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Judicial Practice of Protecting Human Rights: Problems of the Rule of Law in a Postmodern Society

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Abstract: Human rights issues are present today in almost every area of society and, accordingly, occupy a special place in it. Due to the fact that modern Ukraine is in a transitional state of creating legal, state and public institutions, the process of formation of civil society requires the identification of the nature of legal relations in a transitional period. After all, relations in civil society should be formed on the basis of awareness of the inalienability and non-repudiation of natural human rights. They should be based on the positive legislation of the state. They are the key to the effectiveness of the entire system of social relations. Ensuring human rights is the criterion by which the achieved level of democracy in the state is assessed. The beginning of this process can be called consolidation in the Basic Law of the provision that a person, his life and health, honor and dignity, integrity and security are recognized as the highest social value, and determining the priority of universal values. At the same time, the needs of the present, in fact, directs the development of modern law, is the development of certain general legal standards that allow us to move on to a new qualitative coexistence of nations in the modern world on substantial humanistic principles. In addition to examining the established mechanisms and specifics of protecting everyday human rights, the article examined the new human rights that exist in post-modern society, which today are called the rights of the "fourth generation".

Keywords: *judicial; human rights; law; judicial practice; postmodern society; fourth generation human rights.*

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1. Introduction

New information and communication technologies accelerate globalization processes on the planet, creating an interconnected and interdependent global society. Significant changes in this regard are experiencing human rights. Global space requires the observance of minimum human rights standards in a universal sense (Schaumburg-Müller, 2011).

The common responsibility of all states that declare respect for human rights means both abstaining from violations and positive actions to protect them, providing legal, ideological, material and other real guarantees of human rights not only as a citizen of this state, but also as part of humanity. An interconnected world requires new solutions to protect against new threats. Now we can say that the legal science is faced with the question of determining and characterizing humanity as a new subject of social and legal relations. The growing influence of the international community and international law, including human rights law, on domestic relations determines the processes of changes in the status of states and understanding of their sovereignty. The modern level of development of human society requires new approaches to management and legal regulation at the national and international levels. Questions arise about the development trends of subjects of modern international relations and international law, about the role of states in ensuring human rights (Gruber, 2015).

Human rights movements have created a reality in which not only the state, but also the individual and the associations of people have received legal personality in international relations in conditions of postmodern society. States no longer have a monopoly on representation of the population. The normative framework for the protection of human rights has gone beyond state borders, giving rise to a wide range of studies in the field of human rights. However, the problem remains the determination of mechanisms for ensuring collective rights, often called third-generation rights. Such a task is extremely difficult, in particular due to the uncertainty of the subject of these rights. At the same time, in the context of the rights of the third generation, such global and important needs are discussed for many people, the subject of some of these rights should be recognized as humanity as a whole, and not as individuals or groups of people (Higgins, 1995).

2. Main research and results

2.1. Possibilities of judicial protection of human rights

The international judiciary has come a long way, which can serve as a guideline for the development of mechanisms for protecting human rights. That is why the scientific literature provides a fairly detailed analysis of the process by which international justice obtains signs of binding and recognition of the jurisdiction of international judicial institutions. The history of the development of international justice is extremely useful as an example that can demonstrate how complex and lengthy the institutional construction of judicial mechanisms for protecting human rights was. Therefore, one should not expect the rapid development and establishment of an effective judicial mechanism for the protection of new individual or collective rights, especially human rights. In this context, it is important to understand the direction of development of international judicial bodies and find ways to improve their effectiveness, as well as extrapolate these findings to human rights (Hannan, 2010).

After the creation of anti-slave courts, the development of international judicial bodies for the protection of human rights was suspended until 1948, when the Universal Declaration of Human Rights was proclaimed. This particular event marked an important change for international law, as human rights were recognized as universal values for the first time in history. Although the International Court of Human Rights has not yet been created, and the Declaration is not a binding document, it paved the way for the creation of regional systems for protecting human rights. There are now three regional human rights courts that operate on an ongoing basis. In Europe, this is the European Court of Human Rights, which was established in 1959. Within the framework of the Council of Europe system. In the Americas, regional human rights agreements exist within an intergovernmental organization known as the Organization of American States. The Inter-American Court of Human Rights was established in 1979. And today 25 states have recognized its jurisdiction (Moyn, 2010).

The African Regional Human Rights System is new and established within the framework of the African Union. The African Court of Human and Peoples' Rights was established in 1998. And began to function in 2004, and now 30 African states have ratified the protocol on its creation, and only 8 have recognized the jurisdiction of this court (Handl, 2012).

