

ENSURING HUMAN RIGHTS AND FREEDOMS DOES NOT MEAN EQUALITY FOR EVERYONE: LEGAL EXCEPTIONS AND RESTRICTIONS

GARANTIR DIREITOS E LIBERDADES HUMANOS NÃO SIGNIFICA IGUALDADE PARA TODOS: EXCEÇÕES E RESTRIÇÕES LEGAIS

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Abstract: After the Second World War, the international community began to pay more and more attention to the protection of human rights and freedoms, as evidenced by the adoption of a number of fundamental international documents. Nowadays, the defense of human rights and freedoms is becoming a priority not only for a single democratic state, but also for the entire world. A number of Declarations and Conventions declare the unity of the international community in the development of the legal system for ensuring human rights and freedoms. To date, democratic states have ratified most of these documents, thereby committing themselves to bring their national legislation in line with European legal standards in the field of human rights and freedoms. At the same time, there are certain exceptions to every rule, which is also the case in the area of human rights and freedoms, since legal equality cannot be the same for every person, of course, with the exception of such fundamental rights as the right to life and health, since their restriction is out of the question. In this regard, the article attempts to answer the question, the essence of which is that ensuring human rights and freedoms does not mean equality for everyone.

Keywords: Human rights and freedoms. Legal equality. Restrictions. Social justice. Protection. Equality before the law and the court.

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Resumo: Após a Segunda Guerra Mundial, a comunidade internacional começou a prestar cada vez mais atenção à proteção dos direitos humanos e das liberdades, como evidenciado pela adoção de uma série de documentos internacionais fundamentais. Hoje em dia, a defesa dos direitos humanos e das liberdades torna-se uma prioridade não só para um único Estado democrático, mas também para todo o mundo. Várias Declarações e Convenções declaram a unidade da comunidade internacional no desenvolvimento do sistema

jurídico para garantir os direitos humanos e as liberdades. Até à data, os Estados democráticos ratificaram a maior parte destes documentos, comprometendo-se assim a alinhar a sua legislação nacional com as normas jurídicas europeias no domínio dos direitos humanos e das liberdades. Ao mesmo tempo, existem certas exceções a todas as regras, o que também acontece no domínio dos direitos humanos e das liberdades, uma vez que a igualdade jurídica não pode ser a mesma para todas as pessoas, claro, com exceção de direitos fundamentais como o direito à vida e à saúde, uma vez que a sua restrição está fora de questão. A este respeito, o artigo tenta responder à questão cuja essência é que garantir os direitos humanos e as liberdades não significa igualdade para todos.

Palavras-chave: Direitos humanos e liberdades. Igualdade jurídica. Restrições. Justiça social. Proteção. Igualdade perante a lei e o tribunal.

1. Introduction

The problem of effective provision of the protection of the aggrieved person's rights has always existed. However, as historical events testify, the Second World War radically changed views on guarantees of world peace because humanity understood the true value of human rights and freedoms, which led to a fundamental update of the legal mechanism for their protection. Starting from that time, protecting human rights is not a purely internal competence of states. It has gained international significance, embodied in the idea of creating a new international law and order, the basis of which is the respect for fundamental rights and freedoms (Ablamskyi et al., 2020; Galagan et al., 2021; Sokurenko et al., 2023). The main task of a modern democratic, legal and social state is to protect human and civil rights and freedoms and national security from external and internal threats. Moreover, the issue of Ukraine's national security is particularly acute in the context of globalization. The state of security in any cell of society makes it possible to fully realize human rights and freedoms, since the sphere of national security is an important link in the system of interaction between the state and society. Effective prevention of all types of modern threats, including the combined threat to national sovereignty and territorial integrity from the outside, is possible in countries with high standards of living, an adequate level of protection of citizens' rights and freedoms.

In today's world, one of the fundamental principles of the rule of law is the actual provision and guarantee of human rights and freedoms, which is currently declared in a number of legal acts. However, we must understand that even the best approaches to legal protection of human rights cannot ensure social justice for everyone if law enforcement practice does not take into account minimum standards of human protection. The point is

that in every society there are "vulnerable groups" of people who are objectively in less favorable conditions than other members of society. At the same time, this status can be acquired and lost by some people throughout their lives, while for others it is permanent. The mere legal guarantee of the same scope of rights and freedoms to all subjects is not enough to remove any obstacles to achieving actual legal equality. Substantive equality is realized through differentiation of legal regulation and the principle of positive discrimination. Positive discrimination is closely related to the doctrine of substantive equality and positive state obligations.

