

The Problem of the Content Determinacy of Main Human Rights and Freedoms in the Context of a “Generation” Theory

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ABSTRACT

The article considers the evolution of human rights and freedoms in the context of a generation concept or the theory of generations of human rights. The authors analyze both conceptualization of “new” generations of rights and freedoms and transformation of the “traditional” rights content. The article deals with the problem of meaningful determinacy of human rights and freedoms from the point of view of the sociocultural approach. The analysis of the main rights evolution in connection with dynamics of society social development is presented. Besides, special attention is paid to the transformation of the concept “human rights”. The conclusion is drawn about human rights and freedoms isolation during their evolution from regulations of positive legislation and their recognition in the capacity of independent ontological reality. At the same time not all claims can be identified as rights and freedoms. Studying the so-called rights of the fourth generation, the authors mention that a lot of them represent “reflexes of law”, which exist as the element of negative individual liberty.

Keywords: *generations of rights, legal determinacy, social rights, collective rights, reflexes of law, the fourth generation rights*

1. INTRODUCTION

The conception of three generations of human rights is a universally recognized theory in the constitutional law. The author of this theory is Czech lawyer Karel Vasak, who was the first Secretary General in the International Institute of Human Rights in Strasbourg. He formulated the theory of three generations of main rights in 1979. According to this approach, they distinguish the generations of human rights, which are interpreted as the main stages of their development, connected with forming conceptions about rights content. K. Vasak’s model gives an opportunity to follow the system of human rights evolution in the context of historical development of a state and a society.

It is necessary to say that Vasak’s “generation” conception has been attacked and is being attacked now by both Russian and foreign scientists [1; 2]. At the same time, traditional blame, which is not expressed “only by a lazy person about this conception, comes to the fact that “the metaphor of human rights generations misleads and gives the visibility of replacement of the initial human rights groups by others, exclusion the old rights by the new generations rights” [3]. But isn’t it really at bottom of fact so? Indeed has our understanding of classical human rights and freedoms (freedom of life, freedom of speech and so on) not a jot been changed from the moment of these

freedoms proclamation in the historically original documents about human rights?

It is not certainly so: the right to personal integrity in Magna Carta implied that not any free person would be arrested, put into prison, deprived of ownership, declared outlawed, expelled or in any kind treated unfairly except in accordance with legal verdict. At present this right is used for substantiation of the right “to dispose of organs and tissues” [4], the right to dispose of your body and so on.

As far as we understand it is impossible to ignore the process of human rights and freedoms evolution, within the framework of which both the revision of accepted rights and conceptualizing of new pretensions of a person and a society are realized. In this view an urgent question arises. It concerns the meaningful determinacy of the concept “main rights” both with reference to essential characteristics, which allow one to identify this or that pretension in capacity of law, and in regard to various “modifications” and evolutions of traditional rights and freedoms content.

2. MATERIALS AND METHODS

General scientific and specially – juridical methods have been used for carrying out the research. For achieving the formulated object we have applied both general scientific dialectical method, which allows making clear the duality

of understanding of examined juridical categories, and methods of formal logic, the comparative method, the system structural method and others.

3. RESULTS AND DISCUSSION

Human rights and freedoms have the supranational and supraconstitutional character that incidentally is stated not only in items of international documents, but also in constitutions. Thus, according to the Constitution of the Russian Federation, the main rights and freedoms are “inalienable and belong to every person from birth” (art. 17), are “immediately functioning” (art. 18). And at that, they are not only given to a person by a state, and belong to him or her originally (from birth), but they determine “the sense, content and application of laws” (art. 18). So, in result, human rights are primary regarding the positive law, including a constitution as a main law. At first glance this thesis contains certain paradox as these human rights are assigned in constitutions, in particular, in the second chapter of the Constitution of the Russian Federation.

However, it is not worth forgetting that positive legislation including formal or juridical constitution just secures stated rights, but does not constitute them. The constituent nature of the constitution is extended to the system of authority bodies, national territorial state system, etc., but not human rights and freedoms. In support of this the Constitution of the RF provides that enumeration of the main rights and freedoms must not be interpreted as negation or derogation of other universally recognized human rights and freedoms (art. 55).

