

DOI <https://doi.org/10.24144/2663-5399.2023.1.05>
UDC 340.115

DIRECT, INDIRECT DISCRIMINATION AND SUBJECTS OF CONSTITUTIONAL LEGAL LIABILITY IN THE CONDITIONS OF ARMED CONFLICTS

Oksana Vasylchenko,

Head of the Institute of Law,

Taras Shevchenko National University of Kyiv

Doctor of Juridical Science, Full professor

<https://orcid.org/0000-0002-4464-3708>

Scopus ID:

www.scopus.com/authid/detail.uri?authorId=57207930953

ResearcherID: M-5779-2016

(<https://www.webofscience.com/wos/author/record/37064042>)

o_vasilchenko@ukr.net

Summary

The article clarifies the signs of direct and indirect discrimination in the conditions of armed conflicts and the circle of subjects that bears constitutional and legal responsibility for committing a constitutional offense - discrimination.

The methodological basis of the research is the general methods of scientific cognitivism as well as concerning those used in legal science: comparative law, methods of analysis and synthesis, formal logic, etc. The empirical basis of the research is international documents, decisions of the ECHR, current legal acts of Ukraine, and assessment of Ukrainian and foreign experts.

The norms of the Geneva Convention on the Protection of the Civilian Population in Time of War and the Prohibition of Discrimination are analyzed. It is noted that hostile discrimination is prohibited, and armed conflict is not an exception to such a prohibition. The provisions of the Geneva Convention, which prohibit hostile discrimination against the entire population of all states in conflict, are aimed at alleviating the suffering de facto caused to the populations of states by war. It is established that regardless of which of the states in conflict exercises jurisdiction over the territory and regardless of whether this state exercises legal or illegal control, but if the state's control over a certain territory is effective, this state is obliged to behave with all persons under protection equally, without discrimination; apply such measure or combination of control or security measures as may be necessary in time of war. Non-fulfilment or improper fulfillment of the above-mentioned obligations by the parties to the conflict is a violation of the norms of international law and the customs of war

The article clarifies the signs of direct and indirect discrimination in the conditions of armed conflicts. In order for discrimination during an armed conflict to be qualified as direct, it is not necessary to prove that the persons were in an identical situation - one hundred percent identity cannot be achieved – it is enough that their situations are similar in fundamentally important points. In order to qualify the treatment as exceptional, a sign must be found by which such different treatment in the conditions of an armed conflict can be identified. It is proven that a state party to the conflict, introducing this or that measure or general policy of the state, must assess the consequences of such a measure/policy of the state from the point of view of whether they may have disproportionately harmful consequences for a specific group of persons. There must be a reasonable relationship of proportionality between the means used and the goal that was planned to be achieved, regardless of whether the state carries them out on its territory, or whether it has resorted to extraterritorial behavior and carries out these measures/policies on the territory of another state that is temporarily occupied by it. A state party to the conflict, pursuing a legitimate (legitimate) goal and taking measures to achieve it, must at each stage of their implementation assess and predict what real consequences they lead to. The article emphasizes that on those parts of the territories of one state, over which another state has illegal but effective control, regardless of whether such control was exercised or is being exercised by this other state directly, through the armed forces, or through a subordinate local administration, this other state is considered to have jurisdiction in the specified territory, and therefore bears legal responsibility for its extraterritorial behavior – a violation of the

prohibition of discrimination. It is emphasized that international acts on human rights, international customs do not require a state party to the conflict to treat the population of another state party to the conflict more favorably, but direct discrimination is prohibited – worse treatment of this or that person or group of persons without adequate justification. Direct discrimination in the conditions of an armed conflict occurs when: 1) a person (group of persons) who are in the territory under the jurisdiction of the state are treated in a less favorable way, in comparison with the way others were treated or could be treated persons in a similar situation; 2) the reason for this attitude is that this person has certain characteristics that belong to the category of «protected characteristics». Indirect discrimination refers to different treatment of people in the same situations in the conditions of a military conflict; equal treatment of people whose situations are different in the conditions of war.

The article also proposes to improve the concept of the circle of subjects of constitutional legal liability by distinguishing: 1) the state that has jurisdiction over its entire territory; 2) of a state that exercises illegal but effective control over a part of the territory of another state, regardless of whether such control was carried out or is being carried out directly, through the armed forces, or through a subordinate local administration.

