

Сергій Іванович Максимов

Національна академія правових наук України

Харків, Україна

Кафедра теорії і філософії права

Національний юридичний університет імені Ярослава Мудрого

Харків, Україна

Наталія Іванівна Сатохіна

Кафедра теорії і філософії права

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Харків, Україна

ВЕРХОВЕНСТВО ПРАВА І НАДЗВИЧАЙНИЙ СТАН: ГЕНЕЗИС ПРОБЛЕМИ

Анотація. *Метою статті є прояснення співвідношення концепцій верховенства права і надзвичайного стану в контексті питання про природу права та його співвідношення із силою. Актуальність теми зумовлена потребою в переосмисленні ідеї верховенства права та його меж в контексті сучасних викликів, зокрема в умовах пандемії. Дослідження має міждисциплінарний характер, що полягає в поєднанні юридичної, філософсько-правової та історико-філософської перспектив з використанням методів філософсько-правової рефлексії, порівняння, аналізу й синтезу та історико-філософської реконструкції. Прояснення співвідношення верховенства права і надзвичайного стану здійснюється у три кроки. Спершу експліковано засадничу ідею верховенства права, яка об'єднує численні його інтерпретації: право розглядається як антитеза свавілля сильного. Відповідно верховенство права виявляється вимогою, іманентною будь-якій правовій системі. Водночас підкреслено внутрішню обмеженість верховенства права, пов'язану з нормативною природою останнього, яка з неминучістю зумовлює необхідність балансування верховенства права і справедливості і радикалізацією якої покликана до життя ідея надзвичайного стану. Другу частину статті присвячено критичному аналізу теорії надзвичайного стану, яка, на протизвагу ідеї верховенства права, ототожнює право і силу, а зрештою, і заперечує право як таке, підносячи безправ'я до норми. Насамкінець, на третьому кроці проаналізовано три підходи до співвідношення верховенства права і надзвичайного стану: 1) пріоритет надзвичайного стану, 2) слабку версію пріоритету верховенства права і 3) сильну версію пріоритету верховенства права. Зроблено висновок, що фундаментальна опозиція між верховенством права і надзвичайним станом унеможливує їх несуперечливе поєднання, а відповідні спроби завжди виявляються компромісом не на користь першого. Натомість, на думку авторів, варто визнати обмеженість самого права, не полишаючи водночас дискурсу верховенства права та засадничих для нього підстав*

Ключові слова: *природа права, право і сила, права людини, надзвичайна ситуація, стан виключення*

Sergiy I. Maksymov

*National Academy of Legal Sciences of Ukraine
Kharkiv, Ukraine*

*Department of Theory and Philosophy of Law
Yaroslav Mudryi National Law University
Kharkiv, Ukraine*

Natalia I. Satokhina

*Department of Theory and Philosophy of Law
Yaroslav Mudryi National Law University
Kharkiv, Ukraine*

RULE OF LAW AND STATE OF EXCEPTION: THE GENESIS OF THE PROBLEM

Abstract. *The purpose of this study was to clarify the correlation between the concepts of the rule of law and the state of exception in the context of the question of the nature of law and its correlation with force. The relevance of the study is explained by the need to reinterpret the idea of the rule of law and its boundaries in the context of modern challenges, in particular in the context of a pandemic. The study is of an interdisciplinary nature, which lies in combining legal, philosophical legal, and historical-philosophical perspectives using methods of philosophical legal reflection, comparison, analysis and synthesis, and historical-philosophical reconstruction. The correlation between the rule of law and the state of exception was clarified in three steps. First, the fundamental idea of the rule of law was explicated, which unites its numerous interpretations: law was considered as the antithesis of the arbitrariness of the powerful. Accordingly, the rule of law turned out to be a requirement immanent to any legal system. At the same time, the internal limitation of the rule of law associated with the statutory nature of the latter was emphasised, which inevitably necessitates striking a balance between the rule of law and justice, and the radicalisation of which brings to life the idea of a state of exception. The second part of this study contains a critical analysis of the theory of the state of exception, which, in contrast to the idea of the rule of law, identifies law and force, and ultimately denies law as such, normalising lawlessness. Finally, in the third step, three approaches to the correlation between the rule of law and the state of exception were analysed: 1) the priority of the state of exception, 2) a weak version of the priority of the rule of law, and 3) a strong version of the priority of the rule of law. It was concluded that the fundamental opposition between the rule of law and the state of exception renders their consistent combination impossible, and the corresponding attempts always turn out to be a compromise not favouring the former. However, according to the authors of this study, it is necessary to recognise the limitations of the law itself, without abandoning the discourse of the rule of law and the fundamental grounds for it*

