

The Principle of the Welfare State through the Prism of Legal Positions of the Constitutional Court of Ukraine

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Abstract. The purpose of the article is to analyze the essence of the welfare state as a constitutional principle and manifestations of its social function through the prism of legal positions of the Constitutional Court of Ukraine. The article highlights the development of the positions of the Constitutional Court of Ukraine on the tasks and functioning of the welfare state, which has passed through several stages of its development. Special attention is paid to decisions made under martial law.

The author draws conclusions about the practice of the Constitutional Court of Ukraine on the implementation of social rights, which reveals a significant specificity of the approach to their presentation, which consists, in particular, in: a) the expanded scope of the enshrined social human rights in comparison with other European states; b) the extension to this block of general norms prohibiting "restriction" or "abolition" (Article 22 of the Constitution of Ukraine); c) the necessity of the principle of proportionality between social protection of citizens and the financial capabilities of the state is forced for obvious reasons.

It is emphasized that in recent years, the social function of the state has been significantly modified. Due to the full-scale invasion of the Russian Federation into the territory of Ukraine, the emphasis has shifted, and this, first of all, quite naturally concerns the need to strengthen the social protection of military personnel and their families.

Keywords: welfare state, rule of law, social rights, Constitutional Court of Ukraine, legal positions, social protection, martial law.

Relevance of the topic. A modern civilized state is a manifestation of organizational and legal reality that can be perceived in different planes (or aspects). The main principle of such a state is the rule of law, with all the characteristics that follow from it (protection of human rights, democracy, separation of powers, etc.). However, such a state also has other constitutional principles, one of which is the principle of the welfare state. The connection between the rule of law and the social character of the state is nowadays organic and inalienable, and the study of its dynamic manifestation is relevant, especially for "new democracies".

The purpose of the proposed article is to analyze the essence of the welfare state as a constitutional principle, and its manifestations in law-making and law enforcement activities

through the prism of the jurisprudence of the Constitutional Court of Ukraine (hereinafter - CCU).

Methods of research. The methodological basis of the research is a set of methods of scientific cognition characteristic of legal science. In order to solve the scientific task, the author uses general philosophical approaches, general scientific and special legal research methods (in particular, the following methods were used: dialectical, formal-logical, systemic-structural, historical and legal, formal-dogmatic, and comparative legal). A special place in our research is occupied by the so-called needs-based approach, according to which the essence of social, including governmental, phenomena is revealed by interpreting them as tools for satisfying certain human needs (either the needs of social communities or the needs of society as a whole) (P.M. Rabinovich).

Summary of the main material.

In Ukraine, the principle of social state is declared in Article 1 of the Constitution of 1996. In 2005, the Constitutional Court of Ukraine conceptually defined the social state as a state that directs its policy to the creation of conditions ensuring an adequate standard of living, free and full development of a person as of the highest social value, his life and health, honor and dignity. The adoption and observance of social norms established by legal acts is a constitutional duty of the state [1].

In fact, throughout the years of independence, the social function of the Ukrainian state was a priority. This thesis can be substantiated by indicators in the regulatory sphere and in the legal practice of the state.

1. The 1996 Constitution of Ukraine enshrines a wide range of social rights (about ten), some of which provide for the provision of "free" services by the state in the areas of education and health care. The inclusion of social rights in the Basic Law (at the highest legal level) ensures the stability of these guarantees.
2. The model of the national welfare state is based on comprehensive social legislation, which includes a number of laws of Ukraine, including codified acts in this area (the Labor Code of Ukraine, the Fundamentals of Health Legislation, etc.).
3. There is a comprehensive institutional system to ensure certain standards of education, health care and social protection.
4. The share of budgetary funds allocated to ensure the social function (socio-cultural sphere) of the state has remained consistently high throughout Ukraine's independence [2, p. 158]. And even now - under martial law - despite the fact that defense expenditures have increased significantly (46.96%), the share of expenditures on social services and social protection in the structure of all expenditures of the consolidated budget of Ukraine as of July 1, 2024 is 11.67%, education - 8.05%, health care - 4.94% [3].

An analysis of the development of the positions of the CCU shows that from the very beginning the Court linked the amount of cash payments to the "financial capacity of the state". In 2001, in a case concerning the duration of scientific work, it stated that while the right to a pension, its amount and the amount of the above-mentioned payments may be linked to economic feasibility, socio-economic circumstances, financial capabilities of the

state at a certain stage of its development, the time of adoption of relevant regulations and certain dates from which such cash payments begin, the duration of scientific work (not the amount of the payment) cannot depend on this [4]. That is, the amount of the payment can be reduced (due to insufficient "financial capabilities of the state"), but other quantitative parameters of social legislation (e.g. the length of service) cannot be worsened.

