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ВЕРХОВЕНСТВО ПРАВА І ПУБЛІЧНА АДМІНІСТРАЦІЯ

THE RULE OF LAW AND PUBLIC ADMINISTRATION

Анотація. Стаття присвячена питанню ролі публічної адміністрації у забезпеченні верховенства права. Перш за все, автор визначив суть концепції верховенства права в політичному контексті (відносини «держава-людина», «держава-громадянин»). Далі окрему увагу було приділено низці правових явищ, які безпосередньо пов'язані з публічним сектором та є визначальними для становлення верховенства права — інституційна спроможність, механізм стримувань і противаг, бюрократія та адміністративний розсуд.

Досліджуючи питання інституційної спроможності, автор проаналізував загальну тенденцію стосовно потреби в обмеженні державної влади; виявив труднощі, з якими стикаються країни, що розвиваються, у зв'язку зі слабкістю інституцій та відсутністю їх цілісності, а також запропонував шляхи подолання окреслених проблем. Зокрема, інституційна спроможність повинна базуватись на: (1) законодавчо врегульованій та прозорій процедурі відбору працівників публічного сектору, акцентуючи увагу на їх професіоналізмі та зацікавленості в результатах своєї праці; (2) чіткому визначенні повноважень законодавчого органу; (3) підзвітності державних органів вищестоящій владі; (4) незалежності владних суб'єктів під час виконання покладених на них функцій; (5) встановленій законом та ефективній процедурі притягнення до відповідальності;

(6) функціонуванні механізму стримувань і противаг; (7) належному фінансуванні. Крім того, у статті розглянуто можливі наслідки порушення механізму стримувань і противаг при різних конфігураціях (зосередження усієї повноти влади у виконавчій, законодавчій або судовій гілках влади). Окрему увагу присвячено ідеї позитивної бюрократизації адміністративних процедур як явища, метою якого є, з одного боку, створення єдиних, уніфікованих та прозорих правил взаємодії особи із державою, і, з іншого боку, обмеження держави як носія влади та мінімізація ризиків імовірних зловживань владою. Автор з'ясував ряд чинників, які головним чином сприяють формуванню негативного сприйняття бюрократії у громадян: надмірне та іноді зайве правове регулювання, випадки зловживання владою та негнучкість публічних службовців під час виконання покладених на них обов'язків. У роботі також розкрито сутність питання адміністративного розсуду та окреслено проблемні аспекти його застосування.

Ключові слова: забезпечення верховенства права, механізм стримувань і противаг, адміністративний розсуд, обмеження державної влади, позитивна бюрократизація.

Summary. This paper dedicated to the role of public administration in ensuring the rule of law. First of all, the author determined the essence of the rule of law concept in a political context ("state-human", "state-citizen" relationship). Then, the attention was paid to the range of legal phenomena related to public sector that are vital for implementing the rule of law for everyone—institutional capacity, checks and balances mechanism, bureaucracy and administrative discretion.

Speculating about the institutional state capacity the author analyzed the common trend of the need to restrict the state power; the issues that developing countries face because of the weakness and lack of institutional integrity and the ways to improve it. As for the mechanism of checks and balances, the possible consequences of its violation with different variations (the concentration of power in the executive, legislative, or judicial branch) are described. The author also considered the idea of

positive bureaucratization of administrative procedures as a phenomenon aimed at, on the one hand, creating uniform, unified, transparent rules for human interaction with the state, on the other hand, thus limiting the state as a bearer of power and minimizing the likelihood of possible abuse of authority. The essence of administrative discretions and the problem of using it are also determined.

Keywords: the concept of rule of law, restriction of state power, state-human relationship, institutional capacity, checks and balances mechanism, positive bureaucratization.

An overview of the research issue. The Rule of Law in a political context should be understood as a "shield" for an unprotected person from the all-powerful Leviathan state. At the same time, no matter how paradoxical it may sound, the state has assumed positive obligations to ensure the rule of law. And within the framework of individual sovereign states, it is difficult to find someone who could more systematically and effectively ensure the rule of law than the state itself, which owns (as a general rule) the largest budget, a monopoly on legitimate violence, focused on public interests etc. Based on these theoretical views, the state is both the one against whom the person is protected and the one who protects the person (in different life situations). Although the concept of the state itself is a legal fiction, actually the state is represented through a set of bodies that perform the functions of the state, and which can generally be called public administration. And the public administration, implementing the practices of good governance and the function of the state, ensures the rule of law for everyone. Thus, the institutional basis of the rule of law is a set of bodies entrusted with the fulfillment of positive obligations to the citizens of a particular country.

