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ПРАВА ЛЮДИНИ І ПОЗИТИВНІ ОБОВ'ЯЗКИ ДЕРЖАВИ

Анотація. На сьогодні ні на міжнародному рівні, ні на регіональному рівні захисту прав людини чітко не зафіксовано що саме означає позитивний обов'язок держав захищати права людини. Так само і в доктрині немає єдиного погляду щодо цієї концепції. Досить тривалий час права людини розглядалися як такі, що породжують так звані негативні зобов'язання держав утримуватися від порушень прав людини. Проте з розвитком міжнародного права прав людини дедалі більшого визнання набуває положення про те, що права людини породжують також позитивні зобов'язання держави вжити активних заходів для забезпечення цих прав. Зазвичай такі зобов'язання випливають з міжнародних договорів про права людини або від тлумачення міжнародних судових органів, які контролюють виконання відповідних міжнародних договорів. Тому надзвичайно важливим для доктрини та практики міжнародного права у сфері захисту прав людини є аналіз позитивних зобов'язань держави, закріплених у міжнародних договорах та практиці міжнародних судових органів. Метою дослідження є аналіз прав людини і позитивних обов'язків держави у контексті діяльності регіональних механізмів захисту прав людини. Серед загальнонаукових методів у роботі були використані метод аналізу та синтезу, метод дедукції, метод індукції, метод прогнозування, метод моделювання, метод аналогії та інші загальнонаукові методи. Ґрунтовне дослідження позитивних зобов'язань держави було б неможливим і без використання спеціальних методів вивчення і пізнання, які включають в себе порівняльно-правовий, історико-правовий, формально-юридичний та структурно-функціональний методи. Зокрема, одним з провідних методів дослідження став порівняльно-правовий метод, за допомогою якого була досліджена практика регіональних механізмів захисту прав людини. У статті надано огляд сучасного тлумачення позитивних зобов'язань держав. Зокрема, дослідження зосереджується на практиці Європейського, Міжамериканського та Африканського судів із прав людини у контексті застосування позитивних зобов'язань держави

Ключові слова: доктрина, соціальні права, Європейський суд, правовий механізм, міжнародне право

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HUMAN RIGHTS AND POSITIVE OBLIGATIONS OF THE STATE

Abstract. *At present, both the international and the regional levels of human rights protection lack an express definition of the positive obligation of states to protect human rights. Similarly, the doctrine lacks a unified opinion regarding this concept. For quite a long time, human rights were considered as such that give rise to so-called negative obligations of states to refrain from human rights violations. However, with the development of international human rights law, it is increasingly recognised that human rights also give rise to positive obligations of the state to take active measures to ensure these rights. Such obligations usually derive from international human rights treaties or from the interpretation of international judicial bodies that monitor the implementation of corresponding international treaties. Therefore, it is crucial for the doctrine and practice of international law in the field of human rights protection to analyse the positive obligations of the state, which are consolidated in international treaties and the practice of international judicial bodies. The purpose of this study is to analyse human rights and positive obligations of the state in the context of regional mechanisms for the protection of human rights. Among the general scientific methods, the study used the analysis and synthesis, as well as deduction, induction, prediction, modeling, analogy and other general scientific methods. A thorough study of the positive obligations of the state would be impossible even without the use of special methods of study and cognition, which include comparative legal, historical and legal, technical, and structural-functional methods. In particular, one of the leading research methods was the comparative legal method, which was used to study the practice of regional mechanisms for the protection of human rights. The study provides an overview of the modern interpretation of positive obligations of states. Specifically, this study focuses on the practice of the European, Inter-American and African Human Rights Courts in the context of applying the state's positive obligations*

Keywords: *doctrine, social rights, European Court of Justice, legal mechanism, international law*

INTRODUCTION

The development of human rights and special mechanisms for their insurance is based on the recognition of an individual as an independent legal entity, as a bearer of international legal rights and obligations. Human rights set limits for the interference of the state supreme power in the life of an individual [1]. Notably, the emergence of positive rights, which in particular include social, economic and cultural rights, is a fairly new phenomenon that appeared and gained its development and spread mainly after the Second World War. At that time, it was widely thought that the greatest threat to a person is caused by the actions of the government and its authorities.