Later, the constitutional jurisdiction repeatedly supported the idea that certain monetary payments are social rights that cannot be revoked. For example, the decision of 11.10.2005 No. 8-rp/2005 expresses the legal position that the state is not entitled to set a limit (ceiling) on the amount of the pension (life support) if such a limit is not established by law at the time of such an attempt. The Court stated that by setting a limit for such payments to judges, the law limits the scope of this right and at the same time reduces the achieved level of guarantees of independence of working judges [5].

Therefore, the Parliament was essentially prohibited in principle from adopting laws that could relate to the amount of any payments from the state budget if it was a question of reducing them, since the latter (payments) were perceived by the Court as human rights.

Subsequently, the CCU confirmed this position several times. In the explanatory part of the decision of 22.05.2008 in case No. 1-28/2008, it provided a more detailed understanding of the concept of "restriction of the content and scope of human and civil rights and freedoms". According to the CCU, "limitation of the content and scope of rights and freedoms" is their restriction. In the traditional understanding of activity, the defining concepts of the content of human rights are the conditions and means that constitute the human capabilities necessary to meet the needs of human existence and development. Human rights' scope is reflected in quantitative indicators of human capabilities, which are reflected in the relevant rights, which are not homogeneous and universal [6].

However, since 2011, the CCU has changed its position on social rights quite dramatically and started to distinguish them from the human rights system.

The new position of the Court was most clearly expressed in the decision of December 26, 2011 in case № 20-RP/2011, the motivational part of which directly states: "The social and economic rights provided by law are not absolute." The mechanism of realization of these rights may be changed by the state, in particular, due to the impossibility of their financial support through proportional redistribution of funds in order to maintain the balance of interests of the whole society. In addition, such measures may be required by the need to prevent or eliminate real threats to the economic security of Ukraine... At the same time, the content of the fundamental right may not be violated, which is a generally accepted rule, as stated by the CCU in its decision of 22.09.2005 ¹ 5-rp/2005 in the case of permanent use of land plots. It is also unacceptable to establish such a legal regulation, according to which the amount of retirement benefits, other social payments and assistance will be lower than the level specified in the third part of Article 46 of the Constitution of Ukraine and will not allow to ensure proper living conditions for a person in society and to preserve his human dignity, which would be in contradiction with Article 21 of the Constitution of Ukraine. Therefore, changing the mechanism of accrual of certain types of social benefits and assistance is constitutionally permissible to the extent that the essence of the content of the right to social protection is questioned. Moreover, the decision recognizes as constitutional the practice of "cutting" social rights at the subordinate level by the Government of Ukraine if the Parliament

grants it the right to "determine the procedure and amounts of social payments on the basis of the available financial resources of the budget of the Pension Fund of Ukraine..." [7].

25.01.2012 p. The CCU confirmed a new line on the nature of social rights. In case No. 1-11/2012 the Court gave an interpretation of a number of constitutional provisions defining the parameters of the welfare state in terms of the following issues: a) whether the state is authorized to establish the content and scope of social payments depending on its socio-economic capabilities; b) whether the state has the right to change the procedure and amounts of existing social payments and assistance financed from the State Budget of Ukraine; c) whether the regulatory and legal acts of the Cabinet of Ministers of Ukraine on social protection of communities are binding for the courts of Ukraine.

The Court outlined the general parameters of a welfare state, pointing out a number of new features (compared to its previous positions): "Ukraine, as a welfare state, recognizes the human being as the highest social value, distributes social wealth in accordance with the principle of social justice and takes care of strengthening civil harmony in society. The main tasks of the welfare state are to create conditions for the realization of social, cultural and economic human rights, to promote the independence and responsibility of each person for his actions, and to provide social assistance to those citizens who, for reasons beyond their control, are unable to ensure an adequate standard of living for themselves and their families" (paragraphs 1 and 2 of item 2.1 of the Decision) [8; cf. 9; 10, pp. 143-144]. As we can see, the above-mentioned features emphasize aspects that do not appear in the text of the Constitution of Ukraine, in particular, "promotion of independence and responsibility of each person for his actions", "provision of social assistance to those citizens who, due to circumstances beyond their control, cannot ensure an adequate standard of living for themselves and their families".

In relation to the above issues, the Court also found that

1. The State's social protection of persons entitled to support in the event of total, partial or temporary incapacity for work, the loss of the breadwinner, unemployment due to circumstances beyond their control, old age and in other cases provided for by law comprises a set of measures which the State takes within the limits of its socio-economic possibilities.

2. Changes in the mechanism of accrual of social benefits and assistance should be made in accordance with the criteria of proportionality and fairness and are constitutionally permissible to the extent that the very essence of the right to social protection is questioned. One of the features of Ukraine as a social state is the provision of social needs in the field of social protection at the expense of the state budget of Ukraine, based on the financial capabilities of the state, which is obliged to distribute social wealth fairly and impartially among citizens and territorial communities and to strive for a balanced budget of Ukraine. At the same time, the level of state guarantees of the right to social protection must be consistent with the Constitution of Ukraine, and the purpose and means of changing the mechanism for calculating social benefits and assistance must be consistent with the principles of proportionality and fairness.

