Artículo de investigación

Human rights as the basic value of the concept of private law in modern Europe

Права людини як базова цінність концепту приватного права у сучасній Європі

Los derechos humanos como valor básico del concepto de derecho privado en la Europa moderna

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Abstract

The purpose of the article is a study of the concept and features of human rights as the fundamental concept of modern private law. The object of research is the historical, philosophical, political, ideological, economic, social and other dimensions of the concept of human rights. The main conclusion of the scientific article is the statement of the dominant role of the concept of human rights for the development of modern society, oriented to universal human liberal values and private law, as an indispensable attribute of such a society. At the same time, authors state, that modern tendencies for further expansion of the "borders" of human rights and freedoms at the expense of the interests of the state or at the expense of other social groups have no basis.

Keywords: human rights, liberal economy, private law, Roman law, civil society.

Анотація

Метою статті є ґрунтовне дослідження поняття та ознак прав людини, як засадничої конструкції сучасного приватного права. Об'єктом дослідження є історичні, філософські, політичні, ідеологічні, економічні, соціальні та інші виміри концепції прав людини. Головним висновком наукової статті є констатування домінуючої ролі концепції прав людини для розвитку сучасного суспільства, що орієнтується на загальнолюдські ліберальні цінності та приватного права, як неодмінного атрибуту такого суспільства. При цьому, сучасні тенденції до подальшого розширення «меж» прав і свобод людини за рахунок інтересів держави або за рахунок інших соціальних груп не мають під собою жодних підстав.

Ключові слова: права людини, ліберальна економіка, приватне право, римське право, громадянське суспільство.

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Resumen

El propósito del artículo es un estudio a fondo del concepto y las características de los derechos humanos como el concepto fundamental del derecho privado moderno. El objeto de la investigación es la dimensión histórica, filosófica, política, ideológica, económica, social y otras del concepto de derechos humanos. La principal conclusión del artículo científico es la afirmación del papel dominante del concepto de derechos humanos para el desarrollo de la sociedad moderna, orientado a los valores liberales humanos universales y al derecho privado, como un atributo indispensable de dicha sociedad. Al mismo tiempo, las tendencias modernas para una mayor expansión de las "fronteras" de los derechos humanos y las libertades a expensas de los intereses del estado o a expensas de otros grupos sociales no tienen ninguna base.

Palabras clave: derechos humanos, economía liberal, derecho privado, derecho romano, sociedad civil.

INTRODUCTION

The modern concept of private law was formed at the end of the nineteenth and early twentieth centuries. It should be determined whether it exists in its original language or has undergone changes due to the challenges of time. And such a challenge was the First World War (Great War), although it influenced the perception of many traditional values ("Lost Generation", "All people are enemies"). The Second World War has become a kind of catharsis, showing the possible height and fall of the human spirit, the price and pricelessness of human life, honor, and dignity. Soon after the end of this war, the constitution of "sovereignty of a private person" took place, various measures were taken to ensure human rights.

After the adoption of the Universal Declaration of Human Rights in 1948, a Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in Europe, which, in fact, reflected the main provisions of the Western European concept of private law.

In our opinion, an important factor in the development of the understanding of the concept of private law in Europe was the formation of the European community, reflecting integration tendencies first in Western Europe, and then, and throughout Europe.

The consequence of European integration was the formation of a "European law", which can be considered in a wide and narrow sense. "European law" in a wide sense encompasses the legal regulation of the entire set of economic, social, political, scientific and cultural relations concerning the organization and activities of European international organizations, and in the narrow sense, is the right of European communities, complemented by the legal array of the entire European Community. It also came out from international law and represents a special legal phenomenon of European law.

Although sometimes "European law" refers to a system of legal norms created in connection with the formation and functioning of the European Communities and the European Union, but, in our opinion, the definition of this type is suitable only for characterizing the way of regulating civil and other relations in the EU. But they can not be used in the formulation of the concept of private law. Instead, in order to create such a concept, the axiological approach should be used (practically and used), taking into account the defining humanitarian values of modern Europe, which, in turn, implies active research and the consideration of the legal consciousness of the participants in private relations.