"This approach refers to the promotion of a national framework of substantive and procedural rules that ensures the presence of rule of law guarantees throughout the public administration and particularly *vis-à-vis* the individual. This framework may consist of constitutional provisions binding on the authorities and organization of the administration, administrative law, administrative procedure law, and supporting

legislation. If it works as it should, the framework will offer legal protection of individual rights, enhance the legitimacy of the administration and state, and help to build confidence in the value of the rule of law generally" [2, p. 27].

Thesis statement. The construction of a balanced and optimized system of state bodies, the effective implementation of public administration is a prerequisite for fulfilling the positive obligations of the state and the implementation of the rule of law.

Therefore, **the purpose of this paper** is (1) to analyze a range of legal phenomena that play a vital role in ensuring the rule of law; (2) to determine problems, which developing countries face in the process of establishing institutional state integrity, and ways to solve it; (3) the nature of bureaucracy and its positive effect in administrative procedures.

This paper is written as a theoretically-oriented research. During preparation of this work it was used qualitative methods and different approaches like: generalization, induction, deduction, comparison, theoretical modeling etc.

The analysis of recent publications and research. Many scholars (McInerney Th. F., Haragopal G., Dicey A. V., Clayton S. A., Per B., Bejstam L., Ederlöv J., Wennerström E., Zajac R., Bellamy R.) have investigated the problems associated with administrative and judicial discretion. Perhaps the pioneer of the discussion of this issue was Dicey, who was strongly against the use of discretion.

"Many public administration scholars have explored the implications of administrative discretion within a democratic and constitutional republic (Davis 1960, 1969; Dodd and Schott 1979; Frederickson 1993; Keiser 1999; Lowi 1979; Schoenbrod 1993; Selden 1997; Selden et al., 1998; Wood and Waterman 1991). Broadly speaking, the focus of these studies is how to control and/or reconcile the concept of power infused within an unelected bureaucracy. Friedrich (1940) and Finer (1941) succinctly framed the argument regarding how public administrators should operate and be held accountable within a democracy over 70 years ago" [3].

Presentation of the material. Institutional capacity and the rule of law. Although it is customary in any sources of information to criticize public authorities faster than to praise them, the performance of state functions depends to a greater extent

on the work of public authorities. And institutional capacity directly affects the implementation of the rule of law, even though the administrative procedures themselves are subordinate to the rule of law.

Institutional state capacity ensures the overall integrity of the state machinery, as well as the independence, transparency and efficiency of individual bodies. Of course, in literature, one often encounters a general trend of the need to restrict the state (as is typical in the works of Robert Nozick) and its functioning only in accordance with the law. This statement is true, but only the argumentation of such a position, as a rule, proceeds from hypothetical extreme situations of usurpation of power (for example, the situation in Russia now, or in Belarus two months earlier). In developing countries, it actually leads to a tendency that could be described as a pendulum, when the powers of law enforcement and other control bodies are either immensely expended or excessively narrowed.

Although, if we take into account the need to perform daily functions, it is the openness, efficiency, regulation of the activities of the state body, the professionalism and competence of workers that make it possible to implement and protect the rights of citizens. Since, if we pay attention to the scale of relations in the field of administrative and constitutional law, then the implementation of human rights depends precisely on state bodies. The absence of such authorities makes it impossible to exercise the rights of people in the designated area.

In developing countries, the weakness and lack of institutional integrity are reflected in a number of negative effects on the efficiency of government and agencies and, accordingly, on the realization of citizens' rights. For example, one can name the consistent formation of state bodies not on the basis of competence and professionalism, but on the basis of political views and loyalty to a particular leader. As a result, this leads to the following:

- (1) a specific state body neither does not work effectively nor fulfill its functions;
- (2) this state body pursues more the accomplishment of tasks set by the head himself than performs functions in accordance with the law;
- (3) a change of the leader results in the disorientation of employees;

(4) total politicization of the state body (regardless of the fact that it may not be political by nature);

(5) increased corruption.

