в міру своєї вини, жоден невинуватий не був обвинувачений або засуджений, жодна особа не була піддана необґрунтованому процесуальному примусу і щоб до кожного учасника провадження була застосована належна правова процедура; спираючись на широкий аспект вживання поняття „протидія" у кримінальній процесуальній сфері, в криміналістичній науці назріла, на нашу думку, необхідність запровадження загальнотеоретичної категорії „протидія кримінальному провадженню", яка б об'єднала досудове і судове провадження, відповідно їх змісту й процесуальної форми, що дозволило б системно і комплексно підійти до розробки заходів подолання такої протидії.

Під протидією кримінальному провадженню пропонується розуміти цілеспрямовану активну чи пасивну поведінку заінтересованої особи (групи осіб), направлену на перешкоджання проведенню кримінального провадження і вирішенню його завдань, в силу забезпечення власних потреб або потреб інших осіб. У такому підході відображається і поняття криміналістики, що визначається як наука про закономірності злочинної діяльності та її відображення в джерелах інформації, які слугують основою для розробки засобів, прийомів і методів збирання, дослідження, оцінки і використання доказів з метою розкриття, розслідування, судового розгляду та попередження злочинів, але невиправдано у наукових дослідженнях її пов'язують лише із досудовим розслідуванням, що, на нашу думку, звужує її предмет пізнання. Разом з тим, варто зауважити, що по відношенню до Чорнобильської зони відчуження буквальне вжиття терміну „протидія кримінальному провадженню" є недоречним, оскільки безпосередньо судове провадження здійснюється за межами зони (як правило, судами у м. Славутич або у м. Іванків).

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THE RULE OF LAW IDEA IN AMERICAN JURISPRUDENCE

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Анотація. *Стаття присвячена аналізу ідеї верховенства права в американському правознавстві. Пропонуються окремі підходи до визначення досліджуваного поняття, його складових компонентів та вимог для ефективної реалізації. Автор доходить висновку, що питання пов'язані із верховенством права, на сьогодні залишаються не вирішеними.*

Ключові слова*: верховенства права, американська правова доктрина, конституціоналізм.*

Abstract. *The article is devoted to the analysis of the rule of law idea in American jurisprudence. Different approaches to the definition of the studied concept, its essential elements and requirements were suggested. The author concludes that the issued, related to the American rule of law idea, remain open.*

Key words*: the rule of law, American legal doctrine, constitutionalism.*

Introduction. The Rule of Law idea is the fundamental principle of any present-day society. However, the lack of scientific consensus in reference to the definition of the term, its basic requirements and elements complicates the issues, surrounding the demarcation the law-bound state from the police government. By the same token, it enables the state and its regulatory and administrative authorities to negate human rights and freedoms, to exercise its power and achieve its own goals. Hence, a conscientious distortion of the rule of law ideas and its essence is in evidence. Taking the above into account, it's necessary to undertake a study of American legal tradition, scientific doctrine of which is distinct from others in that highest level of abstractedness and positions complexity on a particular legal phenomenon.

For this reason, the topicality of the research could be predetermined by several factors, most important of which is the necessity of investigation of the American rule of law idea that will make it possible to create a correct impression of this important universal category.

Problematic of the subject matter, investigated in our article, could be explained by the following. In the first instance, the American legal tradition, relying on the common law, has developed a strong sense of the rule of law idea. But at the same time, the present American conception of this notion is not being static. In the second instance, the American rule of law idea is multy-faceted enough. As a consequence, the great number of important issues (such as, for example, cross-functional approach to defining the rule of law essence, its basic elements and requirements) are still open. And, finally, we must always remember that the rule of law is superior to the rule of any human leader. That's why we should make an attempt to analyze some American approaches to the rule of law, its role in national legal system and policy.

The aim of the research is to study main peculiarities of American legal thought, relevant to the rule of law idea. This aim can be achieved by means of the following **objectives**: 1) to mark out a conceptual framework for analyzing the essence of the rule of law; 2) to figure out scientific challenges to rule of law definition, suggested by some American scholars; 3) to find out and accumulate main American approaches to distinguishing basic elements and requirements of the rule of law in American jurisprudence. Indeed, it's anything original to add. Nevertheless, we must understand that any branch of law can only be fully and effectively implemented when the laws of a state as a whole are respected by the citizens, on the one hand, and government – on the other.