METHODOLOGY

In the process of research, dialectical, synergetic, systemic, historical, comparative legal and other research methods were used.

On the basis of the dialectical method, the concept of human rights as a phenomenon which has undergone significant transformations during its historical development in the areas of modern Europe and in general in the world is considered.

The synergistic approach has allowed the concept of human rights to be explored as a complex notion that has positive social effects and contributes to the fundamental needs of all members of human society. Thanks to the systematic method, an attempt was made to assess the real status of human rights protection in European countries and beyond the borders of Europe. The historical method allowed to investigate human rights in terms of dynamics of the process of their development. The comparative legal method was used in the study

of different approaches to understanding human rights and freedoms in different countries and cultures.

PRESENTATION OF KEY RESEARCH FINDINGS

The proposal to move away from a purely positivist approach which is suffering from the dogmatism and formalism, a narrow and anti-spiritual dimension of legal reality, while taking into account the fact that the natural law theory, in spite of its importance for world political and legal history, is in many respects exhausted itself as the basis for the further development of legal thought. This is due to the challenges of the modern world, reflected in the world of law as excessive pragmatism, mercantile, lack of spiritual guidance, apparent religiosity, moral "blurry", etc. There is no fundamental unifying moral idea, a humane outlook (ideology).

Such realities require an appropriate change in legal priorities and values, and, at the same time, a sense of justice that should be given spiritual and cultural significance. In particular, attention is drawn to the fact that the time has come to change the understanding of the meaning and nature of legal consciousness. It is no longer considered as the result of a reflection of legal reality. On the contrary, legal consciousness, as an organic part of the spiritual reality, acquires an independent spiritual and cultural status among the foundations of social and legal life. It is a creative and relatively independent phenomenon of the legal sphere of society, which can not exist without legal consciousness. The rethinking of the positivist perception of legal consciousness from the point of view of its objective inclusion in the spiritual and cultural context involves the active use of such concepts as legal spirit, legal spirituality, legal contemplation, legal reflection, legal sense, sense of legal consciousness, eidos of legal consciousness, legal mentality, abstract sense of justice, legal subconscious.

It is rightly emphasized that an important role in the formation and development of "spiritual and cultural" justice belongs to the principles and axioms that express the most important foundations and properties of this type of legal consciousness, which seeks to meet the requirements of spirituality, to create in this direction the legal culture of the person (personality) in general, the legal life of society. Principles and axioms express the nature of justice, show its ability to be an organizing and guiding principle. Therefore, the spiritual and cultural theory of justice and law is considered as an independent trend in legal thinking, which should reflect a broad socio-legal spectrum: philosophy, sociology, ideology, psychology, cultural studies, dogma, history and other aspects of law, its spirit and meaning (Bajnyyazov, 2006).

This approach, in our opinion, is also reflected in the modern view of the essence of law, and especially the concept of private law in European civilization.

Realizing European law as a system of principles and legal norms formed in connection with the establishment and functioning of the European Communities and the European Union, on the basis and in accordance with the founding treaties and general principles of law (underlined by us - the authors), we take into account that the basis of the general the principles of EU law are the priority of the rights of the individual, enshrined in the European Convention, which takes into account the constitutional traditions of European countries. The same traditions determine the further development of the national law of the member states of the European Communities.

The change to the attitude to human rights approaches to the vision of the essence of law, lead to the change in the vectors of research in the field of private law.

The essence of civil society is that it is the result of reconciling the interests and relationships that are formed between private individuals and their established associations that exist and operate in a market environment (Kharytonov, Kharytonova, Tolmachevska, Tkalich & Fasii, 2019).

The above implies an increase in the proportion of the concepts of law in the system: "concept - categories - concepts of law", and hence the growth of the moral and axiological component of the concept of law and the concept of private law, in particular, human rights and freedoms become an absolute value.

However, it should be noted that along with the positive features, this fact has, from the point of view of legal and certain defects, which became the basis both of internal and external Challenges for the given understanding of the concept of private law. Although, in fact, it is not a question of criticizing private law as such (it is worth remembering the consistent tradition of identifying of the private law and civil law (Chycheryn,1998), which to some extent relieves

the acuteness of the problem) and criticizing those civilizational values that are reflected in those concepts, the concepts and categories with which it is related in the context of the recognition and enforcement of human rights.