Speaking of the Inter-American Court of Human Rights, established in accordance with the American Convention on Human Rights, it should be noted that it is not a statutory body of the Organization of American States. Unfortunately, this individual defense system, designed for all citizens of both Americas, covers only a fraction of them, and most residents remain without access to the defense of this international court (Marslev, 2016)

Despite the complex trends in the development of regional judicial mechanisms for protecting human rights, it is nevertheless necessary to determine the factors that impede the creation of more global international judicial bodies. Attention must be paid to the fact that an important feature of international human rights courts is that a citizen can file a lawsuit against his own state. Therefore, states, ratifying the relevant international treaty and recognizing the jurisdiction of a particular international court, should be prepared to renounce part of their sovereignty

Creating real conditions for the judicial protection of complex rights - such as human rights - is complex. Perhaps for this reason there is no global judicial authority for the protection of human rights. UN bodies such as the Human Rights Committee and the UN Human Rights Council only monitor the implementation by Member States of the International Covenant on Civil and Political Rights. The UN Human Rights Council complaint mechanism, but this is not a judicial body, and its resolutions are not binding. These bodies will not be considered from the point of view of potential protection of human rights, since they are ineffective, so it is difficult to talk about their role in protecting new rights (Pallemaerts, 2008).

2.2. Human rights in judicial practice of the European Court of Human Rights

Undoubtedly, the right to peace is not enshrined in the European Convention on Human Rights, but if we consider some cases that relate to issues of effective control over the territory and some interstate complaints, we can draw the following conclusion: the court recognizes the fact that human rights violations may be the result of violations of the world. And de facto the restoration of violated rights is possible only through the restoration of the violated peace (Rowe, Schulmann, 2008).

Next, several cases will be analyzed as an example of the co-dependence of the right to peace and human rights. These cases are also important in terms of their extraterritoriality, for example, Al-Skeini and Others v. The United Kingdom, in which the Court found a violation of the procedural aspect of the right to life. The applicants claimed that their relatives at the time of their death in Iraq were under the jurisdiction of the

United Kingdom, and in violation of Article 2, there was no effective investigation into the circumstances of their death. In order to see the international legal aspect in this case, you need to pay attention to the fact that the Iraq Disarmament Coalition, in which the United Kingdom was among the participants, was created pursuant to UN Security Council resolution 1441 of November 8, 2002.

So, the United Kingdom is responsible for violating the right to life of Iraqi citizens in Iraq, whose representatives were in Iraq thanks to the permission of the UN Security Council. A non-international conflict has gained international significance due to a violation of the right to peace, which has led to a violation of other human rights (Rosas,1995).

Analyzing the practice of the European Court of Human Rights, one can trace a clear tendency to use the instruments of the Convention for protection that are not contained in the Convention itself, including the right to peace. An example would be Chechen affairs. 58 As of March 2009, Russia has been prosecuted in 60 cases involving forced disappearances, 22 cases of extrajudicial killings, four cases of indiscriminate attacks and four cases of torture, as well as one death due to negligence and destruction of property (in some cases - for more than one violation). The court also found that in many cases, family members of the victims were subjected to inhuman treatment as a result of government actions or inaction in violation of the law. In each case, the Court accepts that Russia did not conduct an effective investigation. Most of these cases relate to torture, enforced disappearances and extrajudicial execution, which were used in Russian counter-offensive operations in the North Caucasus (Hiskes, 2005).

The pattern is that the European Court of Human Rights, recognizing the possibility of restricting certain rights in the event of a legal armed conflict, is regulated by international humanitarian law, nevertheless recognizes that states are obliged to protect human rights. It can be assumed that this is a hierarchy of values, namely: the right of the state to participate in an armed conflict and / or peacekeeping mission is limited by human rights standards. The right to peace in this context is the basis that creates the most favorable regime for the protection of human rights and, accordingly, should be the ultimate goal of any state (Schwank, 2014).

In contrast to mechanisms for protecting the rights of mankind, which provide for at least a partial restoration of a violated right, mechanisms for holding accountable provide for punishment for their violation. For this reason, consideration of the mechanisms of prosecution is only cursory, since a detailed analysis requires a separate study at the intersection of national and international criminal law. However, for greater

completeness of this dissertation research, it is necessary to pay some attention to precisely the mechanisms of holding accountable for violation of human rights. Violation of human rights, especially the right to peace, may contain international crimes, the responsibility for which is provided for in international criminal law. Criminal liability can be seen as a mechanism to hold accountable for the most serious cases of violation of these rights.

Despite the potential possibility of protecting the violated human right to peace through traditional judicial mechanisms, it is nevertheless necessary to take into account the peculiarities of this right and its subject (Martinez, 2018).

