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THEORETICAL AND METHODOLOGICAL ASPECTS OF HUMAN RIGHTS

Human rights, as well as human obligations, comprise the most vital social, political and legal institute, which is an objective measure of a given society's achievements and serves as an indicator of its level of development. And this is understandable. After all, it is with the very assistance of this institute that a personality links with a society's material and spiritual benefits, with mechanisms of power, with legal forms of expression of will and the realization of personal interests. To a great extent, the degree of accomplishment for a person, his or her life, health, honor, dignity, inviolability and security depends on the level of protection of rights. The "human factor" has finally become a touchstone and a starting point for any transitional measures implemented in society.

It is no accident that the problem of human rights has always and still continues to draw the attention of experts in various fields of social studies: lawyers, philosophers, politologists, historians, etc. Along with applied aspects, connected in particular with their establishment in the Constitution and practical implementation, this problem also contains complex theoretical and methodological aspects. Specifically, these include issues regarding the origin, nature and mechanisms of implementing rights.

Thinkers of different historical eras and nations tried to find the answer to these issues. Even today, however, they have not been completely resolved and continue to be the subject of scholarly discussion.

The palette of views which throughout the ages has been expressed with respect to the origin and nature of human rights is fairly broad. Despite all their differences, however, two primary approaches to resolving these issues have dominated and continue to dominate political and legal thinking.

According to the first approach, rights are naturally vested in people and belong to fundamental traits that are inherent in human beings, without which an individual cannot become a "member of a societal union". Human beings cannot be deprived of their natural rights since this deprivation will destroy their very nature. In other words, rights serve as the elementary prerequisite for a dignified human existence and the development of humanity as a whole. The task of the state is only to recognize these rights, establish them in the Constitution and laws, and provide guarantees of implementation and protection from acts of violation.

Theoretical concepts of inalienable and integral natural human rights have become a starting point for the foundation of freedom and equality, the inviolability of property, division of power and other values of contemporary civilization. These concepts have been inserted into the basis of international legal acts on human rights. The concept of a law-governed state, fortified by the constitutional theory and state/legal practice of nearly all European states, was formed in its core.

According to the second approach, human beings obtain their rights from the state, which is of a paternalistic nature (the state takes on the role of the pater — the father). Although this approach to the origin and nature of human rights is predominantly characteristic of legal positivism which is currently undergoing a period of decline, this approach is used in other doctrines in a somewhat modified (or rather camouflaged) way. The paternalistic interpretation of the nature of human rights is, in fact, the theoretical foundation that all totalitarian regimes — with their syndromes of state inviolability and monopoly on everything and all,

including human rights — have relied and try to rely on. And in this respect, the Soviet administrative command system was no exception. Camouflaged by Marxist phraseology (camouflaged since K. Marx's views on law and human rights, despite the inconsistency and theoretical vulnerability, are after all, more profound than interpretations by Marx's national followers) this positivist understanding of the origin and nature of human rights has in fact, become an integral part of the official ideology of this system. In all honesty, however, it should be noted that not all scholars shared this view.

At first glance, the shift in purely theoretical accents in the approach to understanding the nature of human rights, produced rather substantial results.

By transforming the state into a monopoly in the area of rights, it degraded the dignity of human beings, turning them into beggars (as a rule, those who beg have no rights) and obedient and grateful subordinates of the state. This, in turn, had a negative effect on people's consciousness, instilling in them characteristics of submissiveness before the powers-that-be, and finally, opened up possibilities for different types of manipulation and license on the part of these powers.

Today, the situation has completely changed. The totalitarian system collapsed along with the USSR. And although it is a difficult process, the independent Ukrainian state, defined in the new Constitution of Ukraine as a socially-oriented, democratic and law-governed one, is gradually establishing itself. The national legal system is in the process of formation. People's social and political views are changing, previous stereotypes are being discarded and there is expansion of a scholarly world outlook. In contrast to previous years, when western research data was mainly viewed through the prism of an "idealogical struggle", today, this data has become the subject of objective scientific analysis.

The concept of human rights is also gradually changing in this environment. Today, in Ukraine, you will not find strong advocates of the paternalistic approach to the origin and nature of human rights, not only among experts in the general theory of law, but also among experts in separate fields of law, although, following the old habit of inertia, you may often encounter statements such as "the state establishes the rights," "the rights are given to", etc., both in scientific literature and legislative acts.