Keywords: *nature of law, law and power, human rights, state of emergency, state of exception*

INTRODUCTION

Along with human rights and democracy, the rule of law is currently one of the key ideals that inspires liberal societies. The Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms mentions the rule of law as part of a common European heritage¹, and Article 3 of the Charter of the Council of Europe – as a principle that every member of the Council of Europe must necessarily recognise². As Tom Bingham notes, in a world divided based on nationality, race, skin colour, religion, and wealth, the rule of law is one of the key unifying factors, which, perhaps, most brings us closer to a universal secular religion, an ideal, but an ideal that should

be sought in the interests of good governance and peace, at home and in the whole world [1, p. 172]. In this sense, the rule of law is more of an aspiration than an existing state of affairs, an excessive ideal to which a particular society can approach to a greater or lesser extent. At the same time, this concept refers to a set of specific requirements for the legal system, generally aimed at curbing power arbitrariness by establishing certain limits of discretion for holders of public power. For its part, the concept of a state of emergency problematises precisely these boundaries, and therefore the rule of law as such, bringing to the fore the question of appropriateness of using the rule of law as

1. Convention for the Protection of Human Rights and Fundamental Freedoms. (1990, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

2. Charter of the Council of Europe. (1949, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001#Text.

an evaluation criterion for the way in which society tries to cope with an emergency [2]. In other words, the question is whether such a situation constitutes an exception to the law, or whether it remains subject to legal regulation.

The generally accepted answer to this question, which is respected by current international law and almost all national legal systems, is formulated, in particular, by the Venice Commission in the arguments provoked by the fight against the COVID-19 pandemic regarding compliance with the principles of democracy, human rights, and the rule of law in a state of emergency. This answer lies in the fact that “a state of emergency is itself a legal institution, which is subject to legal regulation, though the rules applicable to it might be somewhat different from those applicable in times of normalcy”, and therefore, “even in a state of public emergency the fundamental principle of the rule of law must prevail” [3], although this refers to a weakened version of the rule of law [4, p. 115]. A stricter position is that it is in emergencies that the need for the rule of law is greatest, and therefore difficult times require not to weaken the rule of law, but on the contrary, to strengthen it [5, p. 1004]. However, in any case, the rule of law and the state of emergency are considered to be such that can be consistently combined.

However, despite the governments' declaration of commitment to the rule of law under any circumstances, in practice one can observe a widespread deviation from its requirements with reference to the exclusivity of the current situation. In this sense, the state of compliance with the obligation stipulated by the European Convention for the Protection of Human Rights and Fundamental Freedoms to notify the Secretary-General of the Council of Europe of a derogation from human rights obligations is quite demonstrative. Due to the COVID-19 pandemic, almost all Member States of the Council of Europe are now resorting to such a retreat, but only 10 countries out of 47 have officially announced this¹. Given the scale of such disregard for law in the modern world, the Italian philosopher Giorgio Agamben defends an alternative to the generally accepted concept of a state of exception as a zone of absolute anomie, or a kind of legal vacuum, and concludes that law today has actually lost all meaning, since the state of exception has turned from an exception to the norm [6, p. 134].

It can be assumed that the polar interpretations of the above-mentioned problem are related to different opinions on the nature of law as such, in particular on the nature of its connection with force, and rethinking the correlation between the rule of law and the state of exception from the standpoint of legal understanding will explain the paradox of the state of exception.

