
SECTION 1

CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

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CONSTITUTIONAL SYSTEM OF PROTECTION OF HUMAN AND CIVIL RIGHTS AND FREEDOMS: THEORETICAL AND LEGAL PRINCIPLES AND THE ROLE OF THE BAR

Ivan Gabani,

*Department of International Law,
Uzhhorod National University
PhD
orcid.org/0000-0003-2929-5343
ivan.habani@uzhnu.edu.ua*

Stepan Kalyniuk,

*Department of Economic Law,
Uzhhorod National University
Candidate of Juridical Science
Scopus ID: <https://www.scopus.com/authid/detail.uri?authorId=58976826800>
orcid.org/0000-0002-6735-9232
stepan.kalyniuk@uzhnu.edu.ua*

Summary

The article is devoted to the study of the constitutional system of protection of human and civil rights and freedoms in Ukraine with a special emphasis on the role of the bar in this system. The author analyzes the current state of human rights mechanisms and reveals a significant gap between constitutional declarations on the rule of law and their practical implementation.

The study substantiates the need for a conceptual rethinking of the structure of state obligations in the field of human rights. It is proposed to move away from the traditional understanding of the triune obligation of “recognition-observance-protection” and consider protection as an independent state obligation. Such differentiation is due to the specifics of the subjects of implementation, the peculiarities of functioning and various mechanisms for ensuring each of these obligations.

Special attention is paid to the role of the bar as an independent institution of civil society. It is proved that the activities of a lawyer do not have a dual nature, but are unique in their essence: by protecting the rights of an individual, a lawyer simultaneously contributes to the strengthening of legality in society. A direct connection has been established between the effectiveness of advocacy and the general level of democratic development of the state.

The author critically assesses the current state of the rule of law in Ukraine, stating that the proclamation of the rule of law in the Constitution does not correspond to the real state of affairs. The main problems that hinder the effective functioning of human rights protection mechanisms have been identified: citizens' distrust of state institutions, violation of rights by government structures, weakness of civil society institutions.

The study is based on a comprehensive analysis of domestic and foreign scientific literature, international documents in the field of human rights, constitutional provisions and law enforcement practice. The results of the study can be used to improve national legislation in the field of human rights protection and the development of civil society institutions.

Key words: constitutional system of protection, human rights, advocacy, state duties, rule of law.

1. Introduction

In the current conditions of the development of Ukrainian statehood, the problem of the effective functioning of the constitutional system for the protection of human and citizen rights and freedoms is of particular relevance. Despite the constitutional proclamation of Ukraine as a state governed by the rule of law and the consolidation of the state's obligation to recognize, observe and protect human rights, an analysis of law enforcement practice shows significant gaps between the declared principles and their real implementation. This problem is directly related to the important scientific tasks of developing effective human rights protection mechanisms and the practical needs of ensuring the rule of law in Ukrainian society.

The relevance of the study is due to the need to rethink traditional approaches to understanding state responsibilities in the field of human rights and to find new conceptual solutions to overcome the gap between constitutional declarations and public practice. Of particular importance is the study of the role of the legal profession as an independent institution of civil society in the system of human rights protection.

The novelty of the study lies in the justification of the need to consider the protection of human rights as an independent state duty, separate from recognition and observance, as well as in the comprehensive analysis of institutional mechanisms for the implementation of this duty with a special emphasis on the role of the legal profession.

The purpose of the study is to develop theoretical and legal principles for the functioning of the constitutional system for the protection of human and civil rights and freedoms and to determine the place of the legal profession in this system.

The objectives of the study:

- to analyze modern approaches to understanding state duties regarding human rights;

- to substantiate the concept of protection as an independent state duty;

- to investigate the role and functions of the legal profession in the system of protection of constitutional rights;

- to identify problems of the practical implementation of human rights protection mechanisms in Ukrainian realities.

The research methodology is based on the comprehensive application of general scientific and special legal methods, including system-structural

analysis, comparative law method, formal-dogmatic approach and methods of legal hermeneutics.

Analysis of recent scientific research shows that the issues of human rights and mechanisms for their protection are actively studied in both domestic and foreign scientific literature.