That is why for quite a long time the field of human rights protection was dominated by a liberal philosophy that laid the foundation for civil and political rights. Due to the fact that civil and political rights have appeared first, most states of the world interpreted them mainly as negative obligations, that is, those

according to which the government should refrain from interfering with certain freedoms. However, with the development of international human rights law, states have increasingly realised that for the effective exercise of human rights, the state must adhere to and perform both negative and positive obligations, thereby equating positive and negative obligations. According to G. Hristova [2], the doctrine of positive obligations of the country in the field of human rights was established mainly along with the development of the case law of the European Court of Human Rights, which gained official recognition, international prestige, validity and reliability, as well as regulatory properties. Indeed, the concept of positive obligations of the state in horizontal relations appeared in the case-law of the European Court of Human Rights in the second half of the 1980s and owes its success to the fact that this body constantly promoted it. It also demonstrates that the Convention on Human Rights and Fundamental Freedoms is a living instrument that meets the demands of a changing reality. New sources of threats to the rights and freedoms of the Convention require the Member States to apply new and adequate measures [3].

A. Zavalny also noted that positive obligations are the obligations of the state to take certain actions to avoid violations of rights and freedoms or to enable a person to exercise their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. This, for example, may include the adoption of legislation that would help ensure the exercise of those rights guaranteed by the Convention [4]. Furthermore, positive obligations require various forms of action on the part of states, ranging from an effective murder investigation to protection of peaceful demonstrators from violent attacks by their opponents. The current significance of these obligations is clearly illustrated by the fact that it is the obligation of states to ensure a fair trial for civil and criminal proceedings that has been the source of the vast majority of complaints to the European Court of Human Rights in recent years. Therefore, it is crucial to study the legal basis and content of the key positive obligations [5].

The problem of responsibility of states for the violation of international obligations in the field of human rights was studied by L. Huseynov [6] at the dissertation level. S. Shevchuk studied the concept of positive obligations of the state in the case law of the European Court of Human Rights [7]. For example, Y. Razmetayeva noted that the positive human rights obligations of the state require national authorities to act, take measures to guarantee and ensure the exercise of human rights, their protection and restoration in case of violation. Positive obligations of the state are aimed not only at creating means for the protection of human rights but also at their effectiveness and successful practical application [8].

1. MATERIALS AND METHODS

The main objectives of this study are to analyse the positive obligations of the state in international human rights law. Such obligations usually derive from international human rights treaties or from the interpretation of international judicial bodies that monitor the implementation of corresponding international treaties. In addition, the study focuses on the positive obligations made by the European, Inter-American and African Human Rights Courts. Notably, the study of human rights and the positive obligations of the state was conducted by performing the following steps. First of all, the study analysed international legal provisions regarding the positive obligations of states that were developed within the framework of the UN and regional international organisations for human rights protection. Next, an analysis of the practice of regional courts dealing with human rights issues was conducted. Based on the analysed material, general conclusions were drawn, and prospects and recommendations regarding the positive human rights were presented.

A wide range of scientific methods was used to achieve the goals set in the study. In particular, the study uses both general scientific and special legal methods of scientific cognition, the specific combination of which is determined by the purpose and objectives of scientific research. Among the general scientific methods, the study used the analysis and synthesis method, as well as deduction, induction, prediction, modelling, analogy, and other general scientific methods. A thorough study of the positive obligations of the state would be impossible even without the use of special methods of study and cognition, which include comparative legal, historical legal, technical, and structural-functional methods.

The methodology of the study is based on the general scientific dialectical method. It was used to analyse the essence of the concept of positive obligations of the state. Analysis and synthesis helped in the study of theoretical approaches to understanding the doctrine of positive obligations of the state. The system and structural analysis were used to clarify the key elements of positive obligations of the state and investigate the regional mechanism for the human rights protection. A number of logical methods, namely deduction and induction, were used in the study of regulations that define the positive obligations of the state. The forecasting was used to finalise the findings of the study. The historical legal method was used to highlight the prerequisites and formulation stages of the doctrine of positive obligations of the state. In particular, one of the leading research methods was the comparative legal approach, which was used to study the practice of regional

mechanisms for the protection of human rights. In particular, the practice of the European, Inter-American and African Human Rights Courts was analysed.

The study was based on research activities of Ukrainian and foreign scientists, materials of research-to-practice conferences, seminars, etc. In addition, regional international legal regulations in the field of human rights protection were analysed, which include: the European Convention on Human Rights and Fundamental Freedoms; the American Convention on Human Rights, as well as the African Charter on Human and Peoples' Rights. Thus, using the above-mentioned methods and materials, the problems of human rights and positive state obligations were comprehensively analysed.

