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SOCIAL HUMAN RIGHTS, BETWEEN LEGAL AND REAL CONSTITUTIONAL LIMITATIONS (ON THE EXAMPLE OF ONE LAW)

On the basis of some provisions of Law of Ukraine «On amendments and invalidation of some legislative acts of Ukraine» dated December 28, 2014 № 76 the author disclose the problem of the interpretation of p. 3, Art. 22 of the Constitution of Ukraine on the impossibility of narrowing the content and scope of existing rights and freedoms during the adoption of new laws in the context of social rights guaranteeing and due to the political and economic situation in the country. Analyzing the nature of social rights, the practice of the Constitutional Court of Ukraine, international human rights law, the author argues that the interpretation of the mentioned constitutional provision must be based on recognition of the existence of the grounds for reviewing the benefits provided to certain population group based on intelligence, proportionality and non-discriminatory nature of the review.

Keywords: social rights, social benefits, benefits, restrictions of human rights, content and scope of human rights.

Problem setting. Social rights are an important part of the constitutional and legal status of human and especially those that support people who are in a special position (assistance in connection with child-birth, benefit disabled, benefits provided to veterans, participants of liquidation of the Chernobyl accident, etc.). These rights should be pursued at the expense of the State and local budgets, which makes the issue of social rights is not only legal, but also political and economic. The main contradiction can be formulated in a simplified way in the form of two problems in this area: (1) where to find funds for the provision of social rights, which are enshrined in the Constitution; (2) what to do if you do not have enough funds in certain circumstances. The legislator periodically corrects the list of provided benefits and direct payments, which constitute the content and scope of individual social rights in addressing those problems. The question is whether is it consistent with the Constitution in the context of part 3 of article 22 of the Constitution of Ukraine [1], which forbids narrowing the content and scope of human rights. This article will try to consider this issue on the example of certain provisions of the Law of Ukraine «On amendments and declared invalid some legislative acts of Ukraine» dated December 28, 2014 number 76 (hereinafter – the Act N 76) [2] and outline approaches to its solution.

Analysis of recent researches. Such scientists were engaged in research of specified problems as V. B. Averyanov, J. Le Grand, D. Commerce, S. P. Pogrebnyak, C. Propper, P. Rabinovich, S. Smith, A. L. Fedorova, S. V. Shevchuk and others.

Article's main body. According to Art. 1 of the Constitution of Ukraine, our state is proclaimed a social state. This component of the constitutional system of Ukraine, along with other components (sovereignty and the independence, democratic and legal character of Ukrainian state) has a fundamental character and determines the development of legislation public administration, law enforcement practice etc. German constitutionalist E. Kommerce points out that the concept of the social state (Sozialstaat) supports social justice and obliges the government to provide the basic needs of all individuals [3]. Conceptual elements of the social state are: 1) subsistence level worthy of human dignity; 2) social equality; 3) social security; 4) the growth of welfare [4].

The implementation of legal regulations, institutions and procedures that can ensure real existence of mentioned elements aims at achieving and maintenance of social justice. In the most general form of social justice is there where equal opportunities are provided [5]. However, equal opportunities and justice in general are not understood in the essence of formally legal. S. Pogrebnyak indicates that the principle of justice should be considered in three aspects: formal justice (formal equality) and procedural justice (compliance with law-established procedures) and substantive justice. Content validity determines the need for compliance with certain principles that can help to figure out what a recent case belongs to each participant of social relations [6].

In any society, there are individuals who need special support from the state because of certain life circumstances. The principle of justice and the concept of the social state predict that the provision of such opportuni-

ties will allow these people to be able to live and to evolve as full members of society and not be permanently in the status of social outsiders.

The idea of the social state is embodied in social human rights on the level of Chapter II of the Constitution of Ukraine. According to Art. 46 of the Constitution of Ukraine, citizens have the right to social protection, including the right to provision in cases of complete, partial or temporary disability, loss of breadwinner, unemployment due to circumstances beyond their control and also in old age and in other cases provided by law. This right is guaranteed by compulsory state social insurance through insurance contributions of citizens, enterprises, institutions and organizations, as well as budgetary and other sources of social security; establishment of a network of state, communal, private institutions for the care of the disabled. Pensions and other forms of social payments and assistance that are the main source of existence should ensure a standard of living not below than the subsistence minimum established by law.