This approach is also confirmed by UN documents. "The public administration plays a major role as the main interface between the state and the people, and has obligations, as a duty bearer, to uphold the principles and standards of international human rights, and ensure equal access to quality services. Civil registration, for example, is a sine qua non for allowing people to claim their rights and entitlements. Governments, aid agencies and others concerned with development therefore need to know more about the kind of rule of law challenges and bottlenecks that confront administrators, and their effects. People, in particular those suffering from exclusion and discrimination, need to know what they are entitled to obtain from the public administration. This is particularly the case in fragile, crisis and post-crisis environments where the public administration is often the only authority in place, with a key role as a facilitator in a range of national and international reconciliation initiatives. In many of these crisis situations, the public administration fails to perform this task and often perpetuates discrimination and exclusion. Respect for the rule of law can help a public service agency to improve its performance benchmarks, including for the detection and prevention of corrupt behavior. Low levels of respect for the principles of the rule of law in public service delivery can seriously challenge administrative agencies' ability to effectively implement development and poverty reduction strategies and programmes. For example, maladministration in the application of housing, land and property rights perpetuates inequality and discrimination and can prevent generations of poor families from lifting themselves out of poverty. Deficiencies in civil registration, or in the issuance of birth, death, marriage and citizenship certificates, can have a direct impact on people's right to vote, or to other entitlements such as health care and education" [7, p. 12].

At the same time, to ensure the institutional capacity of state bodies, it is necessary to provide:

- (1) a normatively regulated and transparent procedure for the selection of employees with an emphasis on professionalism and integrity;
- (2) clearly defined powers of the state body in legislation;
- (3) accountability of the state body to higher authorities;
- (4) independence of the state body in matters of performing the assigned functions;
- (5) a prescribed and effective procedure for prosecution;
- (6) functioning of the mechanism of checks and balances;
- (7) adequate funding.

In my opinion, the lack of institutional capacity of state bodies dooms them to constant reformability, distrust on the part of society and ineffectiveness.

Checks and balances mechanism in scope of the rule of law. An integral part of public administration and the institutional capacity of the branches of government is the mechanism of checks and balances. "Countries in which rule of law exists have a separation or diversity of governmental powers. Excessive concentration in any one branch, institution or level of government often leads to the arbitrary and abusive exercise of power. Separation (or at least independent decision-making, if not complete autonomy) provides the checks and balances needed to keep government contained. Checks and balances occur vertically among the different levels of government as well as horizontally. When functioning appropriately, regional and local governments can provide a balance to central government authorities. Through monitoring and oversight, civil society also acts as a critical check on government at all levels. Checks and balances depend on all branches of government functioning appropriately. In many countries, however, it is the legislature and/or judiciary that needs support in order to curb the excessive power of the executive. Checks and balances include the ability of the public to hold the justice sector accountable. This requires a degree of transparency in both decision-making and administration of public resources managed by the justice sector. Judicial branch accountability also runs vertically, with higher levels of authority holding subordinate levels accountable through the appeals and disciplinary processes. Independence and autonomy of the judicial branch demand self-discipline

to curb abuses and minimize the need for external checks. In emerging democracies, the judiciary often needs support in achieving self-discipline along with the capacity for self-governance" [8, p. 7-8].

At the same time, the violation of the mechanism of checks and balances entails serious consequences in the functioning of the state. Such a situation is possible if one or all of the elements are violated:

(1) the parity of legislative powers among the legislative, executive and judicial branches;

(2) with a formal balance of powers, there is an informal influence of some of the branches of government.

When all the fullness of power is concentrated in the executive power, the legislative power loses the ability to influence the executive by passing laws, the judiciary does not have the power to influence the executive branch by considering complaints about actions, inaction or decisions, then there is a huge risk of dictatorship formation and the usurpation of power (the individuality of the manifestation of consequences depends on the form of government, legal tradition, territorial location of the country, etc.).

Focusing the fullness of power in the legislative branch with a weak executive and judicial branch will lead to non-compliance with laws and the inability for the population of a particular country to protect their rights.

Breaking the mechanism of checks and balances through the formation of a strong and independent judiciary is probably extremely rare. At the same time, theoretically, a possible abuse of power by the courts and the actual implementation of legislative functions through the adoption of judicial decisions.

At the same time, I am convinced that the most dangerous manifestation of the violation of the analyzed mechanism in the context of imbalance due to strong executive power. And there is probably no excessive independence of the judiciary. Everyone can remember the attempts of the ex-President of the United States, Donald Trump, to crush many directions in US policy, and how the US Supreme Court

promptly and effectively resolved the issue of the rights and obligations of the ex-President and the legality of the acts he adopted.

Positive bureaucratization of administrative procedures. I first heard about the idea of a positive bureaucratic context in a discussion between Professor Tom Ginsburg and Professor Thomas McInerney about how to preserve constitutional democracy [6]. At first, the idea of bureaucracy as a positive phenomenon can sound very strange and unexpected. But continuing to reflect on this issue, we come to the intermediate conclusion that common understanding of the bureaucracy and its role in the "life" of a democratic state is very superficial and one-sided. It is not for nothing that Professor Thomas McInerney noticed during the aforementioned discussion that usually negative things are said about bureaucracy.