2. RESULTS AND DISCUSSION

At present, both the international and the regional levels of human rights protection lack an express definition of the positive obligation of states to protect human rights. Similarly, the doctrine lacks a unified opinion regarding this concept. It is generally recognised that the state has an obligation to ensure the protection, enforcement, and observance of human rights. In other words, human rights protection rests upon the state. Therewith, the obligations, for the violation of which the state can be held responsible, can be distinguished into positive and negative obligations. Positive obligations require the national authorities to act, that is, to take the necessary measures for the defence of a right or to take reasonable and appropriate measures to protect the rights of the individual. In other words, positive obligations are obligations to ensure respect and protection of human rights. In turn, negative obligations relate to the negative duty, that is, to refrain from actions that would interfere with human rights. Some scholars divide human rights into classical and social rights. Classical rights are those rights, to comply with which the government is obliged to waive any actions that may lead to a violation of this particular right (i.e., a negative obligation).

In the case of social rights, the government is obliged to perform certain actions to ensure the enforcement of the right (i.e., a positive obligation). That is, a positive obligation requires state intervention. Notably, the distinction between civil and political rights of the first generation and economic and social rights of the second generation has led to the emergence of a special term, in part because the wording of the International Covenant on Civil and Political Rights is mainly based on the “everyone has a right” model, while the wording of the International Covenant on Economic, Social and Cultural Rights prefers the “Member States undertake” model. The difference in models reflects different approaches. Admittedly, for human rights to be protected in the second case, states cannot merely exercise non-interference, that is, taking a passive approach to human rights would be insufficient for this [9]. As the UN High Commissioner for Human Rights noted, everyone has rights and obligations in accordance with the provisions of international human rights law. The state has primary responsibility, since it must not only respect human rights and respond to them when they are violated but also protect against violations by third parties and create an environment where all rights are respected [1]. The scope of a state's positive obligations is defined by various international treaties, state constitutions, etc. Thus, the fundamental rights stipulated in each international human rights treaty make provision for positive obligations of states.

Notably, in addition to the United Nations, international organisations such as the Council of Europe, the African Union and the Organisation of American States have developed human rights instruments and established bodies to monitor their insurance by member states. For example, one of the most important tools in the European context is the European Court of Human Rights, which decides on the application of the Convention for the Protection of Human Rights and Fundamental Freedoms by states. The Inter-American Court of Human Rights operates within the Organisation of American States, while the African Court of Human and Peoples' Rights protects and promotes human rights within the African Union. Therefore, this study will analyse the practice of the above-mentioned human rights mechanisms. It should be noted that within the framework of the United Nations, the Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948. It proclaimed a list of the following positive rights: the right to property (Article 17), the right to social security and the exercise of social and economic rights necessary for the dignity of a person and the free development of his personality (Article 22), the right to work (Article 23), and the right to education (Article 26). Article 25 recognises the right to a certain standard of living: “everyone has the right to a standard of living appropriate to the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services, as well as the right to security in the event of unemployment, illness, disability, old age or lack of other means of subsistence”.

In addition, a number of positive obligations are also outlined in General commentary No. 3 of the UN Committee on Economic, Social and Cultural Rights, which explains the nature of the obligations of the Member States to the treaty. In particular, Member States wishing to implement in good faith the International Covenant on Economic, Social and Cultural Rights should: 1) take all appropriate measures to implement

economic, social, and cultural rights; 2) make provision for remedies in legislation introducing policies important for the realisation of economic, social, and cultural rights; 3) adopt targeted and effective programmes to protect the most vulnerable groups.

At the regional level, one of the most effective mechanisms for guaranteeing positive human rights consolidated in the Convention for the Protection of Human Rights and Fundamental Freedoms is the European Court of Human Rights, which operates within the Council of Europe. Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms obliges Member States to ensure the rights and freedoms defined by the Convention for anyone within their jurisdiction. As noted by the European Court of Human Rights in the case of *Assanidze v. Georgia* [10], it follows from Article 1 of the Convention that Member States are responsible for any violation of the protected rights and freedoms of anyone within their jurisdiction. In addition, the European Court of human rights notes that the duty to protect human rights is not limited to the obligation “not to obstruct” or “not to interfere”, but also includes the obligation to take measures to protect the rights and freedoms consolidated in the Convention for the Protection of Human Rights and Fundamental Freedoms, that is, this precisely refers to the performance of positive obligations by the state. One of the first cases to address the state's positive obligations and to be examined by the European Court of Human Rights was the *Belgian Linguistics Case*. In particular, the applicants lodged six applications between 1962 and 1964 on their behalf and on behalf of their children, alleging that Belgian language legislation relating to education had violated their rights under the Convention for the Protection of Human Rights, namely Article 8 (family life) in conjunction with Article 14 (prohibition of discrimination) and Article 2 of Protocol 1 (right to education).