The Constitution of the RF (like constitutions of other states) contains numerous directions to globally consensual nature of the main rights and freedoms. They are guaranteed “in accordance with universally recognized principles and norms of international law” (art. 17), are considered not named in the Basic law, but the universally recognized human rights and freedoms (art. 55). The right to political asylum is given according to the universally recognized norms of international law (art. 63), etc. Thus, along with essentially constitutional rights, “the universally recognized rights and freedoms” are highlighted. They also obtain the constitutional recognition and protection. Does it mean that rights and freedoms recognized by international society (“universally recognized rights”), express authentically the concept “main rights”? It seems that it does not: firstly, regarding the content of certain rights and freedoms in different international documents some disagreement may exist in spite of universally recognized nature of such rights. For example, there is not any doubt that the right to life refers to the number of fundamental universally recognized rights. In the meantime the European Convention of Rights and Freedoms recognizes this right from the moment of a person’s birth, but the American Convention of Human Rights proceeds from the assumption that “this right is protected by law as a whole from the moment of conceiving”. Does it mean that a person in the states - participants of the American Convention - has the right to

life from the moment of conceiving and in the countries of European Union – from the moment of birth?

Besides, secondly, both the catalogue of human rights and different content characteristics of early recognized rights are not static. In such a way the right to the Internet access has been related to the universally recognized rights not long ago. Does it signify that this right has appeared since the moment of approval of corresponding UNO (United Nations Organization) acts, for example, resolution of UNO Council of Human Rights concerning the discussion of the Internet access restriction by the authorities of the state? It is obvious that this issue can arise exclusively in the context of narrow positivist approach to a law and understanding of human rights.

At the same time logically following the principle “everything is allowed, which is not prohibited”, expands the understanding of a person’s legal status up to those bounds when it includes not only “universally recognized” rights and freedoms named in constitutions and internationally lawful acts, but also any legal (not contradicted the law) interests of a person which ones may be identified as “unwritten” rights. In connection with this there is a question: may any pretension of a person who “wishes to live exercising his own rights” assume the status of the subjective law? In other words with the acknowledgment of self-dependence of subjective public rights, not depending on positive law, a problem of lawful distinctness displaces from “quality” of subjective law (“definiteness of law”) to the field of substantially-notional characteristics of these rights.

In the modern scientific literature there is a universally recognized viewpoint that assigning human rights in the earliest historical legal documents (the Bill of Rights, the French “Declaration of Human Rights and Freedoms” and others) was connected in socio-cultural sphere with personalization and individualization of an individual as “equal in rights with the power state”. In the traditional “before tuned-in” culture the concept of human rights “did not exist” as any “I” was merged in general “we”.

That is why the first generation of human rights appears through dichotomy “personality vs. state”. These rights are often characterized by way of “negative freedom”, i.e. “freedom from...”: freedom from tortures, freedom from slavery, freedom from interference in private life and etc. (practically any freedom can be reformulated into “negative formula”). They are, in a sense, “the rights-shields” (Matias Kumm). At the same time originally there was a well-known opinion that in relations between a person and a state arise not even subjective human rights, but the so-called “reflexes of law” [5; 6].

The conception of “reflexes of law” (“law reflexes”, “reflexes of objective law” and so on) was proved by outstanding German lawyer Rudolf von Ihering, who in particular paid a great attention to the juridical conception of interests. Explaining the reflective functioning of law, Ihering gives an example when a tenant of a block-of-flats lays a carpet on the public stairs, the tenants of the upper floors use both the stairs and the carpet, but they do not have any subjective rights to this carpet. The usage of the carpet

is just the reflex of their right to the usage of the public stairs [7].

Iringue himself has been working out the notion of law reflexes mainly in the field of civil legal relations. However, his followers German scientists Karl Fridrich phon Gerber and Paul Laband moved further and extended that structure to the public rights of a citizen, which in their opinion were the reflex, the consequence of self-restriction and self-obligation of a state.