Many scholars, both from the adversaries and from the supporters of Western civilization, pay attention to the problems with which it faced at the present stage of its development. Thus, criticized "excessive" democracy, the uncertainty of the boundaries of freedoms and human rights in the private sphere, tolerance, same-sex marriages, abuse of the rights of national minorities and much more.

The subject of criticism were all four "cornerstones of the European home", which at one time were called V. Skuratovsky: 1) liberalism; 2) protestant ethics of labor; 3) the merger of Athens with Jerusalem; 4) Roman law with the Christian mystical correction to him. (Which are also the cornerstones of the European model of civil society and the concept of private law).

With regard to the external challenges, then let us pay attention to liberalism, which causes a firm rejection of supporters of traditionalism. It has been especially intensified recently. And the circle of critics has also expanded.

M. Veller believes that: "... in the twenty-first century Europe will be over, and European civilization will be over. ... the democratic values will overwhelm the remnants of the white peoples, ─ And then Russia will be able to realize its Last Great chance. To become an object of powerless envy.

Today's Europe is rotten, ... degeneration, cannot save itself. Buried! Do not imitate! And to imitate what was the main thing in the great Europe of great times - the greatness of the mind, the talent to work and the beneficial severity of morality. "

And for those who are poorly aware of what the values of the "great Europe of great times" are the most important, further clarification goes on: «We need a completely different system of views, and it does not coincide with the views of today's West and cannot be welcomed. But it completely coincides with the European system of views of past centuries ─ when European civilization was created. ... Honesty, hard work, patriotism, pride in the mission of his people, morality, intolerance to evils, severity of crime, distance for strangers, willingness to kill and die in the name of ideals, commitment to national values and traditions, firmness of the family hearth ...» (Veller, 2007).

Liberalism is severely criticized by officials. So, the head of the Constitutional Court of the Russian Federation V. Zorkin, who recently shocked the Russian public with his reflections on the "goodness" of serfdom for Russia of the nineteenth century, called liberalism one of the main problems of the world at the International Congress in Seoul! "In the economy liberalism impedes the development of many people and states. In the sphere of human rights - it promotes the activation of sexual minorities. In international relations, the emergence of countries like the United States, which claim to be a part of their understanding of the role of world leaders, is the result of liberalism. Law must be purged from liberal views, Zorkin said, referring to Aristotle and Immanuel Kant at the same time."

Y. Pronko, a journalist who positions himself as an Orthodox Christian who adheres to liberal values, analyzing his statement, writes: («1. Man is primary, the state is secondary; 2. The compliance with the law, human rights, and freedoms is an obligation for both “simple” and “complex” citizens of Russia; 3. Free national elections and the turnover of power - a real way to improve the efficiency of public administration; 4. A competitive market economy is the only option for the natural development of any economy, even such a “national” one as the Russian one; 5. Freedom of the media and the right of people to their opinions - a real way to fight corruption and overdue "servants of the people"; 6. Compliance with the Constitution and separation, independence of the authorities from each other (legislative, executive, judicial) are real ways to combat the usurpation of power; 7. Observance of the rights and freedoms of a person regardless of nationality, religion, cut eyes and skin color, etc.)». Every Sunday he prays for himself, for relatives and relatives, for his homeland). ... "But," he notes, "I adhere to the main liberal (Christian!) Principle of the freedom of the individual!"

And as a result of the author's reflections the question arises: «When the principles of state pofigism are "preached" by old people, I can still understand. They grew up and "rose to their feet" in the Soviet era, which turned a person from a person into a "cog" of the state machine. When you hear such statements from the head of the Constitutional Court of the Russian Federation, it becomes uneasy.

Liberalism is the evil of the world, then what is good ?!» (Pronko, n.d.).

And the solidarity with this position deprives us of the need to analyze the serious statements of V. Zorkina.

However, it should be noted that even scholars of liberal interest have expressed doubts about the feasibility of using the "axiological" approach, and in particular, the recognition as the leading criterion of the idea of the primacy of human rights in characterizing the tradition of law.