To determine whether there is a positive obligation, a fair balance must be struck between the general public interest and the interests of the individual. For example, in 2014, in the case of *McDonald v. Great Britain* [11], the European Court of Human Rights ruled for the first time that states have a positive obligation to provide assistance to elderly people with disabilities with respect for private and family life. Moreover, it held that social assistance services must respect human dignity, otherwise that right might be violated. In this decision, the European Court of Human Rights found that the UK failed to meet its obligations because it failed to draw up a proper care plan for Ms. McDonald. With regard to the right to life, for example, if a police officer (a state body) kills a person without permission, the state will violate its negative obligations not to act in a way that violates that person's right to life. On the other hand, if the police knew that a police officer was not fit to carry a firearm and nevertheless allowed him or her to do so, or knew that the officer (or any other person) intended to kill the victim but did nothing to stop them, then the state also failed to perform its positive obligations to ensure the victim's right to life [12].

That is, positive obligations concerning the right to life and the prohibition of torture encompass general duties requiring states to introduce adequate legal provisions, mechanisms for implementation, and other relevant structures to protect life and physical or mental integrity; operational duties requiring states to take operational measures to protect persons who have a real and immediate risk to life or physical or mental integrity when the authorities are aware or should be aware of the risk; investigative duties requiring states to investigate credible complaints or suspicions of cases of unauthorised loss of life, torture, inhuman or degrading treatment or punishment, including when they can take responsibility of the state for inaction, which was established, in particular, in the case of *Volodina v. Russia* [13].

Notably, the Inter-American Court of Human Rights distinguishes three types of positive obligations of the state: 1) to prevent violations of human rights; 2) to respond adequately (appropriately) to violations; 3) to create conditions for the exercise of rights. For example, in the 1988 case of *Velasquez-Rodriguez v. Honduras* [14] the next interregional court dealing with the protection of human rights is the Inter-American Court of Human Rights. Notably, the classic negativist position that human rights give rise only to negative obligations to refrain from actions that violate human rights was also rejected. On 12 September 1981, Velasquez, a student of the National Autonomous University of Honduras, was detained by civilian-uniformed officers of the National Bureau of Investigation as well as the G2 detachment of the Armed Forces of Honduras, who, without presenting an arrest warrant or other documents in support of their actions, put Velasquez in an unmarked car, drove him away and placed him in a cell of the Division No. 2 of the public security forces located in the capital of Honduras, Tegucigalpa. Velasquez was charged with a political crime and subjected to severe interrogation and torture. Therewith, the Inter-American Court of Human Rights found it proven that between 1981 and 1984, the practice of enforced disappearances existed in Honduras with the full connivance of the authorities, and the Velasquez case is just one example where the government of Honduras has failed to ensure the enforcement and protection of the rights of the victim of this abuse.

Importantly, the Inter-American Court of Human Rights has clarified that a state can violate human rights caused by enforced disappearance, both by activity and inaction. For example, in the latter case, due to

the lack of proper care on the part of the state to prevent a violation [15]. States' obligations under the Inter-American Convention on Human Rights cover the effective investigation and punishment of any violation of the rights guaranteed under the Inter-American Convention on Human Rights. Moreover, if possible, the state should attempt to restore the victim's violated right and pay compensation for the damage caused as a result of the violation of his or her rights. That is, in *Velasquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights interprets the American Convention on Human Rights as generating positive obligations that require state action to actively protect against human rights violations. In addition, in this case, the Inter-American Court of Human Rights recognised a wide range of positive obligations, including the obligation to prevent, investigate, punish, and provide redress for human rights violations, etc.

An important case where the African Court of Human and Peoples' Rights established positive obligations was the case of *Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. The Republic of Mali* [16]. The application was submitted by two Malian Human Rights Organisations – APDF and IHRDA. The applicants alleged that the Civil Code of Mali, adopted in 2011, violated several international human rights treaties ratified by Mali, in particular: the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on the Rights and Welfare of the Child and the Convention on the Elimination of all Forms of Discrimination Against Women. The African Court of Human and Peoples' Rights ruled that the respondent state's Civil Code violated the Maputo Protocol because it sets the minimum age for marriage for men at 18 for men and 16 for women. The Civil Code also allows children over the age of 15 to marry with the consent of their parents. That is, the Civil Code of Mali excluded unprotected girls and teenage girls from early marriage, and also ensured discriminatory protection. The African Court of Human and Peoples' Rights has therefore established a positive obligation to amend legislation in Mali to address the above-mentioned problems. Notably, this was the first decision of the African Court of Human and Peoples' Rights, which concerns the rights of women and the rights of the child in Africa. By this decision, the court imposed strict obligations on states to comply with international human rights standards.