The implementation mechanism of social rights is determined at the level of the current legislation. Legal basis of social protection of war veterans is defined by the Law of Ukraine «On status of war veterans, guarantees of their social protection» dated 22.10.1993 N 3551-XII (hereinafter-the Law N 3551-XII) [7]. This Law aims to protect war veterans by: creating appropriate conditions for the maintenance of health and active longevity; the organization of social and other kinds of services, strengthening the material and technical base created for this purpose institutions and services and the training of professionals; implementation of target programs of social and legal protection of war veterans; granting of privileges, advantages and social guarantees in the course of employment in accordance with professional training and with consideration of health status. That is, the granting of privileges, advantages and social guarantees is one of the main objectives of this Law. The Article 4 of the Law specifies that veterans include participants of operations, invalids of war and participants of war. Adoption of the Law of Ukraine «On amendments and declared invalid some legislative acts of Ukraine» dated December 28, 2014 number 76 (hereinafter – the Law № 76), in particular, paragraph 9 of section led to changes in the Law number 3551 through the abolition of benefits of war veterans by excluding items that are set before.

Thus, paragraph 9 of section I of Act No. 76 was amended to the Law No. 3551, which abolished benefits:

1) free travel by all kinds of city passenger transport, motor transport in the countryside, railway and water transport of the suburban communication and buses of suburban and long-distance routes, including intra- and interregional irrespective of distance and residence for persons who had the status of war veteran and persons

who are subject to this Law (excluding para. 7 of part one of article 14 and paragraph 7 of part one of article 15);

2) free travel once in two years (roundtrip) by railway, water, air or long-distance motor transport irrespective of availability of railway communication or travel once a year (roundtrip) the specified types of transport with the 50 percent discount, which had the status of war veteran and persons who are subject to the Act (excluded item 16 of part one of article 14 and item 18 of part one of article 15);

3) for persons who have special merits to the Motherland

– free travel once a year (round trip) by rail in a double compartment sleeping cars, fast and all-coach trains, water transport in the first-class state cabin (local first category) express and passenger lines, air or intercity road transport (excluded paragraph 15 of Article 16);

– free use of intercity transport (tram, bus, trolley, subway, water crossings) and commuter trains, and in rural areas – buses in suburban and intercity routes, including intra, inter-regional and local regardless of distance and place of residence (excluded paragraph 16 of Article 16);

4) articles 14, 15 and 16, supplemented by norms which place extra benefits, as provided for in these articles, depending on the average total family income, namely: «to establish that the benefits... are subject to the condition that the average monthly cumulative income of a family counting on one person for the previous six months does not exceed the total income, which gives the right for tax social privilege in order determined by the Cabinet of Ministers of Ukraine».

It should first of all be noted that the subject of constitutional initiative considering the abolition of certain benefits for veterans as the absolute right to cancel and limitations in the use of these benefits, depending on the size of the average total family income – as a narrowing of the scope and content of the law. This approach, in our opinion, is not correct.

In paragraph 4 of the Decision of the Constitutional Court of Ukraine dated October 11, 2005 № 8-RP/2005 indicates that «the content of the rights and freedoms of the individual are the conditions and tools that define the material and spiritual human capabilities required to meet the needs of its existence and development. The volume of human rights is the quantitative indicators of appropriate features that characterize its multiplicity, size, intensity and degree of manifestation and expressed in specific unit of measure» [8]. This legal position reproduces the understanding of the categories of the content and scope of rights, earlier proposed in the commentary to article 22 of the Constitution of Ukraine [9]. In another work P. Rabinovich and I. Pankiewicz noted that the abolition of the rights or freedoms should be under-

stood like official (juridical or actual) liquidation of them, complete destruction [10].

The right person in this case is the right to social protection, guaranteed by article 46 of the Constitution of Ukraine. This right determines, in particular, the existence of a number of benefits that the state sets for war veterans. Revision of these benefits, particularly their narrowing or cancellation can be considered only in the context of the problem of limiting the content or scope of rights of a person having the status of a war veteran, on social security, but not in the context of this right of cancellation that would occur, for example if the state eliminated the entire social protection of war veterans in principle. Therefore, in this case we have to answer the question whether the legal rule of Section I, paragraph 9 of the Law № 76 constrict the content or scope of the social rights of persons who have the status of war veterans. Giving a legal justification for inconsistency of Chapter I, paragraph 9 of the Law № 76 to Articles 8, 21, 22 and 46 of the Constitution of Ukraine (unconstitutionality), subjects of the Constitutional initiative indicate the separate positions expressed by the Constitutional Court of Ukraine, regarding the right to receive social benefits.