The purpose of this study was to clarify the correlation between the rule of law and the state of exception in the context of the question of the nature of law. For this,

the following tasks were set: to describe the available approaches to understanding the rule of law, to explicate the fundamental idea of the rule of law, which combines its numerous interpretations, and to identify the limits of the rule of law (2.1), to conduct a critical analysis of the concept of a state of exception in the versions of Carl Schmitt and Giorgio Agamben (2.2), as well as to describe the connection between different opinions on the correlation between law and power and the corresponding ideas about the nature of the state of exception and to analyse three approaches to the correlation between the rule of law and the state of exception, which can be conditionally designated as the priority of a state of exception, weak and strong versions of the priority of the rule of law (2.3).

1. MATERIALS AND METHODS

This study is a philosophical-legal and at the same time a historical-philosophical exploration, and as such has an interdisciplinary nature. The authors' approach to understanding the problem of correlation between the rule of law and the state of exception is to combine legal, philosophical-legal, and historical-philosophical perspectives.

The legal component of the study comprises analysis of individual elements of statutory consolidation and practice of applying the concepts of the rule of law and the state of exception in the modern world to formulate the problem of their correlation as both a theoretical and practical issue. The philosophical-legal perspective involved the interpretation of the problem in the light of the main question of the philosophy of law – the question of the nature of law. Based on this instruction, the fundamental idea of the rule of law and the idea of a state of exception were considered from the standpoint of the correlation between law and power and compared in a synchronous dimension. For its part, the study of the genesis of the problem of correlation between the rule of law and the state of exception involves placing it in a broad historical-philosophical context, consistently reconstructing the corresponding concepts, their basic ideas, and key concepts that embody these ideas. However, for historical-philosophical research as a study of the history of ideas, it is not the reproduction of the chronology of events that is of primary importance, but their theoretical reconstruction, the identification of semantic connections between ideas that can unfold in the nonlinear space of thought. Here, along with the method of phenomenological reduction, elements of hermeneutical interpretation of the semantic core and semantic ties between ideas are used. Thus, the diachronic measurement of research is associated with a method that can be referred to as the method of historical reconstruction, through which two key lines of understanding the nature of law and its correlation to power are connected with the concepts of the rule of law and the state of exception.

The main method of study was the philosophical-legal

1. Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms. (2021, June). Retrieved from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

reflection, which lies in the desire to cover the ultimate foundations of the studied phenomena of the rule of law and the state of exception, in particular through problematisation and identification of dialectical oppositions of law and force, revealing their interpenetration and insurmountable boundaries. At different stages of this study, the method of philosophical-legal reflection was supplemented by logical methods of comparison (the logical composition of the “strong” and “weak” versions of the rule of law and its correlation with the state of exception), analysis and synthesis (conceptual components and their combination into a complete concept), as well as the method of historical reconstruction of ideas, notions, and concepts that fill the semantic constructions of the rule of law and the state of exception with content that goes considerably beyond their usual empirical perception.

The study was conducted in three stages. At the first stage, the authors analysed and compared two main approaches to understanding the rule of law – narrow (formal) and broad (substantive), generalised the main interpretations of the rule of law and identified the fundamental idea for all of them. Next, proceeding from the proposed interpretation of the idea of the rule of law, its limits were identified. For its part, the problematisation of the latter allowed outlining the scope of questions that set the internal dynamics of the problem under study, and the main areas of answering these questions in the Western intellectual tradition. The second step was to analyse the concept of a state of exception, the basic motives of which were compared with the fundamental idea of the rule of law in terms of the correlation between law and power. In particular, the theories of the state of exception by Carl Schmitt and Giorgio Agamben were consistently reconstructed, their comparison and critical interpretation was made from the standpoint of the philosophy of law. At the third stage, the problem of correlation between the rule of law and the state of exception was updated in the light of recent history and three main approaches to solving this issue were analysed and compared: the theory of priority of the state of exception, weak and strong versions of priority of the rule of law. Finally, reconstructing the genesis of the problem of the correlation between the rule of law and the state of exception in the light of the question of the nature of law allowed concluding on the nature of this opposition and its significance for law.

