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Natural Rights of Human Being as the Basis for Reformation of Constitutional System of Ukraine

Дана наукова стаття присвячена проблемам реформування правової системи України відповідно до європейських стандартів. Сьогодні людина оголошена найвищою цінністю як у Конституції України, так і у міжнародно-правових актах. Проблема, яка досліджується у статті стосується певної колізійності положень системи природнього права і системи позитивного права.

Ключові слова: *конституційна реформа, природні права людини, гуманітарне право.*

Данная научная статья посвящена проблемам реформирования правовой системы Украины в соответствии с европейскими стандартами. Сегодня человек провозглашен наивысшей ценностью как в Конституции Украины, так и в международно-правовых актах. Проблема, которая исследуется в статье относится к определенной колизийности положений системы естественного права и системы позитивного права.

Ключевые слова: *конституционная реформа, естественные права человека, гуманитарное правою.*

This paper deals with the issues of reformation of the Constitutional system of Ukraine according to the European standards. The human being is proclaimed as the main value both by the Constitution of Ukraine and by international acts. The issue investigated in the article refers to some conflict of statements of natural law system and positive law system.

The author considers that the defense of natural rights and freedoms must be the basis of future constitutional reform in Ukraine, in spite of the fact that a lot of these rights already had the form of constitutional propositions.

Keywords: *constitutional reform, natural rights of human being, humanitarian law.*

Ukraine today lives in a new world, in a new dimension, in a new legal sphere. The serious influence on it makes the process of globalization. In our opinion the changes connected with this process are not absolutely positive and useful for domestic legal system.

The conception of rights and freedoms of human being as the way of substantiation for his or her dignity is a quite new phenomenon for philosophical and political legal thought. It attained global dimension only in XX century, when human rights had understood as the main social and state value. This point of view was legally regularized by the international legal documents. However, some authors believe that codification of legislation (meaning constitutional and legal processes) has resulted in the identification of right and legislation and the emergence of legal positivism [1]. This problem has not become a subject of deep legal analysis of national authors, in fact, makes its **scientific novelty**.

Nevertheless it should be admitted, that the definition of rights and freedoms of human being is absent in international legal acts. The fact is that in some documents of United Nations (UN) special organizations, which had been involved into preparation of Universal Declaration of Human Rights (UDHR) the consensus for universal definition of human rights was not reached. It was connected with cultural, ideological and social specifications of the countries, which took part in preparation of this document. The equivocal

approach to human rights is revealed by European Court of Human Rights. Its decisions could be controversial in cases with the same circumstances in dependency of what country becomes a defendant in a court. For example, everyone knows the discussion about formulation of Art.18 of the International Covenant on Civil and Political Rights (ICCPR) [2]. The statement of the first item of Art. 9 of European Convention on Human Rights (ECHR) is identical to formulation of Art. 18 of UDHR [3]. In both it is defined the right to freedom of thought, conscience and religion. The delegations from several non-western countries expressed concern with the statement of freedom to change ones religion or belief and its connection with probable negative influence of foreign missioners activity for the culture of those countries.

The Constitution of Ukraine is an internal legal act that is the back ground of legal system of Ukraine and in the same time it is the systematic defender of human rights and freedoms [4]. The problem of reformation of constitutional legacy should not be simplified to adoption of new constitution or to acceptance of amendments to the current Main Law of Ukraine. This process must be connected with a lot of doctrinal issues both of common and constitutional law and also with philosophical categories and concepts. The processes of reforming the Constitution of Ukraine led to **urgency of this article.**

First of all, the meaning of the Constitution consists in this legal protection of rights and freedoms of human being and citizen by its every single article and proposition. This idea is obvious not only at the second chapter "Rights, freedoms and duties of human and citizen", but also at the rules of the chapter "General Principles" (for example at the Art. 3 "A human being, his or her life and health, honor and dignity, inviolability and security are recognized as the highest social value in Ukraine."). It also presents in the fifth chapter "The President of Ukraine" (for example at the Art. 102: "… the President of Ukraine is the guarantor of the state sovereignty, territorial integrity of Ukraine, adherence to the Constitution of Ukraine, human and civil rights and freedoms…"). The norms which defense human rights are contained at the XII chapter "The Constitutional Court of Ukraine", so according to Art. 152: "Material or moral harm, inflicted to the physical or legal persons by acts and actions which are acknowledged unconstitutional, is compensated by the state in the order set by a law".