The positive rights imply the obligation of the state to ensure the rights of individuals to education, health, or work by building schools and maintaining a high level of economy. For example, the positive right to education was studied by M. Matskevich [17]; the right to education for refugees was analysed by T. Kortukova [18] et al. The positive right to health through the protection of the right to life has been studied in the case law of the European Court of Human Rights by S. Andreichenko [19]. In this context, the author noted that the positive obligation of the state requires it to create a regulatory framework obliging hospitals, both public and private, to apply appropriate measures to protect the lives of patients [19]. In addition, in the context of the right to private and family life, to ensure a person's right to family life, the state may not only be obliged to refrain from interfering with it, but also positively promote, for example, family reunification or parents' access to their children. O. Yavor [20], L. Yemchuk [21] and others have studied the positive obligations of the state in the context of the right to private and family life in the practice of the European Court of Human Rights. In addition, states should not only refrain from intentionally and unlawfully taking lives, but should also take appropriate measures to protect the lives of anyone within their jurisdiction. G. Hristova studied the positive responsibilities of the state in the context of respect for the right to life [22]. O. Horpyniuk examined the state's commitment to the protection of the right to life and the prohibition of torture [23]. Thus, the subject of positive state obligations is relevant for study, requiring a comprehensive and integrative approach. Human rights are also referred to as “fundamental rights”, which emphasises the fundamental importance of these rights. International human rights law has historically focused on the prohibition of abuse by the authorities. States should not arbitrarily torture, detain, or kill, discriminate on the basis of race or gender, etc. These obligations of the state can be called negative [24-26]. Therewith, today human rights must ensure a decent life for people, making respect for human dignity a fundamental principle of human rights. The need for the effective enjoyment of these rights and, consequently, the effective protection of fundamental rights has led to the identification of an increasing detail and scope of positive state obligations [27].

Positive rights usually include social, economic, and cultural rights. For example, these include the right to healthcare, the right to education, the right to social security, the right to an adequate standard of living, etc. In other words, positive rights are the obligation of the state to take action, while negative rights are a call to ban certain actions or non-interference in them. The term “positive rights” is often used for these basic social, economic, and cultural rights, as they require the state to take positive action to promote the well-being of citizens, rather than just abstaining from action [28-30]. Therewith, social, economic, and cultural rights belong to the rights and freedoms of the 21st century. Notably, the responsibility of states for compliance with and implementation of international human rights standards is beyond doubt. In addition, the applicability of international human rights treaties to states that ratify them is not controversial. In this

context, there is also no doubt regarding the general principle that states are responsible for complying with human rights standards [31-33].

The system of the convention for the protection of human rights and fundamental freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights impose certain positive obligations on the state. This means that the state must actively protect the human rights of persons living within its jurisdiction. In many respects, the above-mentioned international human rights treaties mainly deal with the establishment of restrictions on state bodies to interfere with human rights. In this context, these international treaties mostly define the negative obligations of state bodies, that is, the obligation to refrain from certain actions. However, they also relate to positive obligations, that is, the obligations of public authorities to take positive steps or measures to protect the rights of individuals stipulated in these international human rights treaties.

CONCLUSIONS

For a long time, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights have played key roles in shaping the regional human rights system. The term “positive rights” is often used for basic social, economic, and cultural rights, as they require the state to take positive action to promote the well-being of citizens, rather than just abstaining from action. Therewith, social, economic, and cultural rights belong to the rights and freedoms of the 21st century. The scope of a state's positive obligations is determined by various international treaties in the field of human rights protection. Thus, the fundamental rights stipulated in each international human rights treaty make provision for positive obligations of states.

Therefore, the study provides an overview of the current interpretation of positive obligations of states. In particular, the study focuses on the practice of the European Court of Human Rights in applying the positive obligations stipulated in the Convention for the Protection of Human Rights and Fundamental Freedoms; the practice of the Inter-American Court of Human Rights in relation to the positive obligations consolidated in the American Convention on Human Rights and the practice of the African Court of Human and Peoples' Rights in the enforcement of the positive obligations consolidated in the African Charter on Human and Peoples' Rights. It is also important to note that today, without the doctrine of positive obligations, systems for the protection of regional and universal human rights may be outdated and ineffective.

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