In paragraph 4 of decision of the constitutional Court of Ukraine dated October 11, 2005 № 8-RP/2005 which is above-cited we can find the following: «...narrowing of the content of the rights and freedoms means the reduction of the features, content characteristics of human capabilities that show relevant rights and freedoms, that is, the qualitative characteristics of the law. Narrowing the scope of rights and freedoms is an abridgement of the circle of subjects, size of territory, time, size, or amount of benefits or any other measurable indicators of the usage of rights and freedoms, i.e. their quantitative characteristics».

Paragraph. 5.2. of The decision of the Constitutional Court of Ukraine in its 22 September 2005 № 5-rp / 2005 (the case of permanent use of land plots) The Constitutional Court of Ukraine explained: «in accordance with Article 22 of the Constitution of Ukraine constitutional rights and freedoms are guaranteed and can not be canceled (part Two), the adoption of new laws or amending to existing laws shall not be diminished content and scope of existing rights and freedoms (part three). The abolition of constitutional rights and freedoms – is their official (legal or actual) liquidation. Narrowing of content and scope of the rights and freedoms is a limitation of them. In the traditional understanding of activities, the defining concepts of the content of human rights are the conditions and means that constitute the human capabilities required to satisfy the needs of its existence and development. The volume of human rights is their important property, expressed by quantitative indicators of human capabilities, which are reflected by the relevant rights that are not ho-

mogenous and general. The essence of the content of the basic law in any case can not be broken, that is a generally accepted rule [11].

In section 3.2 of decision of the Constitutional Court of Ukraine dated July 9, 2007 No. 6-RP/2007 States: «certain social benefits, compensation and guarantees for social protection were established in separate laws of Ukraine, which are part of the constitutional law for approval and ensuring of the rights and freedoms of citizens. Therefore, according to part 2 Article 6, part 2 Article 19, part 1 of Article 68 of the Constitution of Ukraine, they are generally binding and have to abide by state authorities, local self-government bodies and their officials equally. Noncompliance with obligations by the state concerning individuals puts citizens in a disadvantage, undermines the reliance of the person to the state that naturally leads to the violation of the principles of a social legal state» [12].

However, you should draw attention to decision of the Constitutional Court of Ukraine of December 26, 2011 No 20-RP/2011 (the case constitutionality of para. 4 section VII «concluding provision» Law of Ukraine «On State Budget of Ukraine for 2011»). The Constitutional Court of Ukraine while arguing that decision, determined: «the dimensions of social benefits depend on socio-economic capacity of the state however, they must ensure the constitutional right of everyone to a satisfactory standard of living for themselves and their families, guaranteed by article 48 of the Constitution of Ukraine [13]. The Decision of the constitutional Court of Ukraine of 19 June 2001 № 9-RP/2001 (case on scientific work length of service) indicates a dependence of the size of social payments from the economic factors, which states that «the right to a retirement benefit, its amount and the size of payments can be linked with the financial possibilities of the state, economic feasibility, socio-economic circumstances in a particular period of its development, and the adoption of relevant normative legal acts and laws» [14]. In addition, in the Decision of the constitutional Court of Ukraine dated October, 8 2008 No. 20-RP/2008 (case on insurance payments) it is stated that the types and amounts of social favors and payments to victims that are being implemented and reimbursed by the «social industrial injury insurance and occupational diseases insurance Fund of Ukraine» are establishing by the state taking into account financial their possibilities» [15].

Thus, the legal stance of agency of constitutional jurisdiction are based on two theses that might seem contradictory: 1) the impossibility of narrowing of the content and scope of human rights, including social rights; 2) the dependence of social rights up to the economic and financial capacity of the state and the need to take into account the current economic situation in determining and ensuring the social standards.

We should also mention the international legal aspect of the problem. Ukraine is party to the European social Charter. However, it should be considered that Ukraine has incurred obligations relatively to certain articles of this Charter, including articles 12, 13, guaranteeing the right to social security and medical and social assistance.

At the same time, Ukraine is party to the Convention on the Protection of Human Rights and Fundamental Freedoms [16], including the jurisdiction of the European Court of Human Rights (ECtHR), whose decisions are recognized in Ukraine as a source of law, applies to our state according to the norms of international and national law.