A. Medushevsky believes that the proposals to bind the legal tradition with certain values and to define the law as a measure of individual freedom (personality), emotionally attractive and ethically universal for the modern era, from the standpoint of the comparative study of the legal world cultures appear to be limited.

First, because the concept of the freedom of the person as a universal value has passed the evolution of his contemporary understanding inherent in the New and the New Times, it is unlikely to be transferred to the past as a universal criterion for assessing the quality of legal tradition.

Such differences, indeed, took place. But this is why the transformation of the vision of individual freedom in the process of forming the concept of private law is the subject of research in this article.

Secondly, A. Medushevsky is concerned that in the global perspective it turns out that a single civilization, based on the rights of a person (personality) as the dominant principle, is Western civilization.

In our opinion, this assumption can be accepted, especially since the phenomena of civil society and private law are also inherent in Western civilization (civilizations).

However, further from this correct thesis is a false conclusion, in our opinion, it will be necessary to recognize the absence of other legal traditions (except for the European one), and therefore it makes no sense to even raise the question of comparing legal cultures and revealing their peculiarities. The legal traditions (Islamic, Hindu, Confucian, and Jewish) do not know the rights of a person (personality). This thesis is supported by the assumption that the legal culture is more ancient, and the more traditional it is, then it is more oriented on tribal relations and, accordingly, less emphasis is placed on the rights of a person (personality). Therefore, it is proposed to try to get out of a European-centric model, to go beyond the unambiguous concepts created within a single legal culture. This attempt is also justified by the fact that modern science, reacting to the process of globalization, informatization, and knowledge of the "Other", moves towards the departure from classical Eurocentrism of the XVIII-XIX centuries, with its naive evolutionary and positivist schemes of history. The schemes proceeded from the fact that all regions of the world in their development are identical stages of development, and eventually tend to adopt European standards of culture and law. Therefore, the for the creation of an adequate typology of legal traditions, the value is not required, but a formal approach is required, which allows isolating Muslim, Hindu, and Chinese legal tradition, although there are no individual rights (Medushevskyj, 2014).

In our opinion, there was (possibly involuntary) a replacement of the initial links.

If we consider that "the rights of a person (an individual) are an indispensable condition (a sign) of the traditions of law," the absence of non-recognition of such rights in certain legal systems also means the absence of non-recognition of them as belonging to a legal tradition.

But, if we recognize the reference, that "the rights of the person are a sign of the European (western) tradition of law," then the recognition of these rights inherent in a particular legal system means identifying it as a European, that is, one that recognizes and accepts European values. And then we do not see grounds for fear of "Eurocentrism". Just a certain society (state, legal system) either accepts or does not accept European individualistic (liberal) values (and, consequently, private law thinking). Just as another society (state, legal system) accepts or does not accept the values of traditional, collectivist, totalitarian, and so on. And accordingly, this choice gives grounds for referring them to another (public) legal tradition.

Roman law with a Christian mystical correction to it is another favorite object of criticism of those who do not perceive or accept European values.

What only blamed on the account of Roman law has not been spoken! Archaism. Inability to regulate modern complex economic relations.

Especially popular is the very last thesis. Proponents of this position believe that the representatives ("carriers") of the general civil approach (under which they, in fact, mean private law approach) "seek to impose a legal community and law-making bodies on the false idea of modern systems of legal regulation of economic activity (hereinafter - LLEA), hyperbolizing the significance of these systems of private law and civil codes ... In reality, in modern systems, the LLEA has a rather high proportion of public foundations, and economic relations are usually governed beyond bounds the codes of civil codes are codes of commercial separate special laws ", which" ... are permeated with the theory and practice of strengthening the regulatory role of the state" (Mamutov, 2000).

However, this statement contains several inaccuracies, the main of which is the thesis about the public-law principles of regulation of economic activity and the strengthening of the regulatory role of the state.