2. RESULTS AND DISCUSSION

2.1 *The idea of the rule of law in the light of the question of the nature of law*

The history of the rule of law goes back to the origins of the Western intellectual tradition, but even today this expression means different things for different people, remaining an “essentially contested concept” [7]. Thus, narrow concepts of the rule of law connect it with numerous formal and procedural requirements for the legal system. Consequently, according to Joseph Raz, “an undemocratic legal system based on the denial of human rights can, theoretically, meet the requirements of the rule

of law better than any of the legal systems of more educated Western democracies” [8, p. 211]. But the proponents of broad (substantive) concepts refer to the rule of *good* law [9, p. 118], and therefore, respect for human rights is a determining condition for the implementation of the rule of law [10, p. 23; 11]. However, despite such serious differences, this does not refer to different “rules of law”, but rather to “many faces of the rule of law” [9, p. 117], since they are all united by one fundamental idea.

Such a common denominator is the view of law as the antithesis of the arbitrariness of the strong, which has already been expressed in the best way possible by Plato and Aristotle in the famous principle of “rule of laws, not people” [12, p. 51-59; 13, p. 477-478]. In this sense, the observations of the German historian Reinhart Kosellek, who describes the gradual displacement of the idea of justice beyond history as a history of power, or force, are interesting. Thus, if the stories of Herodotus always contain an element of justice as a fate that punishes evil, then Thucydides emphasises the balance of power rather than justice, demonstrating that the stronger wins wars, and insisting on the priority of law in the face of force, on the contrary, can lead to death. Eight hundred years after Thucydides, Augustine came to the conclusion that all states are essentially great robbers, and true justice will be established by God only at the end of all earthly stories. Nevertheless, the right remains a necessary condition for survival of the humankind, despite the need for its daily reproduction. According to Kosellek, all these schemes of interpretation of the correlation between law and force should be addressed precisely because they remind of the burden that falls on a person's shoulders when they are forced to assert the right as opposed to violence [14, p. 368-377]. The idea of the rule of law is essentially an attempt to think of justice in a world dominated by force.

The radical opposition between force and law, which is brought to life by the idea of the rule of law, is a key motive of the philosophy of law, which still dictates internal dynamics for the latter. If force is considered as the source of an individual volitional act, then law represents a universal impersonal mind. In the modern world, the embodiment of this reasonableness, which can resist the arbitrariness of those in power, is human rights. For its part, the rule of law appears as a means of “saving fundamental rights from the clutches of political decisions” [15, p. 148]. It is worth agreeing with Mortimer Sellers, who noted that the general history of law in the West is the history of the struggle to establish the rule of law against competing attempts by rulers to be above or outside the law. Moreover, according to Sellers, this idea is present in every legal system – at least declaratively – since it is “the essence of what justifies or could justify the existence of any legal system, if it is justified at all” [16, p. 198-199]. Indeed, history convincingly proves that the strong do not need justice – the weak always appeal to justice. Therefore, the struggle for the rule of law is also a struggle for law as such, which is an alternative to force.

Along with the strong support for the rule of law in

Western culture, there are also various forms of criticism of this idea, primarily due to its internal limitations, which, in turn, is conditioned by the nature of law as such. The key argument is that no abstract provision can guarantee a fair result in each particular case, and therefore it is worth focusing rather on the contextual practice of judgement from case to case, based on the virtue of practical wisdom, which theoretically cannot be codified [9, p. 129].

Aristotle has already emphasised this: “every law is drawn up for a general case, but some things cannot be said correctly in a general form”, so “the error is found not in the law or in the legislator, but in the nature of the subject because this is the matter of actions” [17, p. 168]. This, however, implies not a rejection of the rule of law, but the need to balance it with justice: a judge can deviate from the strict application of the general rule to avoid injustice in a particular case [17, p. 168]. This refers not to the absolute freedom of discretion, but to careful balancing between the rule of law and equity – a motive that persists in the modern philosophy of law. Thus, John Tasioulas formulated several rules for this balancing: 1) equity should be applied by an authorised judge; 2) the judge should consider the true purpose of the rule, even if it does not draw from the literal interpretation of the latter; 3) a fair decision should be based on objective moral grounds for derogation from the law, and not on the subjective preferences of the judge; 4) the injustice prevented through derogation from the requirements of the rule of law should be serious enough to justify such a derogation; 5) derogation from the requirements of the rule of law for equity is less excused in areas where these requirements are particularly important (e.g., the requirement of foreseeability in criminal law) than in those where they are less important (e.g., the same requirement in family disputes); 6) derogation from the requirements of the law in favour of a person, especially in a criminal law context, is more justified than one that worsens the person's situation in comparison with the current law [18].