Problems with the rule of law peculiarities have been discussed by political experts, legal theorists, legal practitioners and philosophers. Particularly, the rule of law became under review in the scientific works of such scholars as: R. Belton, R. Fallon, J. Raz, M. Rosenfeld, B. Tamanaga, D. Wood and many others.

It should be pointed out, in a current investigation the notion "jurisprudence" will be used as the branch of philosophy, concerned with the law and the principles that lead courts to make the decisions they do.

For the purpose of investigation the rule of law essence, it's necessary to begin within a well-founded analysis of the USA constitution. The Constitution of the USA (hereafter – Constitution) built upon the guiding principles of the Declaration of Independence, in which the rule of law was promulgated. Fundamentally, in Anglo-American history the rule of law idea was expressed in Magna Charta in 1215. It's widely thought, the classic American expression of the rule of law idea comes from the pen of John Adams – an American Founding Father, the second president of the United States. He wrote in Art. XXX of the Massachusetts Constitution in 1780, in which the powers of the commonwealth were divided into legislative, executive and judicial, also "to the end it may be a government of laws and not of men" [2]. In the course of time, the "Father of the Constitution" and the fourth President of the United States James Madison laid down the foundation of the rule of law establishment. In 1788 he proclaimed following: "If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige to control itself" [7]. It's worth mentioning, the United States

Constitution has no express provision for the Rule of Law. But there are several ways, with the aid of which, this idea is understood to express. The first way is by the concept of the supreme law (according to the Article VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding)". The second way is by the guaranteeing fundamental human rights (for example, Amendment IV guarantees the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures…). The third way, in which the Constitution incorporates the Rule of Law, is requiring due process of law (for example, Amendment V or Amendment XIV to the Constitution) [3].

So, what exactly does the rule of law mean? Among numerous scientifically acceptable definitions of the rule of law, similarly there some approaches formed in American judicial practice. For example, the rule of law definition could be linked to the judicial independence. So that, in 1947 US Supreme Court in case "United States v. United Mine workers" emphasized: "In our country, law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself was it law, every man can. That means first chaos, then tyranny" [14]. As can be seen from the above, judicial independence is an essential condition of the sustainable rule of law functioning. U. S. Supreme Court of Appeals Judge D. Wood in her article "The Rule of Law in Times of Stress" emphasized: "… neither laws nor the procedures used to create or implement them should be secret; and…the laws must not be arbitrary" [15, p. 446].

One of the most difficult theoretical issues is the problem of the rule of law determination. Professor of Constitutional law R. Fallon once mentioned: "In American legal discourse, debates about the historical and conceptual foundations of the Rule-of-Law idea are seldom engaged directly. Indeed, many invocations of the Rule of Law are smug or hortatory" [4, p. 2]. In "A Concise Guide to the Rule of Law", B. Tamanaga also depicts a tendency of a lack of consensus among scholars with reference to "what it means, its elements or requirements, its benefits or limitations, whether it is a universal good, and other complex question" [13, p.2]. M. Rosenfeld holds the same opinion as the majority of scholars and writes following: "... the fact that there is no consensus on what "the rule of law" stands for, even if it is fairly clear what it stands against" [11, p. 1308].

For this reason, at least, there are several dozens of the rule of law specifications. The simplest and most understandable is the following definition of rule of law: government officials and citizens are bound by and act consistent with the law [13, p. 3]. This is a narrow (or "thin") approach to the rule of law definition. Also we can find other variations of such approach: "… people should obey the law and be ruled by it", "government shall be ruled by the law and subject to it", "government by law and not by men" and so on [10, p. 14].

Having reviewed a great number of scientific works, we can highlight following approaches to the rule of law definition, existing in the legal doctrine and case law. For example, R. Belton convinced, definitions of the rule of law fall into two main categories: 1) those that emphasize the ends, that the rule of law is intended to serve within society (such as upholding law and order, providing predictable and efficient judgments), and 2) those that highlight the institutional attributes, believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, trained law enforcement agencies). Scholar offers to distinguish ends-based definitions of the rule of law and definitions based on institutional attributes [1, p. 3]. Modern legal theory also distinguishes substantive, formal and functional approaches to defining the rule of law.