"Bureaucratia was established in the wake of Napoleon's defeat when it adopted Bentham's Constitutional Code, which was subsequently revised by Max Weber, Hans Kelsen and Herbert Hart" [1].

"Max Weber extolled virtues of modern bureaucratic form of organization as they are grounded in legal-rational authority. This form of authority, Weber maintains, is far superior to the other forms of authority—traditional and charismatic. It is the legal-rational character of the bureaucracy that is supposed to determine the overall form and content of organization in the modern context. The rules, regulations, procedures, written documentation, impersonal norms, neutrality, anonymity, non-political criterion of selection, training—all are expected to contribute to the strengthening of legal-rationality" [5].

In fact, the nature of bureaucracy is not as obvious as it seems at first glance, and its manifestation does not have an exclusively negative context. It should be assumed, idealizing, that perhaps the most widespread formalized manifestation of the rule of law is legislation and legality as such. The desire to settle relations by written standardization of certain of the most important rules of conduct in the legislature has come in our time since ancient Rome. The regulation of legal relations with the state in itself is not something negative, but rather a positive phenomenon aimed at, on the one hand, creating uniform, unified, transparent rules for human interaction with the

state, on the other hand, thus limiting the state as a bearer of power and minimizing the likelihood of possible abuse of authority.

This, in a way, gives rise to legal certainty and the ability to predict the positive and negative effects of interaction with the state. Moreover, such regulated procedures give reason to believe that the state, outside the regulated procedures, will not break into anyone's home or act in any other illegal way.

Technically, such formalized administrative rules are abstract and designed for many situations in life. At the same time, the procedure is being improved more and more in order to satisfy the interests of as many users of the same type of administrative services. In modern conditions of globalization, a huge number of intersecting legal norms, rules and procedures of different levels (national, supranational, international), each individual state is obliged to create conditions when the provision of certain administrative services, on the one hand, will be as efficient as possible, on the other hand, maximally protected from vulnerabilities, violations of human rights (and the rights of third parties), covering the maximum number of variations in everyday situations.

Of course, at some stage of the complexity of the existing system, for certain groups of people, this or that administrative procedure will seem overly formalized, unreasonably complicated. Moreover, the state itself will be accused of bureaucracy, that it creates procedures that do not pursue the embodiment and implementation of the rule of law for every person. But a situation of bureaucracy is inevitable.

The negative effect in the eyes of people is intensified even more if we take into account the data obtained in the framework of sociological studies in law, which claim that the effect of bureaucracy is intensified by the fact that employees of such state bodies, acting in a standardized and algorithmic manner every day, lose their flexibility of thinking and individual approach. In the words of Stanley Milgram, we are already talking about an "agency personality" who can work only in a formulaic way.

So, what do we have as a result of the functioning of bureaucratic procedures and "bureaucrats" (as a conditional group performing such functions)? First, we have an algorithmized and standardized performance of state functions with coverage of the

maximum number of situations in life (positive effect). Secondly, the complexity of multi-level and diverse regulation (with the goal of taking into account as many everyday situations as possible) leads to excessive and sometimes meaningless regulation, which leads to the formalism of a number of formalism. Thirdly, it cannot be excluded, in the process of creating or performing such administrative procedures, cases of abuse of authority.

How can the negative consequences of excessive formalization (or bureaucracy) be minimized? Obviously, theoretically, the most effective way to take into account the individual case in a specific situation and minimize bureaucracy would be the direct application of the concept of the rule of law and the application of the principle of proportionality between the required degree of formalized procedure and the individuality of the situation. In fact, a deviation from unnecessary (in the opinion of the executor of the administrative procedure) elements of the formalized procedure. But here another question arises: how to practically limit the need for an individual deviation from the formalization of the procedure and the fact of unreasonable departure from formalization for one or another illegal purpose. Weighing the positive result and the potential negative consequences, it would be more reasonable to inherit the bureaucratic procedure, while hearing reproaches of bureaucracy from time to time, than risk violation of human rights.

Thus, bureaucracy is a formalization, abstractness and algorithmic nature of administrative procedures. Although it has a politically negative context, it is oriented towards the realization of human rights and is a necessary component (through a proper procedure) of the rule of law. At the same time, the embodiment of bureaucratic elements entails not only achieving the desired and necessary legal goal, but also has negative consequences in the form of excessive regulation, which, nevertheless, has a compensatory mechanism aimed at the inadmissibility of human rights violations.