Achieving a proper balance in ensuring human rights and freedoms and national security is based on the idea that these phenomena are inextricably linked and interdependent. The derogation of states from their obligations to ensure human and civil rights and freedoms does not disappear when confronting threats to national security. The state's counteraction to security threats is always associated with certain restrictions on human and civil rights and freedoms, or disadvantages for people, due to the need to ensure the security of the entire society.

2. Methodology

The methodological basis of the research is general philosophical approaches, general scientific, special and proprietary methods of jurisprudence. Using the dialectical method, the essence of human rights and freedoms was defined as a theoretical and legal phenomenon that was in constant motion. The synergistic method was used to characterize the protection of human rights and freedoms as a component of the mechanism of ensuring equal rights and opportunities of a person and a citizen in order to identify his place in this system, as well as the factors that affect him. The use of the hermeneutic method made it possible to objectively interpret domestic and foreign legislation in the field of protection of human rights and freedoms. The prognostic method contributed to the substantiation of possible directions for improving the theory and practice of protecting human rights and freedoms.

3. Results and Discussion

In a democracy that strives for freedom and security, one cannot avoid a balance between two contradictory values and principles, which, on the one hand, relate to the

security of the state and its citizens, and on the other hand, to human dignity and freedom (Ryzhuk, 2021, p. 11-12). Thus, the need to ensure human and civil rights does not justify the refusal to guarantee the security of society and the state, and ensuring national security cannot justify the violation of fundamental human rights and freedoms.

The level of development of a democratic society is determined by the degree of guaranteeing and ensuring human and civil rights and freedoms (Irkha, 2015, p. 78), which are a central element of the constitutional and legal status of a person and an important element in the field of legal regulation of social relations. However, most of the constitutionally enshrined rights and freedoms are not absolute: the realities of the functioning of the state and society indicate that there are situations when these rights can be restricted on quite legitimate grounds.

Considering the problems of constitutional and legal restrictions on human and civil rights and freedoms in Ukraine, O. Andriievaska draws attention to the relevance of modern rethinking of legal regulation of rights and freedoms, especially in terms of clarifying their permissible restrictions by the State (Andriievaska, 2018, p. 14), and provides an exhaustive analysis of the main directions of revealing the essence of this scientific category. We should support the position of O. Skrypniuk, who understands the restriction of human rights and freedoms as a regime of temporary general or specific individual suspension or narrowing of the scope of rights and freedoms defined and guaranteed by the Basic Law in the interests of ensuring the rights of others, as well as ensuring national security and defense of Ukraine, as provided for by the Constitution and laws of Ukraine (Skrypniuk, 2011, p. 8-9). In our opinion, such a definition is the most understandable and meaningfully comprehensive, since it takes into account the essential features of this concept, namely: exclusive legality, temporality, indicates the subjects of legal relations, outlines the purposes of restrictions, socially useful nature, emphasizes the protective function, etc. Let's make it more specific: the general type of legal restrictions is used as a result of a certain legal regime or condition related to the needs of protecting national security and defense, and the purpose of specific and individual restrictive measures against a particular person is to ensure the constitutional rights and freedoms of other people.

Any restrictive measure must be justified, clearly defined, necessary and proportionate to the goal. The legal regulation of restrictions on human and civil rights and freedoms in the interests of national security should be carried out by clear and accessible legal provisions. The effectiveness and proportionality of the limits and consequences of the

restriction in relation to the importance of the interests is also supplemented by the factor of "urgent social need", i.e., the justification of restrictions on certain human rights in order to protect national and public security is subject to rather strict conditions.

The definition of human rights can be found in the article by I. S. Zahorui "The Concept of "Human Rights", where he analyzed different approaches and views to understanding the concept, which find their place in the philosophical and legal literature, as well as the justification of such rights. The researcher himself, summarizing the main material and relying on real state and political and legal phenomena in the context of the movement, gives his own author's definition of this concept: "human rights are a general and equal for all measure (norm) of freedom (possible behavior) necessary to meet the basic needs of its existence, development and self-realization, which in certain specific historical conditions is determined by the mutual recognition of freedom by the subjects of legal communication (with other persons, society and the State) and does not depend on its official fixation by the State (human rights are fixed by international acts), although it requires State recognition and guarantee" (Zahorui, 2016). Thus, human rights should be binding, express the capacity and capabilities of a person, and not be recognized as a goal or desire that the state seeks to create. They belong to every person from birth, which also establish standards. It is also worth paying attention to the importance of human rights and guarantees of their realization as an institution of modern society, which are recognized by our state. The Constitution of Ukraine recognizes a person, his or her life and health, honor and dignity, inviolability and security as the highest social value. Article 3 of the Constitution of Ukraine also stipulates that human rights and freedoms and their guarantees determine the content and direction of the state's activities, and that the establishment and enforcement of human rights and freedoms is its primary responsibility. Thus, Ukraine has assumed the obligation to promote the full observance of human rights, prevent their restriction and violation, except in cases expressly provided by laws.