For quick and effective actions to ensure international peace and security, the UN Security Council has been created, which consists of five permanent and ten non-permanent members, and in fact only the decision of the UN Security Council is legally binding on all member states. However, its composition and activities are criticized for the fact that the permanent members (France, the United Kingdom, the United States of America, China and the Russian Federation (as the successor of the USSR) have the right of veto. The composition of the Council has not changed since the founding of the UN in 1945. And already NOT 82 The Charter of the United Nations and the Statute of the International Court of Justice, 06/26/1945 corresponds to modern world order changes, which leads to the inability of the UN as a whole to effectively fulfill its main function of maintaining international peace and security. These five permanent members have the right to veto any decision of the Council Security: The problem is an unfair geographical representation among the permanent members of the Security Council, for example, representatives from Africa or Latin America can only be elected as non-permanent members (Romano, 1999).

Unfortunately, the UN is not effective enough to fulfill the goal of protecting international peace, but as the only truly global organization, it still has important levers for protecting the world. That is why it is advisable to pay attention to the existing mechanisms for protecting and restoring this right - international peacekeeping operations. As already noted, this right cannot be ensured for one person, although peace is a fundamental condition for the protection and protection of other human rights.

In modern peacekeeping operations, human rights issues and provisions on their observance are regularly included in the mission's mandate, as a result of which UN peacekeepers become observers of the state of human rights observance (Legg, 2012).

As noted above, regional organizations have better opportunities to help build peace, which are more effective than global ones. In addition,

section VIII of the UN Charter provides for cooperation with regional organizations that support international peace and security. A regional organization, like regional courts for the protection of human rights, can be more effective, because they operate within the framework of similar value paradigms, cultural characteristics, the level of economic development, and the like.

2.3. The emergence, features and mechanisms of protecting fourth-generation human rights in a postmodern society

With the change of centuries, the development of philosophy, medicine, technological progress, these or other social relations change and arise, which today are especially relevant in post-modern society. Due to the "scientific boom", which took place in the middle of the 20th century and continues to last, many opportunities have appeared before a person that still did not exist, in particular, human cloning, organ transplantation, the use of "virtual reality", artificial insemination, change Gender Engineering. Law as a system of legal norms should give an adequate response to these changes in the form of appropriate regulatory regulation. As a result of all these possibilities, a person has new rights that still did not exist. Such rights are called the "fourth generation" of human rights. Regarding some of the aforementioned rights, proper legal regulation is still lacking; therefore, their study is relevant and timely. (Neumayer, 2005)

The fourth generation rights that today exist in postmodern society belong to all the rights that have arisen as a result of scientific progress, the development of morality, namely all the so-called "somatic rights", in particular the right to euthanasia, cloning, and information rights.

Today, there are discussions among members of society about whether people need such rights, what should be the limits of their implementation? In particular, the Council of Europe, the EU, and some other international organizations have clearly decided on these issues. For example, the Charter of the European Union on Fundamental Rights in paragraph 1 of Art. 3 establishes that everyone has the right to their own physical and mental integrity, and paragraph 2 specifies: when applying the achievements of medicine and biology, the following requirements must be especially observed (Rodríguez-Garavito, Rodríguez-Franco, 2016):

- voluntary and duly executed consent of the interested person in accordance with the rules established by law;
- the prohibition of the use of eugenics, especially its part, aimed at the selection of people;

- a ban on the use of the human body and its parts as a source of profit;

- prohibition of human reproduction through cloning.

The right to euthanasia is also considered to be prohibited - satisfaction of the patient's needs for accelerating death by actions or inaction. The problem is that at the international level there is no normative definition in this human right. There are only selected international documents, for example, the Council of Europe Convention 1997 on the protection of human rights and dignity in connection with the application of the achievements of biology and medicine. At the same time, euthanasia for terminally ill patients is being carried out in Belgium, Luxembourg and the Netherlands. For example, the Netherlands became the first country to legislate for euthanasia in April 2002 (Voeten, 2014)

Regarding the human right to freely dispose of his body and the bodies of loved ones, cloning, etc., these rights can be officially recognized only subject to regulatory fixing at the state level, identifying possible risks and providing all guarantees for the protection of these rights. The fourth generation rights also rank human rights for free choice of a sexual partner, and on the part of the state, it recognized that a developed postmodern society already exists in it, it is necessary to form an appropriate legislative base that would provide equal opportunities for everyone.

Reproductive human rights are both positive (artificial insemination) and positive-negative (abortion, sterilization, etc.). In the latter case, it all depends on the specific situation, for example, an abortion in the case of a pathologically or genetically ill future child deprives the suffering of the parents and the child himself to live in grief, suffering, pain, without joy and the like.