Administrative discretion. The complexity of life is necessarily reflected in the complexity of law, as a universal regulator of a certain part of human life. Pursuing the goal of ensuring protection of the most important spheres of human endeavor, while ensuring, at the same time, a certain level of legal certainty, the legislator seeks to most

clearly, consistently and accurately reflect the legal regulation. But, obviously, given the abstract nature of legal norms and rules, it is impossible to regulate everything in detail. And the legislator resorts to regulation when, in a specific situation, the law enforcement officer can choose among the set of behavioral options proposed by the law the one that most suits the situation and protects human rights (or limits it proportionally and sufficiently to the seriousness of the offense). In such a situation, the law enforcement officer has administrative discretion.

Also, the need for the implementation of discretionary powers arises when the formulation of a legislative provision or the stages of a particular legal procedure is not clear, can be interpreted in different ways.

The problem of using discretionary powers is quite serious. And it consists in the fact that granting freedom to a law enforcement officer while making a decision is fraught with violations of any order, from unreasonable refusals to grant certain rights to unreasonable granting of appropriate rights to people who do not have the right to do so. And the severity of such violations can increase in inverse proportion to the economic and legal level of development of the country.

Conclusion and proposal. Ensuring the rule of law requires a well-thought-out, optimized and functionally effective institutional framework that is able not only to take positive obligations, but also to effectively implement and protect rights within the perimeter of the "state-human", "state-citizen" relationship.

Public authorities must have institutional capacity that is based on:

- (1) a normatively regulated and transparent procedure for the selection of employees with an emphasis on professionalism and integrity;
- (2) clearly defined powers of the state body in legislation;
- (3) accountability of the state body to higher authorities;
- (4) independence of the state body in matters of performing the assigned functions;
- (5) a prescribed and effective procedure for prosecution;
- (6) functioning of the mechanism of checks and balances;
- (7) adequate funding. The lack of this makes government agencies vulnerable.

The mechanism of checks and balances ensures the balance of state branches of government, which is a manifestation of the distribution of power in a democratic state. The violation of this mechanism occurs when there are

(1) a breach of parity of legislative powers among the legislative, executive and judicial branches;

(2) an informal influence of some of the branches of government, even though formal balance of powers is prescribed by law.

As for bureaucracy, it is a neutral phenomenon by itself. The positive bureaucratization of administrative procedures takes place when its objectives are to cover the maximum number of everyday situations and to avoid human rights infringements by creating uniform procedural rules. An excessive and sometimes meaningless regulation, cases of abuse of power and inflexible behavior of government employees create a negative undertone to bureaucracy, which, however, can be minimized.

Administrative discretion is a zone of freedom of a law enforcement officer (limited by the rule of law) aimed at overcoming possible gaps in the plane of law enforcement by interpreting the circumstances of the case and choosing one of the options for behavior (decision) provided for in the law. At the same time, discretionary powers could be used by an authorized person with illegal purposes that slows down the development of the state and causes harm to establishing the rule of law.

Bibliography

1. Bellamy R. The Rule of Law and the Rule of Persons. *Critical Review of International Social and Political Philosophy*. 2001. № 4. P 221–51.

2. Per B., Bejstam L., Ederlöv J., Wennerström E., Zajac R. Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development. URL: https://fba.se/globalassets/rule_of_law_in_public_administration.pdf (дата звернення: 20.05.2022).

3. Clayton S. A. Judicial Review of Administrative Discretion. URL: <http://ebookcentral.proquest.com/lib/luc/detail.action?docID=4395954> (дата звернення: 20.05.2022).
4. Dicey A. V. Introduction to the Study of the Law of the Constitution. URL: https://files.libertyfund.org/files/1714/0125_Bk.pdf (дата звернення: 20.05.2022).
5. Naragopal G. Bureaucracy Rule of Law and Human Rights. *Indian Journal of Public Administration*. 1994. № 3. P. 305–315.
6. McInerney Th. F. America's Rule of Law Crisis: Discussion of How to Save a Constitutional Democracy with Tom Ginsburg. 2020. URL: <https://www.youtube.com/watch?v=YtEnoHtDvKs&list=PLBka5OBbqIOs3Hn1e240dhu9w1pM320zt&index=6> (дата звернення: 20.05.2022).
7. United Nations Development Programme Bureau for Policy and Programme Support and Folke Bernadotte Academy. Guidance Note for Assessing Rule of Law in Public Administration. 2015. URL: https://peaceinfrastructures.org/Home%20Documents/Guidance%20Note%20for%20Assessing%20Rule%20of%20Law%20in%20Public%20Administration/UNDPFBA_AssessingRespectforRuleofLawGuidancenote_2015.pdf (дата звернення: 20.05.2022).
8. Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework. United States Agency for International Development. 2008. URL: https://pdf.usaid.gov/pdf_docs/Pnadm700.pdf (дата звернення: 20.05.2022).