The Strasbourg Court has quite an extensive case-law practice on social rights [17]. Constitutionalisation of social benefits are the main tendency of the Court on social assistance payments that the state must carry by law [18]. Social benefits provided to the person considered by the court as part of right to own, use and dispose of his or her property (which is guaranteed by the Constitution of Ukraine) and groundless (in particular, by discriminatory attitudes) refusal to accrual or payment of these benefits is a violation of this right (Carson and others case against the United Kingdom», «Pichkur case against Ukraine», etc.).

At the same time, the practice the European Court has no definiteness in the matter of the legality of size reduction of pensions and other benefits, as well as their cancellation by using the amendments to the legislation [19]. In particular, in the case of «Airi against Ireland», the Court noted that social and economic rights largely dependent on the situation in the states, especially on financial situation. In Case «Kjartan Asmundsson against Iceland» Court noted the necessity of distinguish between the deprivation of pension and non-discriminatory, proportionate and reasonable reduction of its size.

This position is common with key provisions of International Covenant on Economic, Social and Cultural Rights, which in article. 2 stipulates that each Member State undertakes, to take the maximum of its available resources individually and through international assistance and cooperation, especially economic and technical fields to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures [20]. Thus, one of the pillars of modern architecture of human rights envisages a relationship between the level of economic and technology development and level of guaranteeing of economic, social and cultural rights. It should be recalled that the Covenant on Civil and Political Rights contains no similar warnings.

The relationship between the economy and the level of provision of certain rights is heterogeneous (individual economic rights should be guaranteed at the level of

the absolute, and all social rights depend on the economic capacity of the state), but has an objective character. Social rights in theory of state and law considered as «positive rights», which require enforcement that is more active by state institutions. As noted by O. Petrishin and G. Hristova, these rights require the state to adopt measures in order to ensure their full implementation gradually within available resources [21].

The constitutional Court of Ukraine proceeds from the fact that the implementation of the legislative regulation of social relations based on justice and dimensionality is caused by the observance of the constitutional principles of social and legal state, supremacy of law, taking into account the state's obligation to ensure decent living conditions for every Ukrainian citizen. The decisions of the constitutional Court of Ukraine of November 2, 2004 № 15-RP/2004 [22], dated March 24, 2005 No. 2-RP/2005 [23], dated June 20, 2007 № 5-RP/2007 [24] formulated the legal position regarding this element of the supremacy of law, like proportionality (dimensionality). In addition, according to the legal positions expressed in Decision of the Constitutional Court dated March 17 2005 No. 1-RP/2005 (case on the provision of assistance for temporary disability), the duty of the state is to regulate economic processes appropriately, to establish and apply fair and effective forms of redistribution of public income to ensure the welfare of all citizens» [25].

Thus, we should agree with the opinion of the Constitutional Court of Ukraine that socio-economic rights provided by law are not absolute. The state can change the mechanism for the implementation of these rights, particularly because of the inability of their financial support by proportional redistribution of funds in order to maintain the balance of the public interest.

Conclusions. Therefore, we can say that the state's obligations to ensure rights of the first generation (personal, civic, political) and with the guarantee of second generation are not identical. Provision of social and majority of economic and cultural rights depends on the situation of the economic system. Thus beyond the state and the legislator must confess to certain reasonable amount of discretion in conducting of social policy that would allow the state to adjust social programs based on the real possibilities of the economy regarding their funding. In other words, if the content and scope of social human rights is dependent on condition of the state development of economy, this does not mean that the state can arbitrarily reduce the level of social security, but means that the state may reasonably, proportionately and non-discriminatory view of social guarantee in an effort to provide the fullest possible security to all segments of the population who needs social protection. Moreover, it can be argued that a state may provoke the situation when the system may be destroyed wholly or partly, car-

rying out such activities (without adjusting the system of social protection in accordance with the real possibilities of the economy). These moments in our view, set the context of the interpretation of part 3. article 22 of the Constitution of Ukraine, prohibiting the adoption of new laws or amendments to existing laws that narrow of the content and scope of existing rights and freedoms. If it is a personal, civil, political rights, their content, scope and existing guarantees have absolute nature and can not be limited.