Key words: principle of equality; discrimination; types of discrimination; positive discrimination; constitutional legal liability; sanctions, armed conflicts; occupation; constitutional legal regulation; constitutional offense; state; head of state; parliament; local self-government bodies; executive bodies of state power; person.

1. Introduction

Ukraine is a sovereign and independent, democratic, social, legal state. The norms of the Constitution of Ukraine establish that all people are free and equal in their dignity and rights. Every day, our state makes efforts to ensure that the principle of equality is implemented in accordance with the international obligations assumed by Ukraine (Deshko L., 2018; Kudryavtseva O, 2021). We are talking about Ukraine's obligations under international human rights acts of the UN, and about Ukraine's international obligations in accordance with the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, and under other international human rights acts of the Council of Europe, and about obligations solutions arising from the foreign policy course of Ukraine – integration with the EU (Buletsa S., Deshko L., Zaborovskyy V., 2019). Equally important is the fact that equality is a fundamental value in Ukraine. Therefore, countering and prohibiting discrimination is one of the key issues for both practitioners and legal scholars.

This issue goes hand in hand with the issue of subjects of constitutional responsibility (Bysaga Yu., Deshko L., Nechiporuk H., 2020) for violation of the principle of equality. Russia's full-scale invasion of Ukraine, Russia's occupation of part of Ukraine's territory, systematic mass violations of human rights by civil administrations subordinate to Russia and the military of the Russian Federation on the territory of Ukraine (Deshko L., Vasylchenko O., Lotiuk O., 2023) became the impetus for in-depth complex studies of the problems of the circle of subjects, which bears constitutional and legal responsibility for committing a constitutional offense.

Therefore, the issue of direct and indirect discrimination in conditions of war is relevant, theoretically and practically ripe, as well as the issue of the circle of subjects, which bears constitutional and legal responsibility for committing a constitutional offense - discrimination.

2. Theoretical framework or Literature Review

In the legal literature, the work of Yu. Bysaga, O. Sovgyria, O. Maidannyk, L. Nalivaiko, N. Batanova and other scientists is devoted to the issues of the principle of equality, the prohibition of discrimination, and constitutional responsibility. At the same time, these studies were conducted before the full-scale invasion of Russia on the territory of Ukraine and before Russia's occupation of part of the territory of Ukraine, and therefore these studies do not analyze the issue of the range of subjects of constitutional and legal responsibility in the conditions of armed conflicts. The practice of the European Court of Human Rights and EU law on discrimination are also evolving. In particular, the concept of positive discrimination is undergoing changes (the decision of the European Court of Human Rights in the case «Chapman v. the United Kingdom» and others).

3. Methodology

The methodological basis of the research is the general methods of scientific cognitivism as well as concerning those used in legal science: comparative law, methods of analysis and synthesis, formal logic, etc. The empirical basis of the research is international documents, decisions of the ECHR, current legal acts of Ukraine, and assessment of Ukrainian and foreign experts.

4. Results and discussion

According to Art. 3 of the Geneva Convention on the Protection of the Civilian Population in Time of War and the Prohibition of Discrimination against Persons Who Do Not Take an Active Part in Hostilities, Including Persons from the Armed Forces Who Have Lay Down Their Arms, as well as Those Who Are Hors de Combat Due to Illness, injury, detention or for any other reason, are treated humanely, without any hostile discrimination based on race, colour, religion or belief,

sex, national origin or property or any other similar criteria. To this end, the following actions against the above-mentioned persons are prohibited and will remain prohibited at any time and in any place:

- a) Violence against life and person, including all types of murder, mutilation, ill-treatment and torture;
- b) taking hostages;
- c) insult to human dignity, in particular offensive and humiliating treatment;

(d) Conviction and punishment without prior judgment by a court duly constituted and affording judicial guarantees recognized by civilized nations as necessary.

Therefore, hostile discrimination is prohibited. Armed conflict is no exception.

Moreover, the Geneva Convention establishes safeguards against enemy discrimination in wartime. According to Art. 13 of the Geneva Convention, the provisions of Part II of the Convention apply to the entire population of countries in conflict. Therefore, hostile discrimination is prohibited against the entire population of all states in conflict. These provisions are aimed at alleviating the suffering already caused to the population of the states by the war.