We could find a lot of such examples. The number of it is equal to the number articles in Constitution because this legal act is the main guarantee for the defense of democracy as protection of human rights and freedoms. Nevertheless, using the term "law", we should consider the different possible connotation of it: what kind of human rights do really need protection? What kind of rights is protected by law? So there is a problem of definition the phenomenon of law. Achieving the target of this scientific article necessitates **solving research problems** related to the delimitation of the concepts of "right" and "law".The main regional document for human rights the Convention for the Protection of Human Rights and Fundamental Freedoms formulates the basic legal principles of protection according to the idea of human natural rights exclusively. Meanwhile the states which had been ratified by the ECHR were obliged to implement certain norms into national legislation. That so the natural rights became positive rights, namely the rights regulated by law. Thereby the collision in understanding of natural and positive rights became deeper instead of got its solution. The declarative character of international human rights norms protection became general.

For example it is said in Convention that human rights and fundamental freedoms are natural, inalienable and belong for everyone since birth. However, it is hard to understand what rights is it about, because there are a lot rights and freedoms which could not belong to everyone since birth or to be restricted (as political right). It could be said also about property right. According to Ukrainian civil legislation a land could not be in an ownership of foreign persons or persons without citizenship. At the same time the restriction of right on plot of land for such category of persons by law is connected with restriction of property right for Ukrainian citizens; exactly that right that should be inalienable and unrestrictable. In this case it means the situation when a land for testament should goes to foreigner. We could find a few more paradoxes in civil legislation. For instance, at p. 3 of Art. 269 of Civil Code of Ukraine it is written that individual could not refuse from non-property rights of citizen [5]. But we know that in the same time person is able to refuse from his or her name and choose another one

instead, also person can refuse from right for making his or her family.

By the way, civil law scholars trying to make closer civil law to the concept of natural rights could not avoid of some collisions. The right for name is the one of natural rights from the point of view of modern civil law studies. A person is born without name; he or she is named by his or her parents, but it contradicts to the statement of p. 1 of Art. 269 of Civil Code of Ukraine: "Personal non-property rights belong to every individual by birth or by law". The right for family is a natural law also as it is noticed at the p. 1 of Art. 291 of Civil Code of Ukraine: "Individual has a right for family regardless to age or health". But in this statement most likely refers to abstract objective right, about legal capacity, because everyone knows that health and age do have influence on the right of person for making a family.

The gap between understanding of human rights both natural and positive becomes only deeper, when universal and regional international documents propose the states to set these rights on normative level, to give for it legal, positive character and to create techniques, which could guarantee realization and protection of those rights. Moreover, in this Convention it is said that official state organs of the Council of Europe members are obliged to observe legality and norms of law. Human rights are regulated exclusively by law, which should be formulated clear and understandable and also published. The restriction of rights should be established only by law.

Many scholars today get used to understand law from position of normativistic approach. From this point of view law, rule and normative acts are equal. Scholars who sought to understand the essence of law and gave definition of it, often use the one term "law" for different phenomena.

The general idea in understanding of law which makes in fact impossible its universal definition meanwhile is quite simple and difficult in the same time. This dualistic approach is justified by complexity of the whole phenomenon. Simplistically it looks like dualism of matter and conscience, earthly and heavenly, physical and material. The law belongs to human being by God, by birth. It could not be separated from human being. The law makes human beings themselves. It differentiates them from other living creatures. It justifies his or her life, health, honor and dignity. The law is also the rule, the norm, the measure of licit behavior. It is formulated by correspondent state authority. The law allows something and it forbids something and the most important thing – it supposes sanction for violation of norm. The one word, the one term denotes a lot of different phenomena.

While we analyze scholars' opinions in understanding of law, first of all we should consider and make clear for ourselves, the contexts in explaining law. Do author means something that has objective existence or something that is "created" by state.

We do not reject that law, "created" by state in strictly connected with natural law; it has common roots with natural law. Nevertheless, terminological issues are obvious.

No one knows why today we use the term "law" for two phenomena. One of it is natural, inalienable and unrestrictable (but hardly is it real in modern life). The relations regulated by this law are not legal and accordingly are not protected by state. All problems appeared on the sphere of this "law" should be solved and do solve by holders of the right. The state should not intervene and do not has an ability to intervene into these relations.