In the context of the theoretical foundations of human rights, fundamental research was carried out by P. Rabinovich (Rabinovych, P.M., 1992), who developed a general theory of human rights and their legal support, V. Bukach (Bukach, V., 2001), who studied the content of constitutional rights and freedoms of citizens, and V. Tymoshenko (Tymoshenko, V.I., 2006), who analyzed the problems of the relationship between legal and factual equality. A significant contribution to the development of the classification and guarantees of the implementation of human rights was made by M. Antonovich (Antonovych, M., 2000), I. Borodin (Borodin, I., 2001), V. Pohorilko, V. Golovchenko, M. Siry (Pohorilko, V.F., Holovchenko, V.V. & Sirshi, M.I., 1997).

The issues of institutional aspects of human rights protection were studied by D. Byelov and O. Turyanitsa (Byelov, D.M. & Turyanitsa, O.O., 2015), who analyzed the reform of the institutional system in Ukraine, S. Rossokha (Rossokha, S.V., 2015), who studied the role of law enforcement agencies in the mechanism of human rights protection. Of particular importance are the studies of D. Belov and K.-S. Gefner (Byelov, D.M. & Hefner, K.-S.L.) on the institution of the bar as a key element in the development of a state governed by the rule of law, as well as the works of M. Gromovchuk and D. Byelov (Hromovchuk, M.V. & Byelov, D.M., 2022) on humanism as a philosophical and legal category. In the international scientific literature, the works of C. Gearty (Gearty, C., 2020), who proposed a new approach to human rights law, D. Shelton (Shelton, D., 2021), who studied regional systems of human rights protection and their institutional mechanisms, are of considerable interest. O. De Schutter (De Schutter, O., 2019) analyzed the implementation of human rights through international cooperation, while S. Friedman (Friedman, S., 2021) studied the prospects and limitations of national human rights institutions. A comprehensive analysis of the effectiveness of regional systems for the protection of human rights in the 21st century was carried out by C. Heyns and D. Padilla (Heyns, C. & Padilla, D., 2022).

The problems of implementing the principles of the rule of law in Ukraine and ways to solve them were studied by S. Agafonov (Ahafonov, S., 2006), which is

especially relevant in the context of analyzing the gap between constitutional declarations and the practical implementation of human rights.

2. Theoretical principles of the constitutional status of man and mechanisms for the protection of rights and freedoms

In a democratic legal state, a person is the highest social value and acts as a central figure in all spheres of public life - economic, political, social and spiritual and cultural. Each person is characterized by individuality, originality and uniqueness of his qualities. The degree of his involvement in the functioning of the legal state is determined by the available material and spiritual resources for the implementation of subjective rights and conscious fulfillment of legal obligations. The legal status of a person is formed through the consolidation in the legislation of his rights, freedoms and obligations, which create legal opportunities that acquire real meaning through their practical implementation in life.

The opportunities for rights and freedoms are transformed into reality not only through their use by citizens, but also, as noted by D. Byelov - due to the provision by the state of all necessary material, social, spiritual means, protection and defense of these rights and freedoms by the relevant bodies (Byelov, D.M. & Turyanytsya, O.O., 2015, p. 104).

The stability of the concept of protecting the rights and freedoms of man and citizen is ensured by relying on a system of principles that have been tested by scientific thought and social practice. The strength and progressive nature of this concept is formed through the integration of legal, moral, traditional and other socio-regulatory norms. The use of such a comprehensive approach allows us to prevent the dominance of negative legal phenomena in the legal system and to resist the spread of legal nihilism and indifference to law (Gearty, C., 2020, p. 294).

It is worth emphasizing that the constitutional consolidation of the state's duty to protect the rights and freedoms of man and citizen serves as an indicator of the democratic nature of state formation. This duty acquires functional expression through the work of government institutions of all branches of government. State protection of constitutional rights and freedoms of man and citizen from unlawful encroachments and direct violations is a separate stage of the process of their implementation, which arises as a result of the occurrence of certain legal facts. Scientists consider such protection as a specific form of state activity, this activity can achieve significant development and expected effectiveness in resolving human rights claims of citizens only if it is independently systemically and functionally designed (Shelton, D., 2021, p. 124).