For the modern world, equality and the prohibition of discrimination have become one of the main fundamental, universal principles of human rights and freedoms. Equality means that equal and uniform rights, freedoms and certain obligations will be applied to all regardless of their gender, nationality, religion, place of residence, etc. This is the main content of the principle of equality (Zhuravlova, 2016, p. 76). Only legal guarantee of the same scope of rights and freedoms to all subjects is not enough, since it is necessary to form a comprehensive legislative framework that would be aimed at removing any obstacles to

achieving actual legal equality and provide for liability for unjustified differences in treatment of subjects in the same situation or for unjustified equal treatment of subjects in different situations.

In legal doctrine, legal equality is seen as: equal respect within a certain decision-making process (the requirement to show equal respect for everyone's opinion); objective impartiality (the requirement to treat the same situations equally); equality of distribution of benefits (the requirement for everyone to receive an equal share of a certain benefit); equality of result (the requirement that individuals should be in the same conditions after the distribution procedure).

The concept of legal equality is realized in law through four interrelated principles: equality before the law; equality before the court; equality of rights and freedoms of a person and a citizen; equality of duties of a person and a citizen (Pohrebniak, 2008, p. 82-84). It is the formation of the idea of legal equality that determines the prohibition of discrimination as a violation of the principle of equality. Thus, the idea of formal equality is complemented by the idea of actual (substantive, real) equality.

Legal equality is substantiated within the framework of such concepts as "equality of opportunity", "equality of access to opportunities" and "equality of results". Such equality implies the removal of not only legal but also actual obstacles to the exercise of rights by individuals, equal access of all persons to resources and receipt of a share of the public good, as well as the requirement that individuals should be in the same conditions after the distribution procedure (Khrystova, 2013, p. 13). In this aspect, the principle of differentiation is important, which consists in taking into account and granting each person with appropriate rights, which may be different. For example, "vulnerable groups" of people need protection and support through the introduction of special legal statuses that would ensure their right to social payments, benefits, various forms of social assistance.

The essence of the principle of non-discrimination is changing under the influence of the idea of legal equality, which is a requirement of fair equality of opportunity. In the modern interpretation, it means the prohibition of unjustified different treatment (establishment of differences, exceptions, restrictions or advantages) to persons in the same situation or the same approach to persons in different situations (Bachynska, 2017, p. 167). It cannot be assumed that the content of the principle of equality and the principle of non-discrimination are identical. On the one hand, they coincide in many respects, but on the other hand, they differ in their essence, so they should be considered as independent

principles of the legal status of a person. The content of the principle of equality of human rights and freedoms includes ensuring equal conditions for the realization by a person of his or her rights, freedoms and obligations. In turn, the principle of non-discrimination provides for the creation of conditions for the inadmissibility of restrictions on human rights, freedoms or obligations depending on their anthropological or social qualities.

Thus, it should be recognized that equality of human and civil rights and freedoms and the prohibition of discrimination have become one of the main fundamental, universal principles of human rights.

The concept of legal equality includes the principle of equality of everyone before the law and the court, equality of men and women, the same scope of constitutional rights, freedoms and obligations for everyone, as well as the prohibition of discrimination on the basis of certain (protected) characteristics.

State obligations in the field of ensuring human rights and freedoms

A modern state governed by the rule of law is based on the recognition of the value of human rights and freedoms. By guaranteeing their realization and observance, the state creates conditions for the existence, life, development, and full realization of the individual and society as a whole. Human rights in the modern world emerged almost simultaneously with the emergence of humanity itself and have come a long way in their formation, evolution and consolidation in international and national regulatory documents.

The theoretical analysis of the doctrine of positive obligations of the state in the field of human rights has been widely developed among constitutional scholars. Thus, S. Shevchuk has determined that positive obligations of the state involve its active actions aimed at affirming, protecting and promoting the realization of human rights (Shevchuk, 2020, p. 59). M. Buromenskyi emphasized that from the point of view of positive obligations, the state must not only have legislation that most fully ensures the observance of conventional rights and freedoms, but also take all necessary measures to ensure that it actually works (BuromenskyI, 2000). According to H. Khrystova, positive obligations of the state cannot be interpreted as determining specific means or specific actions of the state, the only criterion should be the effectiveness of actions in a particular situation (Khrystova, 2012, p. 36). To implement these provisions, the positive obligations of the State should cover various categories of measures for the full and comprehensive guarantee of human rights.