Professor of Human Rights and Comparative Constitutional Theory M. Rosenfeld believes "the rule of law is a cornerstone of contemporary constitutional democracy…". Scientist suggested three essential characteristic of modern constitutionalism: 1) limiting the powers of government; 2) adherence to the rule of law; 3) protection of fundamental rights. In his work "The rule of law and the legitimacy of constitutional democracy" he brought up the following issues: What specific characteristics the rule of law must possess to help sustain constitutional democracy? What

particular role it must assume to ensure a working constitutional democracy? How it might ultimately contribute to the legitimacy of constitutional democracy? [11, p. 1310] Constitution interpretation of R. Fallon gave him an opportunity to figure out main purposes of the Rule of law: 1) protection against anarchy and the Hobbesian war of all against all; 2) allowing people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions; 3) guaranteeing against at least some types of official arbitrariness [4; p. 7-8].

Challenging idea of the Rule of Law was suggested by J. Raz in his article "The Rule of Law and its virtue": "The Rule of Law is essentially a negative value, the law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimize the danger, created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people's freedom and dignity. The rule of law is designed to prevent this danger as well" [10, p. 24].

It should be noted that in our opinion consolidation of any principle or idea in the legally set standards (of constitution) shouldn't be an ultimate purpose of a certain government. It is primarily intended to ensure the efficiency of the justice system to resolve appropriately disputes, to protect citizens' rights and to ensure access to government services.

The preliminary issue of the rule of law concept is its basic requirements. In academic literature there are several aspects of the rule of law requirements, distinct in their informative characteristics. Thus, M. Rosenfeld put forward the minimum conditions for the Rule of Law: 1) fairly generalized rule through law; 2) a substantial amount of legal predictability (through generally applicable, published, and largely prospective laws); 3) a significant separation between the legislative and the adjudicative function; 4) widespread adherence to the principle that no one is above the law. Only with due attention to those requirements, any legal regime which meets these minimal conditions will be considered to satisfy the prescriptions of the rule of law in the "narrow sense" [11, p. 1313]. Scientist is of the opinion that a procedurally grounded rule of law would revolve around three essential components: 1) the rule of is in the narrow sense; 2) the prevalence and maintenance of fundamental rights due process guarantees; 3) institutionalization of the adversary system of justice as a means to channel conflicts towards legal resolution rather than towards other possible outcomes [13, p. 1330].

With the definitional analysis, R. Belton emphasized, the rule of law is not a single, unified good. It consists of five "ends": 1) a government bound by law; 2) equality before the law; 3) law and order; 4) predictable an efficient rulings and 5) human rights. Those components are distinct and often in tension with one another in practice [1, p. 3]. Instead of this, B. Tamanaga takes the view that democracy and human rights should not be included within the definition of the rule of law. He gives following reasons for his opinion in a certain way. In the first place, the definition requires only that government officials and citizens be bound by and abide by the law (there is no denotation about how those laws are made and what specific standards those laws must satisfy). Both democracy and human rights are independent legal phenomena. Each must be understood and argued for on its own terms. They are separate elements that focus on different aspects of a political-legal system. In the second instance, the rule of law exists in liberal democracies only [13; p. 6-8].

According to the main purposes of the rule of law, R. Fallon marked out the basic elements, required for realization of this concept from theoretical to practical level. The following elements are: 1) the capacity of legal rules, standards, or principles to guide people in the conduct of their affair (people must be able to understand the law and comply with it); 2) efficacy (the law should actually guide people); 3) stability (the law should facilitate planning and coordinated action over time); 4) the supremacy of legal authority (the law should rule not only citizens but officials, including judges); 5) instrumentalities of impartial justice (courts should be available to enforce the law and should employ fair procedures) [4 p. 8-9].