Thus, the famous saying *Summum jus, summa injuria* (“The greatest law (is) the greatest injustice”) reflects the internal limitation of the rule of law, which is associated with the tradition of practical wisdom in philosophy and legal science founded by Aristotle. Another line of thought, focused not on mitigating the mentioned paradox, but on radicalising it, revolves around the idea of a state of exception.

2.2 State of exception concept

In the most general sense, the idea of a state of exception is that a situational decision as an act of individual will terminates the general norm. In the legal context, the holistic concept of a state of exception was first formulated by Carl Schmitt. According to Schmitt, from the very beginning there has been a gaping pit between the norm and real life, between the rule and its application, to overcome which an intermediary is needed – the decision of the sovereign. Thus, developing the famous thesis of Thomas Hobbes that “authority, not truth, creates law”, Schmitt bases law

exclusively in an act of violence, a strong-willed decision, considering the latter as a specific legal act. According to Schmitt, each provision is by definition designed for normal living conditions and cannot be applied in a state of chaos. In other words, the actual order is not a consequence, but a prerequisite for the operation of the provision. A situation where a normal state is threatened is an exception that it is not described in the provision and cannot be described in it. And in such a situation, the sovereign decides whether a normal situation really prevails or whether there is a state of exception in which the provision can be suspended. Accordingly, the sovereign is outside the normal legal order and still belongs to it, since he is competent enough to decide whether the rule can be suspended. Thus, Schmitt essentially leaves the question of what is law and what is not, at the mercy of an absolute decision of the sovereign, which is based only in himself [19, p. 15-29]. It is in this *ex-nihilo* decision that, in his opinion, the essence of law lies: “authority proves that to produce law it need not be based on law” [19, p. 27]. Schmitt gives it a meaning similar to the meaning of a miracle in theology, and connects the idea of a state governed by the rule of law with the loss of ideas about transcendence, “bunishing the miracle from the world” and rejection “not only the transgression of the laws of nature through an exception brought about by direct intervention, as it found in the idea of a miracle, but also the sovereign's direct intervention in a valid legal order” [19, p. 57].

According to Schmitt, the act of violence and the state of exception established therein are not just inscribed in the law, but constitute the very essence of the latter, which, however, becomes indistinguishable from violence. Accordingly, the idea of the rule of law loses all meaning. In this regard, the current popularity of Schmitt's concept, the most famous interpretation of which belongs to Giorgio Agamben, is quite demonstrative. Agamben does not just update the theory of a state of exception, but shows that in the modern world, a state of exception has become the norm: “Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally” [6, p. 134].

At the anthropological level, this refers to bare life, that is, not to a specific way or form of human life, but to the very fact of life that is common to all living beings: in a state of exception, a sovereign decision suspends the provision that recognises a person's dignity and rights, and resumes human life in the form of a simple biological fact, an object of pure manifestation of power, a life that is completely unprotected, since it can always be taken away with impunity [20, p. 114]. Developing Michel Foucault's concept of “bio-politics”, according to which, in the course of history, natural life is gradually included in the mechanisms and processes of state power, Agamben argues that politics is not just historically transformed into bio-politics, but is initially such [20, p. 13]. As an example of the

maximum politicisation of life, he considers the situation of prisoners of Nazi concentration camps, who, along with their citizenship, lost any legal identity: “Auschwitz marks the death and destruction of any ethics based on dignity and compliance with the norm” [21, p. 74-75]. According to Agamben, it is the concentration camp, where the future determined by the authorities appears to a person in the form of absolute inevitability, that makes up the biopolitical paradigm of modernity [20, p. 151-229].