But let's see how we look at the "regulatory role of the state" in the field of market economics. Thus, the Nobel laureate of economics Friedrich Hayek emphasizes that often a market society is reproached by anarchy and the failure to recognize the common goal. In reality, this is its great merit, because it makes people really free because everyone chooses the goal itself. The discovery of this order of things, when people can live peacefully, without establishing imperative goals and subordination, led to the creation of a great society. Instead of imposing above specific goals, people adopted abstract rules of conduct And there is no hint of the leading role of the state in the development of the economy. Glen Wright relates to the basic ideas of the Americans: individualism, a limited state (the individual is free to use rights and protect his mercenary interests), the concept of property rights (Private property is the basis of economic self-sufficiency. It is necessary to rely on state interference with ownership), competition (the basis of economic activities) (Wright, 1994).

Again, there is no mention of strengthening the "regulatory role of the state", planning, direct intervention in economic activity, etc.

Of course, this does not deny the tendencies of socialization of the LLEA and the convergence of its systems. But what is the "state influence" and "economic law" here? Indeed, these trends may well exist within the framework of private law. Moreover, in the framework of private law, and not abstract LLEA, the most important for western societies (in particular for civil society) is the tendency or rather the pattern of their development, which was noted since the nineteenth century and which consists in the fact that the content of the progressive movement of societies is a gradual transition from the idea of the statute (the presence of a special position of certain subjects, including the state) to understanding the agreement (as the basis for determining a mutually equal position) (Main, 1861).

Regarding on criticisms of exaggerating the importance of Roman private law, it should be noted that the creators of new institutions and concepts "in debt" in front of Roman law, once "Roman law was seen as a treasury from which it is possible to extract legal ideas and principles to meet new needs" (Berman, 1998), it "gave the legal technique, as well as the material rules of the past, which were animated by virtue of their authority and urgent need" (Anners, 1994).

There is a lot to be said about the incorrectness of the assessments of the importance of Roman law for the formation of a modern concept of private law. But, there is no need for this. There is a general problem of choice between the private law (humanitarian) approach and the public-legal (state-regulative) approach. As to the nature and significance of this problem, Ludwig von Mises, who stated that the replacement of the market by planned economy takes away the freedom and deprives a person of the only right to submit. The authority that manages all resources controls all aspects of people's lives and activities. There is only the employer, the work, the will of the boss, which is not discussed. The monarch determines the quantity and quality of what consumers have to buy. There is no such sector where personal evaluations would remain. The authorities issue a certain mandate and completely regulate the place, time and manner of execution. At the first encroachment on economic freedom, all political and legal freedoms are turning into a deceiver (Mises, 1999).

In our opinion, one can not say better about the importance of private law for a European (and not only European) civilization.

Another basis for the existence of the European Union (the vision of the essence of private law) - the Protestant ethics of labor - is criticized by its opponents. The subject of criticism is a positive attitude to the outcome of work - the growth of well-being. On this basis, Orthodox adherents of

the purity of religion accuse them of lack of spirituality, mercantilism, excessive pragmatism, and so on. (In this case, the fact that Protestants made a significant contribution to world culture, literature and art, the orthodox is left out of consideration).

"The Merger of Athens with Jerusalem," as well as every attempt on the restoration of the unity of the Christian tradition is criticized from the standpoint of supporters of orthodoxy. Particularly visible here are the efforts of representatives of the Roman Orthodox Church and the authors of the concept of "Russian world".

Despite criticism from the outside, internal problems exist in the European Union, which influence the definition of the concept of private law. These include the problems of the relationship between a private person, civil society and the state, the impact on these relationships of the market (business), the balance between civil society, corporate and state interests, etc. In particular, such problems are due to the lack of clarity in the definition of the concept of civil society, with which the concept of private law is closely connected with the conditions of liberal democracies.