Political and economic transformations in our country have led to a reassessment of former social ideas and attitudes. The steps taken to significantly

reduce the social burdens of society and the state are perceived by the population far from unambiguously and entail negative consequences. This situation indicates that social problems have deep institutional roots and separate recipes for neutralizing conflicts in society cannot be dispensed with here (De Schutter, O., 2019, p. 588). At the same time, human rights are designed to contribute to the solution of one of the most important tasks - ensuring the sustainable development of the modern world (Friedman, S., 2021, p. 848), and the real scope of individual rights and freedoms is always some kind of compromise that can be achieved in a given society (Heyns, C. & Padilla, D., 2022, p. 240).

In the legal doctrine, there are contradictory approaches to the implementation of established standards in the field of human rights. Some scholars hold the position that the reality of their implementation depends mainly on the degree of socio-economic development of the state (this is confirmed by the works of V. Bukach (Bukach, V., 2001, p. 28), P. Rabinovich (Rabinovich, P.M., 1992, p. 84) and other researchers). Others express the opinion that human rights and freedoms enshrined in generally recognized principles and norms should be guaranteed to everyone, guaranteed by the constitution of the country and its national legislation (in particular, V. Tymoshenko (Tymoshenko, V.I., 2006, p. 2) and others). Of course, emphasizing the importance of constitutional rights of the individual implies not only their proclamation, but also the ability of the state to actually ensure and guarantee them. This is a key point that determines the real weight of fundamental rights and indicates the level of development of a social and legal state. To ensure the constitutional rights of an individual, the state creates appropriate bodies, organizations and institutions: a law enforcement system, judicial institutions, etc.

In the course of the development of the concepts of the legal status of an individual, which were recorded in the US Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen (18th century), the institution of rights and freedoms has become a fundamental component of constitutional law and the core of the constitutional system. Nowadays, the question is often asked: why deal with human rights when democracy has already won? (Rossokha, S.V., 2015, p. 45), identifying democracy with majority rule. However, as history shows, majority rule can be very cruel towards individuals or various minorities (it was the majority that sentenced Socrates to death, and it can hardly be said that this is a good testimony to the political system of Athens).

Researching diverse aspects of human rights and freedoms is not an easy task. Protagoras' maxim «man is the measure of all things» in a step-by-step history. The concept of human rights has acquired a modern meaning in the course of its development - the «human

dimension», as the participants of the CSCE (OSCE) called a set of issues in the sphere of relations related to human rights (Dokument Kopenhagens'koyi narady Konferentsiyi shchodo lyuds'koho vymiru NBSE (OBSE), 1990).

Thus, the recognition of a person as the «measure of all things» involves the identification of system-forming elements that ensure the effectiveness of the mechanism for protecting this status. A comprehensive solution to the outlined problem, in our opinion, requires consideration of the constitutional system for protecting the rights and freedoms of a person and a citizen as an independent phenomenon. It should be noted that in constitutional and legal science the theory of human rights and freedoms has been developed quite thoroughly and systematically (Bukach, V., 2001; Rabinovych, P.M., 1992; Antonovych, M., 2000; Borodin, I., 2001; Pohorilko, V.F., Holovchenko, V.V. & Sirshi, M.I., 1997). The conclusions obtained by scientists in this field, the systematization of scientific knowledge about the nature and essence of human rights, about the principles of forming a legal status, the classification of human rights – all this stimulates the improvement of human rights mechanisms for the implementation of such rights, the search for appropriate and accessible procedures. By applying these procedures, a person can truly feel like they are, according to the constitutional definition, «the highest social value».

3. The structure of state obligations to protect human rights and the role of the legal profession

According to Part 2 of Article 3 of the Constitution of Ukraine, «human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is responsible to man for its activities. The affirmation and provision of human rights and freedoms is the main duty of the state» (Konstytutsiya Ukrainy, 1996). At the same time, the constitutional use of the word «duty» in the singular with the actual extension of this concept to recognition, observance and protection directs to their comprehensive perception and research. This approach prevailed in the study of the issues reflecting the relationship between the state and the individual regarding the implementation of the latter's rights and freedoms (Hromovchuk, M.V. & Byelov, D.M., 2022, p. 302).