Agamben considers the state of exception not as a special right (like the law of war), but as a space of absolute anomie, a legal vacuum, “an empty space where an action that does not relate to law in any way collides with a norm that does not relate to life in any way” [6, p. 134]. Unlike Schmitt, Agamben is extremely concerned about the revealed totality of the state of exception, but is forced to state that “from the camps it is impossible to return to classical politics” [20, p. 238], and from the state of exception in which we live, it is impossible to return to the rule of law [6, p. 135].

Consequently, the inability of Schmitt and Agamben to distinguish between law and power leads to their identification, and then to the complete denial of law as such and the elevation of lawlessness to the norm. In the end, this refers to the gradual disappearance of law due to the destruction of the corresponding experience [22]. Thus understood, the idea of a state of exception poses a radical challenge to the dominant idea of the development of modern law as a global promotion of the rule of law [23, p. 687].

2.3 *The problem of correlation between the rule of law and the state of exception*

If the idea of the rule of law is based on the opposition of power and law, aimed at protecting the dignity and rights of everyone, especially the weak, then the concept of a state of exception proceeds from completely opposite ideas about power as a source of law. In the modern era, these two visions of law became the basis for the theory of absolute natural human rights and the theory of absolute sovereignty. The question of how these two “absolutes” can be consistently combined remains at the centre of philosophical and legal discourse, and the answer to it from the doctrine of supremacy is primarily the institution of judicial control over political decisions [12, p. 142-147]. Notably, Agamben practically ignores the role of the judiciary in his concept, although it is often at the centre of modern debates around the state of exception, which is fairly emphasised by researchers of the philosopher's work [23, p. 684].

Therewith, neither the institution of judicial control nor other tools of the rule of law are sufficient to meet all the modern challenges of the latter, and therefore the theory of a state of exception is experiencing a new wave of popularity today. In particular, it turned out to be surprisingly popular after the events of September 11, 2001 and the outbreak of the war on terrorism, which was declared by the United States and other countries. The unprecedented deviations from the requirements of the rule of law and restrictions on constitutional rights resorted to by governments could

not be explained otherwise than by the uniqueness of the situation, which required extraordinary solutions [5]. Such an event was also the COVID-19 pandemic, which once again focused the attention of philosophers and lawyers on the relationship between the rule of law and the state of exception.

There are three main approaches to solving this issue. Representatives of the first of them (followers of Schmitt) argue that in an emergency, one should rely on general flexibility and sensitivity to circumstances in the actions of the state, which is also desirable in normal times. According to this approach, the rule of law is not in itself the main reference point for the authorities in the face of danger. The second position (presented, for example, by Kim Lane Scheppele) is that in the name of the rule of law, the available constitutional guarantees must remain in force; moreover, in emergencies, they are most needed. Finally, representatives of the third approach (for example, Veronique Champeil-Desplats) propose to protect the rule of law by adopting special emergency rules that make provision for reduction of civil liberties or provision of officials with broad discretion in matters that are usually governed by general legal provisions [2]. These positions can be conditionally designated as a priority of the state of exception, a strong and weak version of the priority of the rule of law, respectively. Evidently, the first approach partially follows the line of Schmitt and Agamben and takes the state of exception beyond the law and order, treating it as an exception to the rule or a *state of exception*. Accordingly, under the permanent state of exception declared by Agamben, there is no place for either the rule of law or the law as such.

The strict version of the rule of law priority was an idiosyncratic response to the practical application of the first approach, in particular the disproportionate US response to the 2001 terrorist attacks. As Kim Lane Scheppele notes on this occasion, the experience of fascism, communism, and world wars in the 20th century forced society to significantly reconsider Schmitt's theory of the state of exception, but the Bush administration's response to the events of September 11 was based on Schmitt's logic, and therefore foresaw a world that had not existed for a long time, and that is why it was not supported by many European allies of the United States [5, p. 1003-1004]. It should be added that the radical changes in legal understanding discussed by the researcher primarily concern the establishment of the idea of human dignity and human rights, which cannot be stopped by any political decision. In this sense, the new enthusiasm of lawyers regarding the idea of a state of exception cannot but cause concern of lawyers, which was surprisingly aptly expressed by Bjarne Melkevik when he said that “this subject is introduced as a Trojan horse in order to accept the unacceptable” [24, p. 7].