Gerber believes that "... people's rights are exclusively negative rights; they are rights to recognizing of a free side of personality, i.e. not subordinate to a state" [7]. In a similar way Laband supposed that "rights of freedom or the main rights are the core rule for the government, which it determines for itself; these rights form the limits of authority for different institutions and provide a separate person with natural freedom of actions to a certain extent, but they do not stipulate for subjective rights of citizens. They are not the essence of law, because they do not have the object" [8].

Kistyakovskiy mentions that from the point of German lawyers' view "personal freedoms are quite not only the consequence of general law and order and first of all a well-known principle: everything, that is not prohibited, is allowed" [7]. Prominent German lawyer George Ellinek considered such rights ("reflexive law pretentions") as an element of "passive status", which characterizes it as the subject of responsibilities, instructions or prohibitions of a state. Such status, "...strictly speaking, does not have legal characteristics at all; and particularly it cannot serve the substantiation of "an individual pretention to "not opposing (from the direction of public authorities) its realization of certain "liberations" [9]. Here we can see only reflexes of law, the usage of the established law and order, but there are no "protecting personal rights" there.

Active status appears in connection with recognition of a person's individual pretensions by a state and a personality's possibility to direct these pretensions to the state ("activate law and order").

Ellinek starts from the fact that any restriction of a person's individual freedom (and these restrictions are "navoidable in any state) "must have legal foundation", and therefore it has our limits. In the historical context those restrictions, which are "especially painful for a person", demand the consolidation of certain rights and freedoms. Thus in his opinion influence of authority in the issues of religion and censorship demanded the consolidation of theses about liberty of conscience and freedom of press, restrictions of a person's freedoms resulted in appearance of the right of meetings, the right of sanctity of the home, the right to private life and so on.

As a matter of fact, it was (and in many respects it is) quite popular at that moment of the "explanatory scheme" of generating the rights of the first generation, according to which human rights are stood apart as "positive freedoms" ("freedom to do something") from the general "negative" person's freedom ("freedom from ...") as reaction to the most serious "interferences" of a state. "When, however, all the freedom restrictions created by an absolutely monarchic state, will be forgotten, when the guardianship of a state

over a personality and a society will leave deep into the history and become a legend, then all these so-called rights will not be rights and will turn into a kind of natural manifestation of a human being like the right to go for a walk" [10]. It should seem, nowadays in the majority of developed countries such phenomena as tortures or slavery (in the original sense) have been forgotten and have fallen into oblivion and, nevertheless, their constitutions and international documents proclaim stubbornly these "archaic" rights. The matter is that evolution of human right is connected not only with renewal of their catalogue and appearance of next generations, but also with change of the conceptual characteristic of law itself.

If initially a torture, as an impossible thing from the point of view of proclaimed freedoms, was understood as the use of "bootikin", then now in modern discourse these are "too thick bars" in the prison. Prohibition of slavery and human trafficking moves to the problems of immigration and prostitution, "home slavery" [11].

The evolution of the main rights and freedoms has not only "quantitative", but also "qualitative" character: understanding the fact that the right to life cannot be realized only by means of consolidation of prohibition of life deprivation acts, and personal dignity demands "affirmative actions" from a state, all these things lead to appearing of the second generation of human rights. In the juridical literature these rights are characterized as "positive" or "the right to ..." in contrast to "freedoms from ...": the right to labour, the right to social security, the right to education and etc. But they are not entirely the rights "of positive actions from the state", which have been kept in mind by Ellinek, for example, the right to legal defense, but rather those law pretensions, which he has relates to "law reflexes" the rights to charity, the right to protection of order and well-organization of cities and so on.

Social rights appear on the basis of fundamental "engagement" of a person in the society and are designed as the rights of a member of a society or a citizen of a state. These rights are deprived of objective ontological determinacy of content and are defined by positive establishments. Though these rights also get the status of "integral" and "natural", only the conception of natural law in this case is being transformed greatly and makes a start from not biological parameters of a person, but from social and ethical nature of a personality.

As V.A. Chetvernin mentions fairly, natural essence of rights originates not from the fact of a person's birth, but as a result of birth in a certain society [12].

Simultaneously socialization of the first generation rights is taking place, and new layers of their content, determined by fundamental engagement of a person in the society, are being separated. Freedom of speech requires neither to prevent a person to express his or her opinion nor to create conditions for this: at present time UNO attributes the right of Internet access to the "main" and "integral" rights.