The Geneva Convention on the Protection of the Civilian Population in Time of War and the Prohibition of Discrimination has Part III, «Status of and Treatment of Protected Persons». It contains section I «Provisions common to the territories of the parties to the conflict and to the occupied territories». According to Art. 27 of the Geneva Convention, protected persons have the right under any circumstances to personal respect, respect for their honor, the right to a family, their religious beliefs and rites, habits and customs. They should always be treated humanely and protected, in particular from any act of violence or intimidation, insults and curiosity of the crowd.

Women need special protection against any violation of their honor and, in particular, protection against rape, forced prostitution or any other form of violation of their morals. Subject to provisions relating to health, age and sex, the party to the conflict under whose authority are protected persons shall have the right to treat them all equally, without any discrimination, in particular as to race, religion or political opinion. However, the parties to the conflict shall apply to protected persons such measures of control or security as may be deemed necessary in the conduct of war.

Therefore, regardless of which of the states in conflict exercises jurisdiction over the territory and regardless of whether this state exercises legal or illegitimate control, but if the state's control over a certain territory is effective, this state is obliged to deal with by all persons under protection, equally, without discrimination; apply such measure or combination of control or security measures as may be necessary in time of war.

Chapter VI of the Geneva Convention is devoted to private property and financial resources. Accord-

ing to Art. 98 all internees will receive payments for the purchase of such goods as tobacco, toiletries, etc. Such payments can be provided in the form of credits or coupons for purchases. In addition, internees may receive material assistance from the home state, from protecting states, from organizations that can provide them with assistance, or from their families, as well as income from property in accordance with the law of the detaining state.

According to Art. 98 of the Convention, the amount of material assistance received from the homeland must be equal for each category of internees. For example, if it is a category of «disabled» – the amount of such assistance should be equal for each such person. If it is, for example, the “pregnant women” category, the amount of assistance should be the same for each pregnant woman. In addition, the amount of aid must be equal not only when it is established by the state, but also when such aid is distributed by the withholding state. Therefore, discrimination against internees is prohibited.

Direct discrimination.

Direct discrimination consists in applying different treatment to persons in the same situation without an objective, reasonable justification. That is, we are talking about an illegal difference in the treatment of persons in a similar situation. We emphasize that the similarity of the situation is not the same as 100% identity of the situation. In order for discrimination during military operations to be qualified as direct, it is not necessary to prove that individuals were in an identical situation. It is enough that their situations are similar in fundamentally important points.

In order to qualify the behavior as exceptional, there must be a sign by which such a different attitude can be identified. Thus, the European Court of Human Rights in the decision in the case «D.H. and Others v. the Czech Republic» dated November 13, 2007 noted: «According to the consistent practice of the Court, discrimination means differential treatment, without objective and reasonable justification, of persons who are in relatively similar situations» (§ 175).

At the same time, we focus on the decision of the European Court of Human Rights in the case «relating to certain aspects of the laws on the use of languages in education in Belgium» v. Belgium (merits) of 23 July 1968. In it, the legal position of the European Court of Human Rights is that Article 14 of the Convention does not prohibit a Member State from treating groups of persons differently in order to remedy «actual inequalities» between them. But, in some cases, the failure to attempt to remedy the inequality by means of differential treatment may in itself lead to a violation of Article 14 (§ 44 of the decision of the European Court of Human Rights in the case «Thlimmenos v. Greece»). In addition, the legal position of the European Court of Human Rights is that a general policy or measure

that has disproportionately harmful effects on a specific group can be considered discriminatory, even though it is not specifically aimed at that group, and that discrimination, which is potentially inconsistent with the Convention, may result from a factual situation.

Therefore, the state, introducing this or that measure or general policy of the state, must evaluate the consequences of such a measure/policy of the state from the point of view of whether they may have disproportionately harmful consequences for a specific group of persons. There must be a reasonable relationship of proportionality between the means used and the goal intended to be achieved. The state, pursuing a legitimate (legitimate) goal and taking measures to achieve it, must at each stage of their implementation evaluate and predict what real consequences they lead to.