Today person is very limited in such kind of rights. There are few of them, but it still are. A person could not be restricted in using environmental goods or in the sphere of intimate connections. The problem of thinking, especially on the norms of the Basic Law as a fundamental document is of great importance. Very detailed problems of positivism and objectivism in the sphere of the Rights considers by O.Uvarova [6].

Here we could find a second aspect of this problem namely the normative regulation of social life as well as changing of social relations into legal relations through normative regulation. It is not possible and not right to refuse the existing of two kinds of law – natural and positive, but let's see what is natural law worth for without its fixation in law?

Does it possible to state to create legal guarantees, legal principles of something that is actually out of borders of state regulation?

Let's agree with indisputable fact that contradiction of legal norms to real trends in development of social (according to positive law) connections provokes inefficiency for law and it does not work anymore.

A norm as an example of behavior is created by practical living activity of people. This process could be faster if it finds adequate image on

rulemaking and on the contrary, the development of normal living activity could be suspended, paused if the imagination of reality, repulsed in normative propositions will be distorted.

Positive law and natural law are two mutually connected but in the same time opposite phenomena. In various times of development of different states the correlation between these laws did not stay the same, it have been changing.

Today the Constitution of Ukraine proclaims our state as legal. It demands from its legal system to be subordinated to the protection of natural rights of human being. Let us for example consider what is deemed to be the object of such crime as murder. No doubt everyone will answer that an object is the life of person as his or her natural right, which could not be restricted or alienated and belongs to human being by birth. And now we should think about that who does give to human being right for life? If individual is born dead, it is not human being anymore. The Criminal Code does not protect this object. There is no human being, so there is no human right. We consider that term "right for life" is not correct. Therefore life is an essential feature of human being, so at least at the level of terminology, should not be considered together with such rights as right to vote, which obviously depends from legislator. It is hardly right.

In the Civil Code of Ukraine, which norms had been mentioned before, personal non-property rights are distinguished in two groups: personal non-property rights that provide natural existence of individual and personal non-property rights that determine the social status of an individual.

The basic human right is the right for life – today it used to be an axiom. Still let's see is it actually so absolute and unrestrictable, as it seems to proponents of natural law tradition. First of all, this right was assigned in normative acts, beginning by UDHR in 1948 and finishing by legislation of mostly all states in the world. This is a proof of its normative character, so the right for life is absolutely corresponds to the definition, given to legal norm by the point of view of positive law tradition.

Second, is it sure unrestrictable? Here we must recollect that death penalty in Ukraine was canceled only in 1999 under the pressure of the Council of Europe and under threat of termination of membership for our country in this strong international association. Ukraine acquiesced and predicted instead of death penalty more inhuman and cruel punishment – life imprisonment. It had been happen in the time of declaration of the principle of freedom and equality of every person by birth. Who could answer for the question what is more precious to person life or freedom? Indeed, at the general international documents it is said that liberty could be restrain in some cases. In criminal law it is predicted absolute deprivation of unrestrictable for liberty. In certain countries death punishment is used. It is predicted by Criminal Code of Russian Federation. That is why inseparability of this right is very vague – life imprisonment is not restriction but deprivation of natural right.

Third, a person could not manage for a life of other human being according to legislation of our country. The punishment for such management it is punishment for murder. Whereas person could not manage his or her own life either not only in meaning of "sinful" and uncivilized suicide, but also in meaning of legal and humane euthanasia. In Ukraine euthanasia is a synonym to willful homicide. One of the current problems solved in the plane of natural rights is the right person to manage their own lives, which is now in the legislation of different countries decided not the same [7].

Everything that have been mentioned before, gave us reason to conclude that the "right for life' should be formulated and understood as "the right for the protection of life", as it is formulated on the right for protection of health. The state could not guarantee that person will be born healthy, as well as he or she will be born alive. That is way a state ought to take by itself responsibility for protection of life, so to create a health care system. The state regulates and protects something that human being had by birth. Today the Ukrainian legislation does not resolved the issue of the moment, which begins with life and, therefore, its protection [8, p. 314-318].