An analysis of domestic law enforcement practice allows us to state that the long experience of studying and practical use of Article 3 of the Constitution of Ukraine in the traditional sense has shown the absence of significant positive developments in the field of human and citizen rights and freedoms. They continue to be violated by the authorities, which generates citizens' distrust of the state and rejection of the initiatives of its bodies, including law enforcement agencies. Such a

development of the situation increasingly distances our state from the standards of the rule of law and weakens it; prevents citizens from realizing themselves as full-fledged participants in civil society and protecting their rights and legitimate interests; creates the danger of a serious, even dramatic, confrontation between Ukraine and its citizens. That is why, in our opinion, in order to prevent this in the future, additional justifications are urgently needed, based on which it is possible to strengthen the coherence of the interests of man (society) and the state, to strengthen constitutional human rights protection mechanisms that create insurmountable legal obstacles to the arbitrariness of power. The most weighty justifications on the studied issues can be identified through scientific understanding of the complex of issues, which can be defined as the constitutional system of protection of human and citizen rights and freedoms and the role of the institute of advocacy in this system.

When a lawyer ensures the protection of human and citizen rights, he does a useful and necessary thing, which is important for both the person and society, since thereby he helps to observe the law, eliminate its violations. Conviction of an innocent person or rejection of a justified claim harms not only the convicted person or the party that lost the civil case. The harm is caused to the entire society, interested in law and order, and not in erroneous court decisions (Byelov, D.M. & Hefner, K.-S.L., p. 108).

The protection of human and civil rights has no grounds for opposing the interests and tasks of the state and its bodies. The activities of a lawyer are not dual in nature. It is unique in its essence: defending the rights and legally protected interests of a person, a lawyer simultaneously acts in the interests of society and the state, contributing to the strengthening of legality. The lawyer, by providing assistance to the defendant in the exercise of his procedural rights, thereby contributes to the correct and comprehensive consideration of the case and the adoption of a lawful, reasoned and fair decision.

Within the framework of the professional duty to protect the rights and interests of their clients, lawyers must play a significant role in the fair administration of justice. Being an active participant in the law enforcement mechanism, occupying an independent place in the justice mechanism, the bar performs (must perform) an important function of public control in this area. This thesis is also confirmed by international documents regulating the scope of activity of the bar. Thus, the Charter of Fundamental Principles of the Activities of European Lawyers of the CCBE defines the role of a lawyer as an indispensable participant in a fair trial, who not only sincerely serves the interests and protects the rights of his client, but also performs such functions in society as the prevention and resolution of conflicts, the resolution of conflicts «... in the further development of the law, as well as

the protection of freedom, justice and the rule of law» (Khartiya osnovopolozhnykh pryntsyviv diyal'nosti yevropeys'kykh advokativ, 2006).

4. The rule of law as a prerequisite for effective protection of human rights and freedoms

It is clear that a lawyer promotes legality and justice when providing any legal assistance. Public legal principles determine the attitude of the legal profession to detected offenses, regulate the interaction of lawyers with clients, and the resolution of a number of other procedural issues. At the same time, the prerequisite for successful legal practice is democracy, legality, respect for human rights, respect for individual freedom, honor and dignity of the person. The prestige of a lawyer and the effectiveness of his activities directly depend on the position of a person in society and the state, on the attitude to the fundamental principles of democracy and legality.

It must be admitted that the proclamation in the Constitution of Ukraine of the presence of a rule of law in our country does not fully correspond to the real state of affairs. According to S. Agafonov, at the current stage of development of our society, the term «rule of law» is widely used. At the same time, some authors proceed from the desire to emphasize that, having declared itself sovereign and independent, Ukraine has simultaneously become a legal state, while others seek to prove that the formation of such a state is a task of a more distant future. According to Art. 1 of the Constitution of our state, Ukraine is a sovereign and independent, democratic, social, legal state. However, modern realities do not always convincingly testify to this (Ahafonov, S., 2006, p. 12).

At the same time, a legal state is a sovereign state that functions in the conditions of civil society and in which the protection of the fundamental rights and freedoms of man and citizen is actually ensured by legal means. It is based on certain principles, the most important of which are the rule of law, the separation of powers, the reality of the rights and freedoms of man and citizen, legality, and the presence of a high legal culture among citizens.

Thus, as already noted, the recognition, observance and protection of the rights and freedoms of man and citizen are the duty of the state. The constitutional principles of building a legal and democratic state have a clearly defined goal - to prevent arbitrariness and lawlessness in relation to a person and a citizen, in particular on the part of the state itself. All these principles stem from the main function of law - to be the bearer and guarantor of human freedom in optimal and reasonable forms. It is just law, based on strict compliance with laws, that is able to maximally express, consolidate, guarantee and thereby ensure, in accordance with the high requirements of civilization, the reality of individual freedom and rights of each person in public life.