International acts on human rights, international customs do not require a state party to the conflict to treat the population of another state party to the conflict more favorably (Deshko L., Vasylychenko O., Lotiuk O., 2022). But direct discrimination is prohibited - worse treatment of this or that person or group of persons without adequate justification. For example, direct discrimination is when wives who live in the unoccupied territory of Ukraine cannot obtain from Russia, which is occupying a certain part of the territory of Ukraine, the entry of their husbands into the territory over which Ukraine exercises jurisdiction. This is partly due to the fact that Russia does not allow male citizens of Ukraine to leave the territory of Ukraine temporarily occupied by it for various reasons (in violation of international law to mobilize Ukrainian citizens, take hostages, etc.). At that time, it is easier for women living in the territory of Ukraine temporarily occupied by Russia to leave this territory to the territory over which Ukraine exercises jurisdiction. The existence of discrimination during the conflict can also be evidenced by the situation when Russia treats people who are in the territory of Ukraine temporarily occupied by Russia and are in a similar or similar situation, and such a difference does not have any objective or reasonable explanation.

Direct discrimination during a state conflict is associated with a difference in treatment of persons who are in the territory of a state under the jurisdiction of this state, are in the same situation, when they exercise this or that right, when such a difference does not pursue a legitimate goal and does not ensure reasonable proportionality of the measures taken by the state that has jurisdiction over the territory in which such persons are present and the objective. Direct discrimination in conditions of war occurs when a person (group of persons) who are in the territory under the jurisdiction of the state is treated in a less favorable way, compared to how other persons in a similar situation have been treated or could be treated and the reason for this attitude is the presence of certain characteristics belonging to the category of "protected features" in this person.

Indirect discrimination.

Indirect discrimination or discrimination of the result (de facto discrimination) in the conditions of war consists in the fact that the principle of equality is not realized in practice in relation to individuals. This may be caused by such reasons as the lack of a mechanism for the implementation of legislative provisions regarding, for example, internally displaced persons, sanctions for their violation, traditionally formed social stereotypes, etc. It is not only about different treatment of people in the same situations in the conditions of war, but also the same treatment of people whose situations in the conditions of war are different. Such situations are indirect discrimination in the context of war, since the difference is not in attitude or behavior, but in its consequences, which affect people with different characteristics differently.

The ECtHR's approach to the issue of indirect discrimination contained in the decision in the case «Thlimmenos v. Greece» dated 04/06/2000: «...the right to exercise the rights guaranteed by the Convention on a non-discriminatory basis is also violated if states do not apply, without an objective and justified explanation, different treatment to persons who are in a significantly different situation... The right is not to be discriminated against in the enjoyment of the rights guaranteed by the Convention may also be violated when States, without objective and reasonable grounds, do not apply a different approach to persons who are in substantially different situations».

Indirect discrimination occurs in such well-known cases, when, for example, Russia, in relation to children who are temporarily occupied by it and who have a certain national origin, takes these children to Russia and places them in special schools, as the media has repeatedly reported mass information, their national origin. The Russian commissioner for children's rights in her interviews has repeatedly officially stated that this is being done by Russia for the purpose of re-educating them. Such re-education, as noted by international experts, international public organizations, etc. It is carried out by Russia in order to eradicate from these children the connection and memory of their national origin, traditions and culture, language, etc. These children were forcibly removed, many of them have parents who did not agree to the separation of them from their children, the removal of children by force to Russia, placement in specialized schools, families of Russian citizens. Such actions by Russia are a common practice that has led to discrimination and national segregation, reflected in the side-by-side existence of two separately organized education systems, namely, special schools for children from the territories temporarily occupied by Russia and "normal" schools for the majority of the Russian population.

Jurisdiction over the territory and subjects of constitutional and legal responsibility in the conditions of armed conflicts

Constitutionalist scholars, when considering the issue of subjects of constitutional and legal responsibility, previously did not focus on the aggressor states. Thus, in the textbook on constitutional law by O. Sovgyria and N. Shuklin, they note that the circle of subjects of constitutional and legal responsibility is the state, which must bear constitutional and legal responsibility in all cases when it does not fulfill its officially assumed obligations, if as a result of this damage is caused to anyone; individuals; legislative body of state power; executive bodies of state power (Shyklina N., Sovhiria O., 2019). Scientists emphasize that peoples and nations are not the subjects of constitutional and legal responsibility, even though entire peoples and nations were subjected to repression during the Soviet regime.

According to the constitutionalist scientist V. Fedorenko, the system of subjects endowed with constitutional delictual capacity (delinquents) cannot be fully identified with the system of subjects of constitutional legal relations. The scientist singles out the following circle of subjects of constitutional and legal responsibility: the state, state authorities, local self-government bodies, their officials, political parties and institutions of civil society – public organizations, professional and creative unions, employers' organizations, charitable and religious organizations, bodies self-organizations of the population, non-state mass media and other non-business associations and institutions legalized in accordance with the law (Fedorenko V., 2016).