State protects these inseparable features of human personality from illegal attacks by formulation normative rules of conduction for people, setting some obligations and prohibitions; among them are such rules as "do not encroach to life, health or property" and others.

We also should consider about norm of Criminal law which let person right for justifiable or necessary defense [9]. Justifiable defense proposes legal reasons in result of which a person can legally deprive another person of life or inflict hard bodily harm.

So there is a collision between statement that every human being has right for life and norm of law which proposes to everyone right to take someone's life saving his or her own life. The dispute between the two concepts of law, natural and positivist defined as discussion about the indivisibility of human rights and freedoms and their incompatibility [10, p. 80-81].

Is not it looking a little bit immoral, especially thinking about that it is impossible for legal norm not to be moral? We could find a lot examples if try to remember certain statements of the Hague Convention and the Geneva Convention according to norms of international humanitarian law and right for conduct of engaging in war or armed conflict (law of the Hague and law of Geneva). If we recall Iraq, Kosovo, Rwanda, Palestine and a number of other states in which the USA had political interests, the general impression would be that for some countries even positive law do not exist, needless to say about natural rights of person.

So we do not we do not deny the existence of certain characteristics that make individual human being, and the need of protection of person as the holder of these features, still emphasize that terminology must be specified. Law is the measure of appropriate conduct, this is a norm preserved in legislation, usually except the definition-norms, it regulates the rules of humans conduct among themselves, state and juridical persons. It establishes sanctions, penalties or other measures of responsibility for violation of these standards. The term "law" should be used only in one sense as a positive law. This positive law must correlate to the interests of people, their communities, and states, not violate their goods, not interfere with co-existence in society. It means that legal norms ideally must consider interests of all sectors of population and interests of a state in general and then in society will be established that what is called law and order. The main purpose of law order is an ensuring for safety of human.

The normative regulations of social relations have among others two main features. Firstly it limits natural rights of human being for the benefit of others, of state and society as well. Secondly it is the only one possibility to establish legal guarantees of rights and freedoms. Certainly if it comes to legal state as the abstract ideal, which is now the state is trying to achieve.

There are countries in which the mechanism of legal regulation acts effectively, even creating the illusion of that the observance of so called natural rights is performed without any state intervention. These are countries with low level of corruption and high legal tradition which allows to public servants and citizens keep high level of legal order at the country. These countries have legislation with high level of inner logic and justice. Unfortunately, Ukraine does not belong to these countries today.

There are states which legal tradition is not so strong; the rules of law are not the limiter that allows state to have influence on the population through the adoption of fair and just laws. People simply do not have trust to those laws, because it does not protect their interests, their goods, that idea which we try to call natural rights. This happens because some public figures do not behave logically in a power struggle. They forget about the interests of citizens by themselves violate the laws. And the laws are often illogical, litigation, pre-trial investigations stay incomplete. In addition, the information about scandal litigations is often absent, or it is contradictory and distorted. And if the law where are codified right for protection of life, right for health care, does not enforced, even in spite of established strict sanctions, what else can we say about natural rights that are not amenable to state regulation.

The Institute of natural law and its propositions are valuable through the formulation of the principles which are fixed later in the form of legal norms. So in that way occurs an institute of positive law.

There are all less natural rights now, which are not fixed in law and are not regulated by it. Basically, it refers to the sphere of human activity, which is called the private sphere, the sphere of family and of other purely private relations. The study of scientific subjects gives rise to the following **conclusions.**

In our opinion natural rights are those that cannot be and should not be regulated by legislation. But as we have already pointed out, they are few, they do not generate any duties, state does not guarantee or protect them, because they are not included in the mechanism of legal regulation.

People decide how to act in any given case by themselves. But if person made a wrong decision and another person had been harmed, no one of them could ask for help from the state. Therefore that what had been violated is not a right. It is not enshrined in

the legal act. The participants of such relations are responsible for their behavior by themselves.

Do not minimize the role of social and natural in a life of human being still we should mark a strict line among natural qualities and features of human being and positive law which has its basis in these features. Positive law regulates conduct of human being born alive, health and free. But it is incorrect to name these features as rights; therefore law is not a regulator of social relations. The legislator is not the one who decides whether person will born health or ill. The task of legislator is the creation of such legislation and law that protect alive, health and free human being from violations on his or her natural goods and interests.

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