It was scientific approach to the essence of the rule of law. Also, there is a military doctrine for the rule of law in American jurisprudence. The official recognition the rule of law as an integral part of US military doctrine was in 2006.There exist a number of books on the issue, particularly, Handbook for Military Support to Rule of Law and Security Sector Reform [6] or, for example, Rule of law Handbook: A practitioner's guide for judge advocates [12]. The main purpose for such

publications is to provide fundamental guidance, considerations, techniques, procedure and other information for the rule of law issues. Its primary purpose is to aid US military commanders and planners to more fully understand their roles tasks in establishing the rule of law in fragile states during stability operations, in failed states, or in occupied territory in the immediate post-conflict period. According to the definition, adopted and suggested by US Army, the rule of law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision-making, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency [12, p. 4]. Traditionally, understanding the rule of law idea in American military doctrine is associated with so called "the rule of law intervention" (or simply intervention). Relations, connected with the intervention are regulated by the Federal rules of civil procedure. Thus, the Rule 24 distinguishes two types of interventions: 1) intervention of right; 2) permissive intervention [16, p. 32]. Each of these types had its own characteristic procedural-legal specifics, which undoubtedly require further research. At the same time, it is necessary to formulate the following issues, which will be future key areas of methodological analysis of the investigated phenomenon. Especially the most important issue is how the rule of law can be established by means of deliberate impact (domestic or international)?

Rule of law concept is often cited as being a very important strategic goal of the United States. That's why this term can be found in numerous official strategy documents such as, for example, National Security Strategy 2015, where the following is emphasized: "We are increasing transparency so the public can be confident our surveillance activities are consistent with the rule of law and governed by effective oversight" [9, p. 20]. On December 7, 2005 National Security Presidential Directive/NSPD-44 was enacted. This Directive declares the United States should work with other countries and organizations to anticipate state failure, avoid it whenever possible, and respond quickly and effectively when necessary and appropriate to promote peace, security, development, democratic practices, market economies and the rule of law [8].

In the course of investigation the following conclusions can be represented.

1. The rule of law is a term that is often used but difficult to define. Thus, the idea of such concept is multy-faceted enough. American jurisprudence with its own legal traditions has its own rule of law doctrine, which characterized by various approaches to determination its essence.

It's should be emphasized, there are two main types of the rule of law doctrine in USA: a) scientific and b) military. The most common and elementary scientific approach to defining the rule of law is known as narrow (or "thin"). According to such approach the rule of law means that the government and its officials as well as individuals and private entities are accountable under the law. In academic literature we can also find many others rule of law definitions. American military doctrine concerned with the "rule of law intervention" and security policy of the USA. The rule of law is a basic concern in the creation of the democracy and law-bound state. Thus in the absence of the rule of law, contemporary constitutional democracy would be impossible. Hence, it should not go without mention the following words: "…there are a variety of related themes that can be extracted from the discussions of the rule of law, but most of them center on the idea that the rule of law is in some way the antithesis of the arbitrary use of power" [5, p. 16].

However, at the same time, any approach to actually implementing the rule of law must take into account a variety circumstances, such as: cultural, economic, and institutional and others. But, in any case, the minimum conditions for the rule of law are standard for any constitutional state.

2. Thuswise, any understanding of rule of law concept needs a fundamental discussion about what essential conditions the rule of law must have. It's worth mentioning, in our opinion, such minimal requirements at the same time are its integral elements. So, there are following standards, which are necessary and important for the efficacious functioning in any legal system: substantive laws must prohibit any form of coercion and violence, so that citizens are protected against lawlessness and anarchy; law should be clear, certain, adequately published and normally prospective; positive law must apply to general classes of individuals; law should be stable; official

discretion must be limited, controlled and guided; the courts must be impartial, independent and accessible and some others.

3. Taking all these points together, the main purpose of the rule of law is to preclude the arbitrariness of the government. So, in this case we are talking about government, limited by law. In this context, the following question arises: should it be limited only by law? What impact does the moral perception has on the society's the rule of law idea?

Undoubtedly, the essence of the rule of law should be investigated further. American rule of law idea is a complex concept of law, which due to its multiversity gives us the chance to investigate a foreign practice of the rule of law establishing.

Nevertheless, the better part of the hard core issues, relying to the rule of law concept remained undetermined. These include, for example, such as: what is accepted meaning of the rule of law? If we understand the rule of concept as a government of law, not men, how then it exists independently from the people who make and interpreter it? What circumstances have a significant impact of the rule of law establishing?

In fact, even if such issues can be considered as theoretical, they are still open.

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