As for such a subject of constitutional and legal responsibility as the state, we emphasize that not all states exercise jurisdiction over their entire territory. In Ukraine, Moldova, Georgia, some territories are temporarily occupied by Russia. A full-scale war is going on in Ukraine because Russia committed an act of aggression against Ukraine.

No norm of international human rights law can be interpreted as allowing one state to violate its norms on the territory of another state (Polychko T., Bysaga Y., Berch V., Dshko L., Nechiporuk H., Petretska N., 2021). Although not legal, Russia exercises effective control over a number of territories occupied by it in Ukraine, Moldova, and Georgia. In parts of those territories over which it has illegal but effective control, regardless of whether such control was exercised or is exercised directly, through the armed forces, or through a subordinate local administration, Russia is considered to have jurisdiction over the specified territory, and therefore bears legal responsibility for one's extraterritorial behavior - violation of the prohibition of discrimination.

Thus, we propose to improve the concept regarding the circle of subjects of constitutional and legal

responsibility. We propose to single out: 1) states that have jurisdiction over their entire territory; 2) a state that exercises illegal but effective control over a part of the territory of another state, regardless of whether such control was or is being exercised directly, through the armed forces, or through a subordinate local administration.

5. Conclusions

1. Hostile discrimination is prohibited. Armed conflict is no exception.

Regardless of which of the states in conflict exercises jurisdiction over the territory and regardless of whether that state exercises legal or illegitimate control, but if the state's control over a certain territory is effective, that state has an obligation to treat all persons, which are under protection, equally, without discrimination. It is also the duty of such a State to apply such measure or set of control or security measures as are necessary in time of war so that the civilian population is protected and that the prohibition of discrimination is not violated.

2. Similarity of the situation is not the same as 100% identity of the situation. In order for discrimination during military operations to be qualified as direct, it is not necessary to prove that individuals were in an identical situation. It is enough that their situations are similar in fundamentally important points.

In order to qualify the behavior as exceptional, there must be a sign by which such a different attitude can be identified.

3. The state, introducing this or that measure or general state policy, must assess the consequences of such a measure/state policy from the point of view of whether they may have disproportionately harmful consequences for a specific group of persons. There must be a reasonable relationship of proportionality between the means used and the goal intended to be achieved. The state, pursuing a legitimate (legitimate) goal and taking measures to achieve it, must at each stage of their implementation evaluate and predict what real consequences they lead to.

4. International acts on human rights, international customs do not require a state party to the conflict to treat the population of another state party to the conflict more favorably. But direct discrimination is prohibited - worse treatment of this or that person or group of persons without adequate justification.

5. We propose to improve the concept regarding the circle of subjects of constitutional and legal responsibility. We propose to single out: 1) states that have jurisdiction over their entire territory; 2) a state that exercises illegal but effective control over a part of the territory of another state, regardless of whether such control was or is being exercised directly, through the armed forces, or through a subordinate local administration.

Bibliography:

1. **Buletsa, S., Deshko, L., Zaborovskyy, V.** (2019). The peculiarities of changing health care system in Ukraine. *Medicine and Law*, Vol. 38 (3), P. 427–442.

2. **Deshko, L.** (2018). Patenting of medicinal products: the experience of implementation of the flexible provisions of the TRIPS-plus Agreement by foreign countries and the fundamental patent reform in Ukraine. *Georgian Medical News*, № 9, P. 161–164

3. **Deshko, L., Vasylichenko, O., Lotiuk, O.** (2022). Crimean Tatar National-Territorial Autonomy: Regulatory and Legal Guarantees of the Rights and Freedoms for the Indigenous Peoples of Ukraine. *Visegrad Journal on Human Rights*, № 3, P. 24–28.

4. **Deshko, L., Vasylichenko, O., Lotiuk, O.** (2023). Elections, referendums and territorial sovereignty of the state: case of Ukraine. *Iustitia*, 1. URL: <http://iustitia.gov.ge/en/archieve>.

5. **Кудрявцева, О.М.** (2021). Принцип рівності у практиці Європейського суду з прав людини. *Правова позиція*, 1 (30), С. 5–9.

6. **Бисага, Ю., Дешко, Л., Нечипорук, Г.** (2020). Міжнародна безпека, національна безпека, конституційна безпека: теоретико-правові підходи. *Порівняльно-аналітичне право*, № 4, С. 43–49.