The positive obligations of the state include the implementation of a set of actions, among which a special place is occupied by the policy of positive discrimination. Thus, Article 1 of the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine" provides that positive actions include special temporary measures that have a legitimate, objectively justified purpose aimed at eliminating legal or actual inequality in the opportunities for a person and/or group of persons to exercise on an equal footing the rights and freedoms granted to them by the Constitution and laws of Ukraine. A substantially identical definition of affirmative action is contained in Article 1 of the Law of Ukraine "On Ensuring Equal Rights and Opportunities for Women and Men": "Affirmative action is special temporary measures aimed at eliminating the imbalance between the opportunities for women and men to exercise equal rights granted to them by the Constitution and laws of Ukraine".

Types of positive actions include trainings and support measures, policy impact assessment, mainstreaming, targeted recruitment, preferential treatment, quotas, positive action programs (Yankovets, 2018, p. 58). Such measures are aimed at achieving actual equality in society, but they provide for the possibility of establishing certain advantages, benefits or privileges for certain categories of persons, harming the rights and interests of others.

Positive actions are mainly focused on the following tasks: eliminating the negative consequences that the systematic discrimination of certain groups of people led to in the past, in particular by overcoming those obstacles that make it impossible for discriminated groups to exercise their rights and freedoms in various spheres of social life on an equal basis with others; ensuring compensation to persons who belong to discriminated groups for systematic discrimination in the past and its consequences, etc. (Ponomarov, Fedorovych, 2014, p. 55). As we can see, the goal of positive actions is to equalize opportunities in the exercise of rights by all persons, regardless of the presence of discriminatory characteristics. Positive actions can ensure that all individuals have equal access to jobs, including senior positions, to quality education, to political and decision-making participation, to cultural influence – regardless of gender, color or physical characteristics.

The peculiarity of positive discrimination is to ensure equal opportunities for certain categories of persons in accordance with the principles of respect for human dignity, guarantees of equality, and social justice. For this purpose, various means and methods of the social state of law are used, which is designed to ensure the free development of an

individual in a democratic society through adequate actions, which is positive discrimination aimed at protecting the weaker in order to ensure a balance of interests in a heterogeneous society and the free development of an individual.

To implement the anti-discrimination policy, a number of temporary special measures are foreseen, to which O. Bachynska includes the following: periodic monitoring to assess the situation of vulnerable groups (for example, monitoring the unemployment rate of representatives of national minorities compared to other citizens); measures aimed at improving the level of education, professional skills, legal awareness for vulnerable groups (for example, creating special training programs for groups of people who are less represented in the labor market); introduction of quotas in the field of employment or representation (for example, the introduction of quotas for women or representatives of national minorities in parliament); provision of benefits, subsidies or financial assistance to certain categories of citizens (for example, benefits for paying utilities for pensioners); revision of standards or requirements in order to ensure access to the realization of their rights for certain groups of persons (for example, reasonable adaptation or universal design policy in the process of designing repair works in settlements (to ensure access of persons with disabilities to infrastructure objects), etc. (Bachynska, 2021, p. 11). The application of positive actions allows to go beyond the formal prohibition of discrimination and is aimed at creating an effective mechanism to counteract the discriminatory situation of persons.

Thus, it should be noted that positive obligations to combat discrimination and the institution of positive discrimination in Ukraine are still at the stage of their formation. Today, the normative foundations of the state's activities have been formed in the form of authorized entities for the implementation of positive actions, which are defined as one of the constituent parts of the state policy of prevention and combating discrimination. Despite the normative settlement, in scientific sources there is no single approach regarding the essence of positive discrimination and a system of measures sufficient to achieve the goal.

4. Conclusions

1. The equality of human and civil rights and freedoms and the prohibition of discrimination have become one of the main fundamental, universal principles of human rights. The concept of legal equality includes the principle of equality of everyone before the law and the court, equality of men and women, the same scope of constitutional rights,

freedoms and obligations for everyone, as well as the prohibition of discrimination on the basis of certain (protected) characteristics. The mere legal guarantee of the same scope of rights and freedoms to all subjects is not sufficient to remove any obstacles to achieve de facto legal equality. Substantive equality is realized through differentiation of legal regulation and the principle of positive discrimination. Positive discrimination is closely related to the doctrine of substantive equality and positive obligations of the state.

2. Positive discrimination provides for the possibility of applying special legal measures aimed at eliminating the imbalance between the ability of different categories of persons to exercise equal rights due to established stereotypes, practices or traditions in society and serve as legal compensation for certain categories of persons in order to eliminate the consequences of social inequality as soon as possible. Therefore, by their very nature, the latter are not discriminatory, as they are aimed at ensuring actual, not formal, equality of opportunity. Positive discrimination is a means of social equalization in historically deformed areas of social relations.

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