5. Conclusions

The study made it possible to establish that the modern constitutional system of protecting the rights and freedoms of a person and a citizen in Ukraine is characterized by a significant gap between the declared principles and their practical implementation. The analysis showed the need for a conceptual rethinking of the structure of state responsibilities in the field of human rights, in particular, the isolation of protection as an independent duty of the state, distinct from recognition and observance. Such differentiation is due to the specifics of the subjects of implementation, the peculiarities of functioning and various mechanisms for ensuring each of these duties, which is confirmed by both theoretical analysis and law enforcement practice.

The study revealed the key role of the bar as an independent institution of civil society in the system of protection of constitutional human rights. It is proven that the activities of a lawyer do not have a dual nature, but are unique in their essence: by protecting the rights of an individual, a lawyer simultaneously contributes to strengthening the rule of law and law and order in society. It has been established that the effectiveness of legal activity directly correlates with the general level of democratic development of the state, adherence to the principles of the rule of law and respect for human dignity, which is confirmed by both domestic experience and international standards.

The results of the study indicate that building an effective system for protecting human rights requires not only constitutional consolidation of the relevant principles, but also the creation of real institutional mechanisms for their implementation. It has been established that the formation of a legal state in Ukraine remains an incomplete process, which requires further improvement of human rights protection mechanisms, raising the level of legal culture of citizens and strengthening the independence of civil society institutions. Prospects for further research are related to the development of specific mechanisms for improving interaction between state bodies and civil society institutions in the field of human rights protection.

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КОНСТИТУЦІЙНА СИСТЕМА ЗАХИСТУ ПРАВ І СВОБОД ЛЮДИНИ ТА ГРОМАДЯНИНА: ТЕОРЕТИКО-ПРАВОВІ ЗАСАДИ ТА РОЛЬ АДВОКАТУРИ

Іван Габані,

кафедра міжнародного права,
Ужгородський національний університет,
PhD (доктор філософії у галузі права)
orcid.org/0000-0003-2929-5343
ivan.habani@uzhnu.edu.ua

Степан Калинюк,

кафедра господарського права,
Ужгородський національний університет,
кандидат юридичних наук
Scopus ID: <https://www.scopus.com/authid/detail.uri?authorId=58976826800>
orcid.org/0000-0002-6735-9232
stepan.kalyniuk@uzhnu.edu.ua

Анотація

Стаття присвячена дослідженню конституційної системи захисту прав і свобод людини та громадянина в Україні з особливим акцентом на ролі адвокатури в цій системі. Автор аналізує сучасний стан правозахисних механізмів та виявляє значний розрив між конституційними деклараціями про правову державу та їх практичною реалізацією.

Дослідження обґрунтовує необхідність концептуального переосмислення структури державних обов'язків у сфері прав людини. Запропоновано відійти від традиційного розуміння триєдиного обов'язку «визнання-дотримання-захист» і розглядати захист як самостійний державний обов'язок. Така диференціація обумовлена специфікою суб'єктів реалізації, особливостями функціонування та різними механізмами забезпечення кожного з цих обов'язків.

Особливу увагу приділено ролі адвокатури як незалежного інституту громадянського суспільства. Доведено, що діяльність адвоката не має подвійного характеру, а є єдиною за своєю суттю: захищаючи права

окремої особи, адвокат одночасно сприяє зміцненню законності в суспільстві. Встановлено прямий зв'язок між ефективністю адвокатської діяльності та загальним рівнем демократичного розвитку держави.

Автор критично оцінює сучасний стан правової державності в Україні, констатує, що проголошення правової держави в Конституції не відповідає реальному стану речей. Виявлено основні проблеми, що перешкоджають ефективному функціонуванню правозахисних механізмів: недовіру громадян до державних інститутів, порушення прав з боку владних структур, слабкість інститутів громадянського суспільства.

Дослідження базується на комплексному аналізі вітчизняної та зарубіжної наукової літератури, міжнародних документів у сфері прав людини, конституційних положень та правозастосовної практики. Результати дослідження можуть бути використані для вдосконалення національного законодавства у сфері захисту прав людини та розвитку інститутів громадянського суспільства.

Ключові слова: конституційна система захисту, права людини, адвокатура, державні обов'язки, права держави.