7. **Поличко, Т., Бисага, Ю., Берч, В., Дешко, Л., Нечипорук, Г., Петрецька, Н.** (2021). *Верховенство конституційних норм у національній системі права*. Ужгород: ТОВ «РІК-У», 220 с.

8. **Совгіря, О.В., Шукліна, Н.Г.** (2019). *Конституційне право України*. Повний курс: навч. посіб. К.: Юрінком Інтер, 556 с.

9. **Федоренко, В. Л.** (2016). *Конституційне право України* : підруч. / До 20-ої річниці Конституції України та 25-ої річниці незалежності України. К.: Видавництво Ліра-К, 616 с.

References:

1. **Buletsa, S., Deshko, L. & Zaborovskyy, V.** (2019). The peculiarities of changing health care system in Ukraine. *Medicine and Law*, 38 (3), 427–442. [in English].

2. **Deshko, L.** (2018). Patenting of medicinal products: the experience of implementation of the flexible provisions of the TRIPS-plus Agreement by foreign countries and the fundamental patent reform in Ukraine. *Georgian Medical News*, 9, 161–164. [in English].

3. **Deshko, L., Vasylichenko, O. & Lotiuk, O.** (2022). Crimean Tatar National-Territorial Autonomy: Regulatory and Legal Guarantees of the Rights and Freedoms for the Indigenous Peoples of Ukraine. *Visegrad Journal on Human Rights*, 3, 24–28. [in English].

4. **Deshko, L., Vasylichenko, O. & Lotiuk, O.** (2023). Elections, referendums and territorial sovereignty of the state: case of Ukraine. *Iustitia*, 1. URL: <http://iustitia.gov.ge/en/archieve>. [in English].

5. **Kudriavtseva, O.M.** (2021). Pryntsyp rivnosti u praktytsi Yevropeiskoho sudu z prav liudyny [The principle of equality in the practice of the European Court of Human Rights]. *Pravova pozysyia*, 1 (30), 5–9. [in Ukrainian].

6. **Bysaha, Yu., Deshko, L. & Nechyporuk, H.** (2020). Mizhnarodna bezpeka, natsionalna bezpeka, konstyutsiina bezpeka: teoretyko-pravovi pidkhody [International security, national security, constitutional security: theoretical and legal approaches]. *Porivnialno-analitychne pravo*, 4, 43–49. [in Ukrainian].

7. **Polychko, T., Bysaha, Yu., Berch, V., Deshko, L., Nechyporuk, H. & Petretska, N.** (2021). *Verkhovenstvo konstyutsiinykh norm u natsionalnii systemi prava* [The supremacy of constitutional norms in the national legal system]. Uzhhorod: TOV «RIK-U» [in Ukrainian].

8. **Sovhyria, O.V. & Shuklina, N.H.** (2019). *Konstyutsiine pravo Ukrainy* [Constitutional law of Ukraine]. Povnyi kurs: navch. posib. K.: Yurinkom Inter [in Ukrainian].

9. **Fedorenko, V.L.** (2016). *Konstyutsiine pravo Ukrainy* [Constitutional law of Ukraine]: pidruch. / Do 20-oi richnytsi Konstyutsii Ukrainy ta 25-oi richnytsi nezalezhnosti Ukrainy. K.: Vydavnytstvo Lira-K [in Ukrainian].

ПРЯМА, НЕПРЯМА ДИСКРИМІНАЦІЯ ТА СУБ'ЄКТИ КОНСТИТУЦІЙНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ В УМОВАХ ЗБРОЙНИХ КОНФЛІКТІВ

Оксана Васильченко,

Директор Інституту права

Київського національного університету імені Тараса Шевченка

доктор юридичних наук, професор

<https://orcid.org/0000-0002-4464-3708>

Scopus ID:

www.scopus.com/authid/detail.uri?authorId=57207930953

ResearcherID: M-5779-2016

(<https://www.webofscience.com/wos/author/record/37064042>)

o_vasilchenko@ukr.net

Анотація

В статті уточнюються ознаки прямої та непрямой дискримінації в умовах збройних конфліктів та коло суб'єктів, яке несе конституційно-правову відповідальність за вчинення конституційного правопорушення – дискримінацію.