On the other hand, at the time when a woman becomes aware of the medical clarification of this diagnosis, according to international standards, the unborn child is already considered a subject in the early stages of pregnancy, and her right to life begins to act. Therefore, in this case, an abortion does not have an unambiguous positive or negative character. Also, in this category of rights, it should be noted that they are of a different nature and some of them (for example, abortion) contradict, like euthanasia, the norms of the church and morality. But despite this, these rights must exist, because they are inalienable rights of every person and have already been reflected in a number of international legal documents. However, we believe that for each of the reproductive human rights, it is necessary to conduct comprehensive scientific and legal research in general, to the extent possible and to what extent (how clearly, firmly) they are enshrined in laws,

the consequences and risks for the development of society and human rights violations this may pull by yourself. And only after that, the question of recognizing each of these rights at the state and law level should be considered (Ivanii, Kuchuk, Orlova, 2020).

Given their diversity in the existence of these rights in a postmodern society, we can distinguish their main features:

- These rights can be called vital. They are manifested in what is the basis of human being, the support of his existence. Since they relate to the everyday life interests of each person, their implementation depends mainly on the state of legal consciousness, on people's awareness of their rights and their willingness to defend the latter and protect them from external encroachments, even when the source of the latter is also a person (Helfer, Voeten, 2014).

- inseparability consists in endowing a person with such rights by nature.

- inalienability means that these rights belong to a person from birth, and in some cases even before his birth and have a natural character, the state can only regulate the implementation of some of them and establish certain guarantees for the latter.

- their naturalness is expressed in the fact that they are common to all people and operate outside the state, are legal in nature, that is, they are proclaimed, but not created by law, cannot be selected by the will of the state. At the same time, the sign of naturalness no longer concerns the most rights, but human needs, which are independent of social phenomena.

- universality as a sign of biological rights is manifested in the fact that they belong to every person, which indicates their supranationality and extraterritoriality, act in all spheres of life at any time.

- such rights are determined by human needs and are realized taking into account individuality, including uniqueness, uniqueness, and identity of a person.

- they exist objectively as a consequence of the fact of a person's birth or conception, reflect his constitutive signs aimed at meeting the needs, without which a person is not able to exist and develop normally, come out of a person's nature and are called upon to form and maintain a person's dignity, originality, uniqueness and personality (Russell, 2011).

- there is a permanent nature, as evidenced by the fact that biological rights do not terminate and do not arise every time.

They play a significant role in solving the main global problem of postmodern society - overcoming the anthropological crisis and preserving man as a unique creature in the development of biology, medicine, genetics,

transplantology, embryology, testifies to the significance of these rights. It is precisely such rights in the modern postmodern state that demonstrate the level of its democracy and civilization.

3. Conclusions

Given the active development of international judicial bodies, it can be assumed that effective judicial protection of human rights will be proposed in the future conditions of postmodern society. Now we can conditionally say that to protect the right to a healthy environment and partially the right to peace, the mechanism of the European Court of Human Rights can be used. The solutions analyzed confirm the interconnection of human rights and human rights.

International organizations play an important role in protecting human rights, partly due to non-traditional protection mechanisms. So, for the right of mankind to peace, we can talk about the existence of mechanisms for collecting information on violations through monitoring missions for the further use of this data in international judicial institutions in order to avoid impunity.

Human rights are in direct two-way relationship with rights of society. Respect for human rights allows for the balanced development of society and avoiding conflicts. In turn, the absence of conflicts and problems with the protection of human rights creates the potential for protecting the environment. Therefore, we can talk about the peculiar protection of human rights through the observance of human rights in conditions of postmodern society.

If we talk about the fundamental principles of the idea of a new fourth generation of human rights in modern postmodern society, this is a confirmation of the constant scientific, technical development of human society. These rights are associated with the virtual life of mankind and caused by scientific and technological progress that arose in connection with the development of science and the implementation of its developments. This generation of human rights is a natural stage in the development of society and may be called "virtual rights". Separate biological rights must be enshrined in the rule of law, since a new approach to the individual already exists, is already beginning to be reflected in the legislative acts of states and international acts. But, before fixing these human rights as the rights of the next generation, it is necessary to conduct a study and make sure that the consolidation of these rights will not have negative consequences for society.

When discussing the choice of mechanisms for protecting human rights, one should be guided by the principle of applying the most favorable regime for protecting human rights, which means adapting existing mechanisms for international cooperation, protecting human rights, and also highlighting new mechanisms if necessary. The absence of traditional mechanisms for protecting human rights that would be recognized from the point of view of the doctrine of human rights does not mean the impossibility of protection - on the contrary, it requires a more flexible understanding of the potential of protection and the versatile use of the mandate of international organizations, which will make it possible to find non-obvious or non-traditional ways of protecting human rights in conditions of postmodern society.

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