Not long ago the European court has considered a case concerning the refusal of giving the medicine, which was necessary for the Russian child's life [13]. A girl of sixth months from Stavropolskiy Krai fell sick of rare and dangerous disease called spinal muscular atrophy. In this

situation there was a single medicine (in the world there are three of them), registered in Russia, “Spinraza”, which could save a person and which had been prescribed by the medical commission. However, this medicine is very expensive, one dose costs about 7.5 million rubles.

On the 27th of February, 2020, the Ministry of Health in Stavropolskiy Krai refused the girl's parents to give this medicine, referring to the lack of standards in providing children with SMA medical assistance, and also the lack of the experience of using this medicine. The parents applied to Leninskiy regional court in Stavropol, which in special conditions, connected with a pandemic, with the help of the technology, WhatsApp pronounced the judgment about providing a child with the medicine “Spinraza” at the expense of the budget means. However, the parents did not get the medicine, as the regional Ministry of Health filed an appeal against the regional court's decision on April 30 in 2020.

Meanwhile, the girl's health became worse and from April 27 she had to be connected to noninvasive lung ventilation. In this situation her parents with the help of the lawyers of the human rights project “Legal Initiative” applied to the European Court of Human Rights with a complaint to violation of article 2 of Convention on Human Rights - “The right to life”. Less than in 24 hours the Court made a decision about using security rules and obliged the authorities in Russia to give the medicine to the child [14]. Was such meaning of the rights to life supposed in the earliest acts about human rights? Of course, this is a rhetorical question. There is no doubt that human rights are constantly evolving, and we are moving farther and farther away from the ancient Sparta's traditions (V.V. Putin). However, we would like to pay attention not to range expansion of subjective public rights, and namely to the change of “focus”, the point of refraction: instead of suspicions of “artificial”, “not real” nature of social rights comes the understanding that “nonsocial” rights do not exist.

At the same time, the limits of realizing the rights of the first generation are constantly being more exactly, which is the sign of defined shifting emphasis from opposition of an individual and a society (“I” and “we”) to recognition of social nature of law subject. For example, freedom of speech is incompatible with promotion of racial and national superiority, infringement of minority rights, etc. Today in many countries of the world there is responsibility (including criminal one!) for Holocaust denial. The laws including the ban on public denial or justification of crimes, committed by the Nazis, are adopted in Austria, Belgium, Germany, Lithuania, Luxembourg, Poland, Russia, Slovenia, France, Switzerland and also in Canada and Israel. It is natural that in this connection the European Court had to refer to the question about the limits of freedom of speech and the validity of such its restriction. In the judgments in the case “Leide and Izorny vs. France”, “Garody vs. France”, “Pasters vs. Germany” c of Human Rights recognized that Holocaust denial cannot be justified by freedom of speech. On the other hand, in the case “Perinçek vs. Switzerland” the European Court recognized impossible the restriction of freedom of speech by

establishing criminal liability for the denial of the Armenian genocide in the Ottoman Empire. In all these cases the Court, in addition to the legal plot of the case, had to address the degree of “sensitivity of the society” regarding these historical facts.

It appears that the rights of the third generation are logical element in the process of identification of individual “I” with socio-cultural projection to the general “we”. K. Vasak called them “the rights of solidarity”. He referred to them the right to peace, the right to a healthy environment, the right to the common heritage of mankind, the right to communication, and also the right to development.

The principle feature of these rights is that the subject right holder is not an individual and even not a group as simple totality of individuals, but collective “we”: in other words, these rights only may belong to the collective metasubject: people, generation, nation and others.

Therefore, in the scientific legal literature these rights are characterized as “the rights of people” [15], which are exercised by collectives, communities, states [16], and it can be done only with joint actions of people of a certain community [17]. In this context some authors even express the idea that nature of these rights is such that they cannot be exercised by one person in principle, and only by a certain social group. N.V. Varlamova thinks that “...the rights of the third generation are a kind of projection of the rights of the first and the second generations to international (namely not interstate relations)” [18].