In fact, having vanquished the positivist concept of human rights granted by the state and armed with the theory of a law-governed state and division of power, which as was noted earlier, was formed on the basis of the methodology of natural law, the majority of national law experts continue to adhere to principles of economic and material monism in understanding human rights. They are viewed as a social/historical phenomenon created by the group of social relations where the economic factor is of crucial importance. In other words, human rights, in accordance with this theory, are an organic element of a human being's exclusive social essence.

Trying to keep abreast of the times, advocates of the aforementioned theory do not even deny one of the primary provisions of the doctrine of natural law — that human rights are integral and inalienable. They justify this provision, however, on the basis of the social nature of human rights, especially those rights that are equal, universal for all people.

The aforementioned arguments are rather shaky. It is impossible to alienate only that which is naturally inherent in human beings, without which human beings stop being human. The qualities that have been developed by people as social/historical entities, directly depend on the conditions of their existence. Should these conditions change, the qualities may be lost. And as historical, especially national experience testifies, the practice of alienating a number of human rights was based on the specificity of the economic and political order.

Following the overthrow of the concept of rights granted by the state, it appears that it is necessary to take the next step — to give up the aforementioned materialistic monism in the approach to interpreting the

origin and nature of human rights in order to obtain an unbiased and profound insight into the origin and nature of human rights. Talk is not about renunciating determinism, especially economic determinism and switching to relativism but about rejecting the fetishism of economic determinism, setting against each other material versus ideal, natural versus social in human rights and the law in general. The latter, by its nature, is the result of the influence of many factors: economy and politics, ideology and psychology, religion and morals, national culture and traditions, etc. Notedly, what is crucial here is not simply one of the aforementioned factors but the way that these factors relate to each other, essentially differing in various periods of historical development and in various regions of the world.

The same can also be said about human rights, in which natural and social, material and spiritual, national and supranational, as well as general civilized elements are interwoven. The special significance of the institute of human rights and freedoms in its natural and legal sense, which today has been acknowledged in all major trends of worldwide political and legal thinking, also raises doubts that the degree of protecting fundamental rights unconditionally depends on the nature of society, concrete historical conditions, especially the level of economic development. Currently, this is the state legal practice of an overwhelming majority of developed countries.

The inveterate dispute about what elements are more prevalent in integral and inalienable rights — natural or social, grows even less acute in connection with the expansion of the list of fundamental rights and the inclusion of social and economic rights to this list, such as the right to labor, recreation, health, etc.

The very interpretation of human rights as not only a social but a natural phenomenom makes it possible to lay the foundation for radically changing relations between people and the state — transforming human beings from subservient subordinates of a monopolistic state into free and equal partners of the state, which in turn, has not only rights but also obligations with regard to human beings. Acknowledging, respecting and protecting human rights and freedoms are fundamental among them. This concept of human rights is enshrined in the new Constitution of Ukraine, one of its major advantages over previous Soviet Constitutions, which were paternalistic in nature.

Other extremely important regulations of the Constitution of Ukraine: that rights are inalienable and inviolable, that constitutional rights cannot be repealed, that rights are equal for all citizens, etc., also stems from this concept. This means that the state cannot deprive human beings of their inherent properties, regardless of its motives. The most that the state can do is limit certain rights for certain people or their associations and only with the aim of ensuring national security, taking measures against crimes, protecting the health and rights of other people, and in accordance with conditions determined in the Constitution and laws.

The second theoretical problem I would like to dwell on is the issue of so-called hierarchy of rights. Is arranging rights according to the degree of their importance justified? Is raising the issue about more important and less important human rights correct in general?

The answer to these questions may seem to be unequivocal: human beings need all their rights and there is no basis to place these rights in opposition to each other. It appears that this type of thinking, however, is not shared by everyone. Obviously, our former Soviet tradition makes itself felt here once again. Thus, in relatively recent history, in accordance with the existing official concept, the above-mentioned social and economic rights were acknowledged as being crucial among human rights, as "one of the major achievements of socialism and the object of our pride". All other human rights — civil, political, etc., were viewed to be derivative from social and economic ones, and therefore, were placed on the back burner.

There are many who adhere to this line even today, viewing social and economic rights as "the most essential and fundamental ones" and consider that any type of deviation from how these rights are defined in the 1978 Constitution of the USSR is a trespass not only on them, but on the entire system of human rights.

At the same time, another extreme approach to the aforementioned rights is noticeable. Some people label them as a "socialist invention", unknown to today's civilized countries, declaring that the aforesaid rights cannot be protected by the court. At best, they are compared to civil and political rights, to rights of a "lower category".