These moments in our view, set the context of the interpretation of part 3. article 22 of the Constitution of Ukraine, prohibiting the adoption of new laws or amendments to existing laws that narrow of the content and scope of existing rights and freedoms. If it is a personal, civil, political right, their content, scope and existing guarantees have absolute nature and can not be limited. When it comes to most social and economic and cultural rights, the prohibition which is enshrined in part 3 of article 22 of the Constitution of Ukraine means that the state may not deprive social protection of certain categories of persons through legislation disproportionately or unjustified and discriminatory because in this case, the constitutional mandate which is given above and the principle of social justice, which aims to guarantee Constitution and the supremacy of law in General is broken. However, the state should have an opportunity to revise for the future a legislative list of benefits, privileges, guarantees, which compile the content and scope of social rights. The economic slowdown or even decline of economic indicators caused by purely eco-

nomical processes (the decline in world prices for main export goods of Ukraine, the global economic and financial crisis, etc.) and political and geopolitical factors (The Revolution of Dignity, which caused the overthrow of the Yanukovich regime, the annexation of Crimea by the Russian Federation and deployment, financing and military support of separatism and terrorism in Eastern Ukraine, increasing of military budget to finance the needs of the ATO) are circumstances that significantly affect the real possibilities of growth of the Ukrainian economy, and thus affect the filling of the budget and extra-budgetary funds to provide community expenditure funding. The failure to acknowledge this means a deepening of the existing problems in the sphere of human rights protection in Ukraine and the leveling of the values of fundamental rights, which in this case can turn into a paper Declaration, in advance are not enforceable.

Thus, the assessment of the constitutionality of the provisions of paragraph 9 of section I of Law N 76 in the aspect of part 3 of article 22 of the Constitution of Ukraine should take place with taking into account the existence of the grounds for revision of benefits provided to a specific group of the population, and assessment of sanity, proportionality and non-discriminatory nature of the provisions of the Law N 76. Only such a position, which can be considered as common to this category of cases, will allow you to break the deadlock, formed by the contradiction between the imaginary absolutely legally certain content and social rights and their limited economic, political and geopolitical situation, which the state is remaining in.

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СОЦІАЛЬНІ ПРАВА ЛЮДИНИ: МІЖ КОНСТИТУЦІЙНОЮ АБСОЛЮТНІСТЮ І РЕАЛЬНОЮ ОБМЕЖЕНІСТЮ (НА ПРИКЛАДІ ОДНОГО ЗАКОНУ)

На прикладі окремих положень Закону України «Про внесення змін та визнання такими, що втратили чинність, деяких законодавчих актів України» від 28 грудня 2014 р. № 76 автор зачіпає проблему тлумачення ч. 3 ст. 22 Конституції України щодо неможливості звуження змісту і обсягу існуючих прав і свобод при прийнятті нових законів у контексті гарантування соціальних прав і політичної та економічної ситуації в країні. Аналізуючи природу соціальних прав, практику Конституційного Суду України, міжнародного права прав людини, автор доводить, що тлумачення вказаного конституційного припису має ґрунтуватися на визнанні існування у законодавця підстав для перегляду, у тому числі у бік зменшення пільг, надаваних певній групі населення, на основі розумності, пропорційності і недискримінаційного характеру такого перегляду.

Ключові слова: соціальні права, соціальна допомога, пільги, обмеження прав людини, зміст і обсяг прав людини.

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СОЦИАЛЬНЫЕ ПРАВА ЧЕЛОВЕКА: МЕЖДУ КОНСТИТУЦИОННОЙ АБСОЛЮТНОСТЬЮ И РЕАЛЬНОЙ ОГРАНИЧЕННОСТЬЮ

На примере отдельных норм Закона Украины «О внесении изменений и признании утратившими силу некоторых законодательных актов Украины» от 28 декабря 2014 г. № 76 автор касается проблемы толкования ч. 3 ст. 22 Конституции Украины относительно невозможности сужения содержания и объема существующих прав и свобод при принятии новых законов в контексте гарантирования социальных прав и политической и экономической ситуации в стране. Анализируя природу социальных прав, практику Конституционного Суда Украины, международного права прав человека, автор доказывает, что толкование указанного конституционного предписания должно основываться на признании существования у законодателя оснований, в том числе для пересмотра в сторону уменьшения льгот, предоставляемых определенной группе населения, на основе разумности, пропорциональности и недискриминационного характера такого пересмотра.

Ключевые слова: социальные права, социальная помощь, льготы, ограничение прав человека, содержание и объем прав человека.