It appears that a separate person certainly takes part in exercising these rights, but this participation is connected not with his or her personal status, but with his or her status as a member of a collective, a community, a state that is organized society. It is interesting that some scientists refer the rights of separate categories of citizens to the rights of the third generation. These categories of citizens for various social, biological or political reasons have difficulties in exercising their rights and need special “positive actions” from the society and the state: the rights of women, the rights of disabled people, the rights of youth, the rights of national minorities and so on.

Undoubtedly, a concrete person can take an active part in exercising these rights; however, he or she will act not on his or her own behalf, but in the interests of a certain community of people: it is possible to protect the rights of disabled people, but not the concrete disabled person N. Even if the named disabled person N acts to protect the right, the object of such protection will be just the right of disabled people in general.

The group of rights of the third generation touches upon the issue of global threats of the mankind. This is not by accident if you take into account that they were formed after the Second World War, and one of the lessons of which was that the democratic procedures themselves did not guarantee the triumph of law and justice. “The rights-shields” could not cope with the tyranny of the masses”. At the same time there is the understanding of other global challenges which the mankind faces with: ecological catastrophes, international terrorism, corruption and etc. These problems do not fit within national borders: for example, the problem of international criminality cannot be

solved at the national level. The situation of “the cold war” between two major nuclear powers has been keeping all human civilization in awe!

It is not surprising that at the mentioned period human rights were losing their national identity to a large extent and were becoming a universal and national concept (“universally recognized rights”). The Global systems of interstate protection of rights and freedoms are founded. They are like the European Court of Human Rights: national legal systems are disposed to “a tuning fork” of international standards of human rights. This takes justiciability of main human rights and freedoms to a whole new level: it is sometimes “beyond the power” of national constitutional courts to defend the rights of an individual from the state mechanism and interstate bodies are quite able to resolve cases “person vs. state”.

Separately it is possible to mention the vector of evolution of the second rights generation: there is understanding that it is impossible to provide and protect “the right to ...” in the same ways as “freedom from ...”. If in the latter case, as it has seemed not long ago, it has been enough to secure the main and invariable right and follow it with sufficient accuracy and constituency (“first the law and then the government”), then socio-economical rights, because of their positive nature are supposed the synthesis of “law” and “government”. What is the point of fixing everyone’s right to social security if there is no such security system itself? The latter is not “extracted” from the law as possibility to speak or write from freedom of speech, but it is a result of “governing”. This in itself is a pretty serious argument against the conception of “the rights-shields”

Besides, socio-economical rights are related in many ways to the actual conditions of their implementation: if personal rights are based on the idea of formal equality, then for this group of rights equality is “affirmative actions” of the state aimed at equalizing the actual conditions of legal use. In this regard, states are forced to differentiate the scope of guaranteed rights in various segments of society: disabled people, pensioners, young people, etc. At the same time, differentiation within various social groups should be combined with the principles of equality and non-discrimination within one segment. Accordingly, there are rights of “group membership” that arise due to association of the individual with a certain social stratum.

In this case, the dichotomy “person vs. state” is replaced by the antinomy “we (women, disabled people, youth, etc.) vs. others”: despite the fact that claims are still addressed to the state, their essence is shifting from the area of “vertical relations” to the plane of “horizontal ones”. For example, job quotas for certain social groups, although implemented by the state, actually oblige individuals.

At the same time, there was what the famous lawyer S.S. Alekseev called “the most important change in the world of legal phenomena”, namely, the acquisition of human rights as subjective public rights of their own legal reality, independent of positive law, “the formation of human rights as an objective reality” [19]. If initially subjective public rights were considered as elements of personal freedom, derived from “the self-restrictions” of the state, enshrined in legislation, then now it has suddenly tuned out that these

rights have “an over-positive” and even “supra-constitutional” content and, in turn, require the creation of certain mechanisms for their implementation, determine the meaning and content of an obliged law.