Actually, the issue of social and economic rights is a lot more complicated than it has been stated in the above approaches. Without disputing, in accordance with the aforementioned rights, the quality of subjective rights acknowledged by the world community as being equal to other human rights — which is especially evidenced by the 1966 International Covenant on Economic, Social and Cultural Rights — at the same time, one cannot help noticing that the role of the state with regard to guaranteeing these rights essentially differs from the guarantees of civil and political rights. While the guarantees of the latter have the scope of individual autonomy and ban the intrusion of any type of subject, including even the state, into this sphere, social and economic rights, on the other hand, require active interference from the state and its positive efforts for their implementation (incidentally, this is where their name of positive rights — in comparison with the first ones, which are often called negative — comes from).

The state reveals its role as a guarantor of social and economic rights primarily by creating suitable conditions for human beings to implement these rights, or to be more specific, in committing the state to develop and implement respective social programs.

There is no need to prove that these programs are conditioned by the economic potential of the state, the correlation of forms of ownership, the social and psychological atmosphere in society and other factors that are dominant in society.

That is why the state's constitutional obligation in the social sphere is characterized by a lesser degree of formal definition than its obligation in safeguarding civil and political rights. The same can be said with regard to mechanisms of legal protection for the aforesaid rights.

If we have an actual rather than a professed desire to maintain a strong stance on the path to building a law-governed state, we must acknowledge one of its most crucial principles, according to which, any type of human and civil rights are protected by the court. Neglecting to protect rights will inevitably turn, as historical experience (such as our own) shows, the best constitutional definitions into declarations, or at best, simply into good (even the most humane) intents of the state.

Recognizing social and economic rights as subjective rights which are similar — in terms of their legal status — to civil and political rights, that is, those that are equally subject to judicial protection, has emphasized the need for a certain change in their definition in the new Constitution of Ukraine, in comparison with the 1978 Constitution, which did not envisage judicial protection for all rights. This especially pertains to the right to labor (particularly with respect to "receiving guarantees of employment"), the right to housing, etc. In conditions where the state loses its monopolistic position as the owner of enterprises and institutions, it simply is not able to guarantee the aforementioned rights to everyone, much less through the application of an efficient legal mechanism such as judicial protection. Social and economic rights, however, contain much of what could and should be guaranteed by judicial protection. In particular, this is the right to remuneration, in accordance with the worker's contribution of labor, and can be no less than the legal minimum wage; the ban on using forced labor; discrimination in labor relations; privileges for women and minors; the right to free medical aid in state and municipal healthcare institutions; the right to free education in state and municipal educational establishments, etc.

To a great degree, the correlation between human rights, the rights of nations and national minorities is very similar to this "arrangement." Affected by the developments in a number of former Soviet republics, a considerable number of politicians and scientists: politologists, sociologists and philosophers frequently operate by the creed that "personal rights are above everything" — above the rights of people, nations and

national minorities. It may sound very tempting, in the spirit of civil society principles and a law-governed state, the highest value of which is a human being, individuality and human rights and freedoms, but by justly stressing the priority of human rights and individuality, those who follow the aforementioned concept actually create artificial antagonisms among different categories of rights.

For all the discrepancy in interpreting the rights of nations and national minorities that exist in today's world literature, there are at least three moments which should be ascertained:

First, the rights of nations and the rights of national minorities are not something that exist separately, alongside human rights. These are the same human rights, although they are often called collective rights (unlike individual rights), referring to rights of the so-called third generation (in accordance with this classification, civil and political rights are called first-generation rights and social and economic rights are second-generation rights). This underscores the consistent evolution of development in the institute of human rights, the historical connection of time and general progress in this field.

Second, the rights of nations and the rights of national minorities (such as the right to preserve their identity, language, cultural heritage, traditions, educational rights, etc.) belong to members of the group rather than the groups themselves although the aforementioned rights can be collectively implemented.

Third, the primary factor in the correlation between the rights of nations and the rights of national minorities rests in the volume and scope of application of these rights rather than in the correlation of concepts. The fundamental right of the nation is the right for political self-determination (all the way to the formation of an independent state), which national minorities do not have.

All rights — individual and collective — are equally necessary for personal development, which cannot be formed out of a shapeless, featureless mass. Individuality results from the spiritual development of a nation or the national minority to which it belongs. The state which does not ensure the development of its culture, language and identity not only denies the principle of an individuality's priority but also violates its rights.

It follows that any attempt to arrange human rights in the form of different categories is impermissible and only creates artificial barriers on the path toward implementing and protecting these rights, impeding their further and even-handed development.