Of course, modern concepts of civil society are inadequate, which creates a danger for the formation of modern ideas about private law. However, one can agree with Jean L. Cohen and Andrew Arato, who believe that the flaws in the concepts of civil society can be overcome if we take into account that the notion of civil society means precisely the sphere of modern life in the West, for which the logic of administrative and economic mechanisms creates the greatest danger; but at the same time, it is in this "zone" where the potential for the further development of democracy in the so-called "real liberal-democratic regimes" has been laid. We are impressed by their proposal not to reduce the relationship of "civil society - the state" to binary opposition, but also take into account such a factor as the liberation of market forces as a result of the democratization of life. In societies where the functioning of a market economy has already acquired or is gaining its own independent logic, only the concept of civil society, properly differentiated from economic structures (underlined by us - the authors) is able to form the core of the critical political and social theory. Otherwise, after a successful transition from dictatorship to democracy, the undifferentiated idea of civil society (embodied in the slogan "society against the state") will quickly lose its critical potential (Koen & Arato, 2003). (Actually, such a problem is usually encountered in post-Soviet countries, where civil society is often replaced by a peculiar "equivalent" - "civilian privacy", which threatens uncertain dwelling with the political elite, institutions with essentially different governing styles, and the rest of the citizens who are separated from the public sphere. It is comforted that in such a state of affairs things are seen as a feature of post-communist democracy, which can exist for several decades or generations, which is alarming, but not fatal, it is the weakness of civil society) (Howard, 2009).

One of the weaknesses of the modern concept of private law is the uncertainty of the limits of the rights of a private person, which often becomes the subject of criticism from supporters of "traditional" orthodox values that intimidate an ordinary citizen by the destruction of family values, same-sex marriages, etc.

At the same time, it should be noted that this is the case when the disadvantages are the continuation of virtues: the recognition of a person's right to free choice of behavior that does not harm another person. This resonates with the arguments expressed in the scientific literature that the behavior of a person is moral in nature, moreover, moral behavior is one of the most rigid socio-biological demarcations (Omelchuk, 2012). However, in those cases where there is a conflict in the field of human rights, as well as in the conflict of interests of members of civil society, the state resorted to the positive-legal regulation of human behavior (Omelchuk, 2012)., while taking into account the national mentality and influencing the formation and transformation of justice in the desired direction.

Let's consider the situation about the admission of the possibility of same-sex marriages, which, given the considerable number of opponents of such an approach, opponents of European integration were particularly criticized from the point of inadmissibility for our mentality, morality, and tradition, while taking into account the national mentality and influencing the formation and transformation of justice in the desired direction.

However, it should be noted that at the same time, they left "beyond the brackets" the fact that it is not a question of obligatory same-sex marriages, but the recognition of the possibility of their existence. At the same time, the principle recognition of the right to same-sex marriage

does not mean the mandatory implementation of it in one or another state.

Indicative in this sense is the position of the European Court of Human Rights, which recognized that the refusal to recognize same-sex "marriages" is not a violation of the European Convention on Human Rights. At the same time, the court explained that while "some countries expanded the concept of" marriage, "including the partnership of persons of one article", European laws that give men and women free marriage rights" cannot enforce this concept".

The Grand Chamber of the European Court of Human Rights has established that the refusal of the State to recognize same-sex marriages does not violate the European Convention on Human Rights. The court pointed out that, although the convention recognizes the possibility of "marrying and having a family" as the right of everyone, the document cannot be interpreted as requiring marriage to be transformed into a completely different concept covering same-sex "marriages."

The court also explained that the European Convention on Human Rights "enshrines the traditional concept of marriage, which can exist only between a man and a woman". The court added: the applicant cannot claim that such a conclusion does not correspond to "the European values that allow same-sex" marriages ", since in the European Union of such countries only 10, and most of the EU members interpret the concept of" marriage "only as a union between man and woman (European Court of Human Rights: countries are not obliged to register same-sex "marriages", 2014).

CONCLUSIONS

Thus, we can conclude that Western (European) civilization does not abandon traditional "universal" values, although it tries (sometimes empirically) to determine their limits.

In this sense, interesting and examples of fairly strict censorship, especially in the field of cinema, when the reasons for the restriction were determined precisely by considerations of the protection of humanitarian universal values (Souva, 2008).

Thus, in our opinion, there are no grounds for excessive perceptions about the "infinity" of human rights. This limit is certainly, and it is determined, usually, naturally, in the collision with the rights and interests of other members of civil society.

The foregoing gives grounds for the conclusion that it is not about "systemic defects" but about the perfection of the concept of private law in accordance with the modern vision of the essence of the rights and interests of a private person, civil society and its values.

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