A well-known constitutionalist, the judge of the Constitutional Court of the Russian Federation G.A. Gadzhiev refers human rights and freedoms to a special legal reality, which is not yet a reality of law. Constitutional recognition (“constitutional positiveness”) of natural rights transfers such unrecognized “proto-rights” from the phenomena of legal reality to the area of law reality. At the same time, this process of translating legal claims into constitutional rights is permanent. Ideas of justice and developing ethics are constantly challenging the positive law, demanding official recognition of new rights, aiming to make them the reality of law. Do we recognize the existence of such rights, which are in legal reality? The question of the existence of rights points to the differences between legal reality and the reality of law” [20].

However, on the other hand, this separation of human rights as an independent legal reality from objective, written law has led to the problem of generating “new” rights and searching for criteria for their separation from subjective claims that follow from the general principle of personal freedom - “everything is allowed that is not prohibited”. Indeed, if we follow this principle, what prevents us from considering any variants of non-contrary behavior as a “measure of possible (permitted) behavior”, i.e. as a subjective right?

4. CONCLUSION

It seems to us that the “fourth generation rights” that are widely discussed today are largely conceptualized on the basis of this logic. First of all, this refers to the so-called “somatic” rights, an approximate catalogue of which M. A. Lavrik made an attempt to form in the work “On the Theory of Somatic Human Rights” [21]. In particular, he highlighted the right to die, the right to dispose of one’s organs and tissues, sexual rights, and reproductive rights. Interestingly, the author does not recognize the right to clone, as well as to use drugs and psychotropic substances, due to the fact that these behaviors are prohibited by the current Russian legislation.

What does this mean: the right to use narcotic substances is a human right, for example, in the Netherlands, but not in Russia? Actually, this is the mistake - in extending the status of “human rights” to any formally non-illegal behaviors that are available to the individual.

At the same time, the very ability of a person to perform such actions may be protected, but only as part of personal freedom and insofar as it is not prohibited by current legislation. However, restricting or even prohibiting such behaviors in national legislation cannot be considered a violation of human rights.

We will try to explain our idea on a concrete example from the practice of the European Court of Human Rights. French citizen Vincent Lambert was paralyzed in a car accident and has been on life support since 2008. French law, following

changes to the public Health Code in 2005, allows for the termination of a patient's treatment if the measures used are "ineffective and disproportionate" and the only benefit from them is artificial life support. In other words, in this case, euthanasia is allowed under French law.

In 2013, Lambert's doctor, at the request of his wife and some of his relatives, decided to disconnect the patient from life support systems, since the treatment was ineffective and unsuccessful. However, another part of the patient's relatives did not agree with this decision and challenged it in the court. This case was considered, among other things, by the State Council of France, which recognized the legality and validity of the decision (euthanasia). As a result, the relatives of Vincent Lambert appealed to the ECHR with a complaint about the violation of the right to life under article 2 of the European Convention.

Far from being unanimous (five of the seventeen judges expressed a dissenting opinion), the European Court of Justice concluded that the issue of regulating euthanasia falls within the margin of appreciation of France, provided that the decision-making procedure does not allow mistakes to be made in making such a decision. On the one hand, the ECHR stated that the right to life guaranteed by the Convention was not violated in this case, but did the European court of justice recognize the human right to euthanasia or, as some apologists for fourth-generation rights say, the "right to die"? Of course not. The court only stated that respect for the right to life must be correlated with the human right to protection from ill-treatment and torture (article 3 of the Convention), as well as with the right to respect for one's private life (article 8) [22]. The regulation of this issue falls within the competence of the state party to the Convention.

This conclusion was confirmed in the decision of the European Court of Justice in the tragic case of Diana Pretty, who, due to a serious illness, could not even commit suicide on her own (at that time, suicide was officially decriminalized in the UK). She asked the British authorities to allow her husband to help her pass away, but was refused. The European Court of Justice in the case "Pretty vs. United Kingdom", despite the severity of the applicant's condition and her suffering, still failed to recognize the "right to die". Despite all that has been said, we are not inclined to reject either somatic rights or, in general, the rights of the fourth generation.

As we see it, this group (or groups taking into account their heterogeneity) is currently undergoing "social selection" and is in the generation stage. Only when there are positive obligations of the state to ensure and protect such rights (not based on national legislation, but by virtue of the very fact of the existence of a "generally recognized right"), and the individual will have the opportunity to demand their implementation (including at the interstate level), it will be possible to talk about their objective existence.

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