 30 April 2022.

68 ibid.

69 ibid.

70 ibid.

71 Constitution of Ukraine (n 39) pt 1 art 19, pt 2 art 55, pt 3 art 8, 56.

72 Decision No 1-p(II)/2021 in Case No 3-333/2018(4498/18) (Constitutional Court of Ukraine (Second Senate), 7 April 2021) <https://zakon.rada.gov.ua/laws/show/va01p710-21> accessed 30 April 2022.

73 Dissenting Opinion of the Judge of the Constitutional Court of Ukraine V Lemak concerning the Decision of the Constitutional Court of Ukraine (Second Senate) of 7 April 2021 No 1-p(II)/2021 <https://zakon.rada.gov.ua/laws/show/na01d710-21#n2> accessed 30 April 2022.

74 ibid.

75 ibid.

76 ibid.

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legal and methodological basis for the rulings of the Constitutional Court of Ukraine in cases of constitutional complaints. The testing of other means to infringe other human rights should also take place. This way the directionality of arbitrariness prevention as the standard requirement for the respect and assertion of human rights, and its subordination to the achievement of fair balance of private and public interests is continuously confirmed.

The Ruling of the Constitutional Court of Ukraine of June 2020 stresses the importance of exercising the first component of the Ukrainian rule of law formula as the foundation of the national constitutional system. According to which "the rule of law in Ukraine" is acknowledged at both international and national levels. While the precise definition of the second component, taking into account 'the imperative nature of its efficiency, is still sought'.[77]

First, this definition deals with 'the set of national institutions, mechanisms and procedures mandatory for the person's ability to possess human dignity and protect themselves against the state (its authorities and officials) arbitrary actions' 2020).[78] It actually promotes the idea of instrumental application of arbitrariness prevention and its practical combination with some other standard requirements for the needs of the rule of law state assessment in Ukraine.

6 CONCLUSIONS

Belonging to the contemporary world and being under significant challenges and threats requires the efficiency of democratic and legal traditions and institutions. That is primarily explained by the need for the restoration and promotion of the appropriate respect for human dignity in the countries where traditions of authoritarian or totalitarian states are still rather strong. They are complete opposites to the constitutional provisions of both private and public autonomy of human rights. The solution is achieved due to the efforts of Albert Dicey, Thomas Bingham and other outstanding philosophers, lawyers and judges of modern times. It is based on the awareness of the ideal and value or constitutional principle of the rule of law. It is derived from the actualisation and concretisation of arbitrariness prevention being combined with other typical principle components. Gradually, it contributes to an up-to-date control and monitoring toolkit directed towards the provision of its practical applicability. It requires the concentration of the existing mechanisms of providing control over the use of power by the state and human protection against arbitrary actions of the state authorities. It does not contradict the arguments in favour of this mechanism subordination to the requirement for arbitrariness prevention in the context of the perception of the rule of law as some normative ideal. Each legal system should strive towards it. It is also treated as the universal and integral principle of law. In the definition of one of the components of the Ukrainian formula of the rule of law as the foundation for the national constitutional system, the Constitutional Court of Ukraine, taking into account the imperative nature of the efficiency of the rule of law principle, refers to the set of national institutions, mechanisms and procedures mandatory for the person's ability to possess their dignity and protect themselves against the arbitrary actions of the state (its authorities and officials).

77 Decision No 5-p (II)/2020 in Case No 3-189/2018(1819/18) (Constitutional Court of Ukraine (Second Senate), 18 June 2020) <https://zakon.rada.gov.ua/laws/show/va05p710-20> accessed 30 April 2022.

78 ibid.

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