The third of the described approaches is a kind of compromise and considers the state of emergency as part of the available law and order, a critical but predictable situation for the latter (*state of emergency*, however, no longer an *exception*). At present, it is this approach that

is generally accepted at the level of international law and most national legal orders. Its obvious advantage is predictability, and its disadvantage is that it introduces a *lite* version of the rule of law, which may eventually infect or even displace the concept of the rule of law, which should be fully applied [2]. Such a process is described, for example, by Veronique Champele-Desplats, who, using the example of the state of emergency introduced in France in 2015-2017, demonstrates how the very concept of the rule of law is transformed and weakened: 1) the state prioritises security requirements; 2) the government that interferes with the rights and freedoms that it must respect in accordance with the classical concept of the rule of law promises to compensate for such interference; 3) in the persecution of its enemies, the state builds a legal regime around the deviation from the provisions that concern these enemies. Consequently, the concept of the rule of law transforms into a formal, security-oriented, compensatory, and discriminatory concept [4, p. 115-117]. However, can the concept of the rule of law, even if formal, be discriminatory? And would it still refer to the same phenomenon?

The analysis of the main approaches to the correlation between the state of exception and the rule of law highlights the fundamental opposition between the relevant ideas, which makes their combination in practice quite problematic.

CONCLUSIONS

Placing the problem of the correlation between the rule of law and the state of exception in a broad philosophical context allows clarifying the ideological foundations of both concepts and, taking this into account, look in a new way at the connection between them. The study of the genesis of both concepts in the Western intellectual tradition suggests that the modern debate around the emergency in law is based on a fundamental conflict between the idea of the rule of law, where law is thought of as the antithesis of power, and the idea of a state of exception, which is based

on the idea of power as the only source of law. If power is considered as the source of an individual volitional act, then law represents a universal impersonal mind, and the modern embodiment of this intelligence, which can resist the arbitrariness of those in power, is human rights. Thus, if the idea of the rule of law emphasises the fundamental anti-authoritarianism of law based on human dignity, then the theory of the state of exception, on the contrary, roots law in authority, which, for its part, makes it impossible to distinguish it from violence.

Proceeding from the opposite grounds, these two concepts represent two different traditions of dealing with the paradox of normativity of law, which lies in the impossibility of equally fair application of the general provision to individual cases. On the one hand, this refers to the tradition of practical wisdom derived from Aristotle, focused on carefully balancing the abstract requirements of the general provision and situational justice, considering the purpose of law, and on the other hand, on the tradition of absolutising the decision as the only way to apply the provision by stopping it, resulting in the idea of a state of exception.

The analysis of the main approaches to the correlation between the state of exception and the rule of law (the priority of the state of exception, the weak version of the priority of the rule of law, the strong version of the priority of the rule of law) highlights the above-identified essential contradictions between the relevant concepts. In particular, such an analysis demonstrates that the fundamental opposition between the rule of law and the state of exception makes it impossible to combine them consistently, and the corresponding attempts always turn out to be a compromise not in favour of the former in a lightweight version of it, which can later completely replace the concept of the rule of law. Instead, it is necessary to recognise the limitations of the law itself, without abandoning the discourse of the rule of law and the fundamental grounds for it.

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Sergiy I. Maksymov

Doctor of Law, Professor

Corresponding Member of the National Academy of Legal Sciences of Ukraine

National Academy of Legal Sciences of Ukraine

61024, 70 Pushkinska Str., Kharkiv, Ukraine

Professor of the Department of Theory and Philosophy of Law

Yaroslav Mudryi National Law University

61024, 77 Pushkinska Str., Kharkiv, Ukraine

Natalia I. Satokhina

PhD in Law, Associate Professor

Department of Theory and Philosophy of Law

Yaroslav Mudryi National Law University

61024, 77 Pushkinska Str., Kharkiv, Ukraine

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