Аналізуються норми Женевської Конвенції про захист цивільного населення під час війни та заборону дискримінації. Зазначається, що ворожа дискримінація є забороненою, а збройний конфлікт не є виключенням для такої заборони. Положення Женевської Конвенції, якими заборонена ворожа дискримінація щодо всього населення всіх держав, які перебувають у конфлікті, спрямовані на полегшення страждань, які *de facto* спричинені населенню держав війною. Виисновується, що незалежно від того, яка з держав, що перебувають в конфлікті, здійснює юрисдикцію щодо території і незалежно від того чи здійснює ця держава законний чи не законний контроль, але якщо контроль держави над певною територією є ефективним – ця держава зобов'язана: 1) поводитися з усіма особами, що перебувають під захистом, однаково, без дискримінації; 2) застосовувати такий захід або сукупність заходів контролю чи безпеки, які є необхідними під час війни. Не виконання чи не належне виконання вище зазначених зобов'язань сторонами конфлікту є порушенням норм міжнародного права та звичаїв війни.

В статті уточнюються ознаки прямої і непрямой дискримінації в умовах збройних конфліктів. Для того, щоб дискримінація під час збройного конфлікту була кваліфікована як пряма – немає необхідності доводити, що особи перебували в ідентичній ситуації – сто відсоткової ідентичності досягти неможливо – достатньо, щоб їх ситуації були схожі у принципово важливих моментах. Для того, щоб кваліфікувати поведінку як відмінне – має бути виявлена ознака, за якою таке різне ставлення в умовах збройного конфлікту можна ідентифікувати. Доводиться, що держава-учасник конфлікту, запроваджуючи той або інший захід чи загальну політику держави, має оцінювати саме наслідки такого заходу/політики держави з точки зору чи можуть вони мати непропорційно шкідливі наслідки для конкретної групи осіб. Має бути розумне співвідношення пропорційності між засобами, що застосовуються, та метою, яку планувалось досягти, незалежно від того чи здійснює держава їх на своїй території, чи вдалась вона до екстериторіальної поведінки і здійснює ці заходи/політику на території іншої держави, яка тимчасово нею окупована. Держава-учасниця конфлікту, переслідуючи правомірну (легітимну) мету і вживаючи заходи для її досягнення, має на кожному етапі їх реалізації оцінювати і прогнозувати до яких реальних наслідків вони призводять. В статті наголошується, що на частинах тих територій однієї держави, над якими інша держава має незаконний, але ефективний контроль, незалежно від того, здійснюється чи здійснюється такий контроль цією іншою державою безпосередньо, через збройні сили, або через підпорядковану місцеву адміністрацію – ця інша держава вважається такою, що має юрисдикцію на зазначеній території, а відтак несе юридичну відповідальність за свою екстериторіальну поведінку – порушення заборони дискримінації. Акцентується увага, що міжнародні акти з прав людини, міжнародні звичаї не вимагають від держави-учасниці конфлікту сприятливішого поведіння щодо населення іншої держави-учасниці конфлікту, але забороненою є пряма дискримінація - гірше поведіння з тією чи іншою особою чи групою осіб без адекватного обґрунтування. Пряма дискримінація в умовах збройного конфлікту має місце, коли: 1) до особи (групи осіб), які перебувають на території, що знаходиться під юрисдикцією держави, ставляться у менш сприятливий спосіб, у порівнянні з тим, як ставилися чи могли б ставитися до інших осіб у подібній ситуації; 2) причиною такого ставлення є наявність у цієї особи певних характеристик, що відносяться до категорії «захисених ознак».

При непрямій дискримінації йдеться про різне ставлення до людей в однакових ситуаціях в умовах воєнного конфлікту; однакове ставлення до людей, ситуації яких в умовах війни відрізняються.

Також в статті пропонується вдосконалити концепцію щодо кола суб'єктів конституційно-правової відповідальності шляхом розрізнення: 1) держави, яка має юрисдикцію щодо всієї своєї території; 2) держави, яка здійснює над частиною території іншої держави незаконний, але ефективний контроль, незалежно від того, здійснювався чи здійснюється такий контроль безпосередньо, через збройні сили, або через підпорядковану місцеву адміністрацію.

Ключові слова: принцип рівності; дискримінація; типи дискримінації; позитивна дискримінація; конституційно-правова відповідальність; санкції; збройні конфлікти; окупація; конституційно-правове регулювання; конституційне правопорушення; держава; глава держави; парламент; органи місцевого самоврядування; виконавчі органи державної влади; фізичні особи.