3. State social standards and state social guarantees may be established by the laws of Ukraine and other legal acts, including acts of the Cabinet of Ministers of Ukraine. When deciding cases concerning the social protection of citizens, the courts shall be guided, in particular, by the principle of legality. This principle provides for the application by the courts of the laws

of Ukraine, as well as regulations of the competent authorities issued on the basis, within the powers and in the manner provided by the Constitution and laws of Ukraine, including regulations of the Cabinet of Ministers of Ukraine issued within its competence on the basis and in accordance with the Budgetary Code of Ukraine, the Law on the State Budget of Ukraine for the given year and other laws of Ukraine [8].

Thus, the CCU established that, first, the state has the right to correlate the amount of social benefits with the socio-economic capabilities of the population. Second, the state has the right to change the procedure and amount of existing social benefits and assistance financed from the state budget of Ukraine, taking into account that "the level of state guarantees of the right to social protection must be consistent with the Constitution of Ukraine". Thirdly, changes in the amount of social payments are made "in accordance with the criteria of proportionality and fairness and are constitutionally permissible to the extent that the essence of the content of the right to social protection is questioned". Fourth, changes in the amount of social benefits and assistance may be made not only by the laws of Ukraine, but also by regulatory legal acts of the Cabinet of Ministers of Ukraine, which are subject to application by courts.

Later, the Constitutional Court of Ukraine changed its position on this issue in Decision No. 5-RP/2016, indicating that "granting the Cabinet of Ministers of Ukraine the authority to apply the norms and provisions of Law No. 2453 in a manner and in amounts based on the available financial resources of the State and local budgets, as well as the budget of the Social Insurance Fund of Ukraine, constitutes a narrowing of the guarantees of judicial independence, in particular with regard to financing, which does not comply with the first part of Article 129 of the Basic Law of Ukraine." Moreover, granting the Cabinet of Ministers of Ukraine the power to determine at its own discretion the expenditures from the State Budget of Ukraine for the financing of courts and the activities of judges "violates the constitutional principles of the separation of state powers in Ukraine and poses a threat to the independence of judges, the guarantee of which is the provision of the constitutional right of an individual to judicial protection" [11].

Thus, the principle of the welfare state is conceptually developed in the decisions of the CCU. And here it is worth paying attention to another aspect contained in the Constitution of Ukraine - the 'free' nature of some social services provided by the state. There are several decisions of the CCU on this issue. In particular, in its decision of 4 March 2004 (the case on accessibility and free education), the Court noted the following understanding of the relevant provisions of the Constitution: free means that the costs of providing the educational process in state and municipal general education institutions are borne in full by the respective budgets on a regulatory basis. Free higher education means that a citizen has the right to receive it, in accordance with the standards of higher education, without paying a fee in state and municipal educational institutions on a competitive basis [12].

Even more complicated is the situation in the healthcare sector. In its 2002 decision (the case on free medical care), the Court stated that even if insurance medicine were introduced with corresponding contributions, it would be unconstitutional. Only if such contributions are paid by legal entities does such insurance medicine comply with the constitutional provision that services in state and municipal institutions must be provided "free of charge" [13]. The only way out of this situation seems to be to amend the Constitution of Ukraine.

It is important to note that the social function of the state has been significantly modified in recent years. In connection with the full-scale invasion of Ukraine by the Russian Federation,

the emphasis has shifted, and this naturally concerns, first of all, the need to strengthen the social protection of military personnel and their families. This trend is confirmed by the relevant Resolution of the Supreme Rada of Ukraine of 6 April 2022 No. 1-p(II)/2022, which emphasizes the primary role of the Armed Forces of Ukraine (hereinafter - the AFU) and other formations that "effectively protect the Ukrainian state and the Ukrainian people", states that the supreme state interest is "maintaining a high level of defense capability", and that support for AFU servicemen is "one of the means of expanding the state's defense capability" [14].

The Constitutional Court of Ukraine is of the opinion that "the purpose of legislative regulation in this area is both the comprehensive social protection of servicemen, which compensates for the legal restrictions and service conditions inherent to this category of citizens, and the increase of motivation of the personnel of the Armed Forces of Ukraine in the performance of the tasks entrusted to them in the defense of Ukraine, protection of its sovereignty, territorial integrity and inviolability...". In addition, the subject of legislative regulation of social protection of servicemen includes issues related to the fact that the status of servicemen entails a high risk of injury, impairment of health or even death while performing their duties in defense of the Motherland" [14].

The position that directly links individual and public interests, constitutional rights and duties in accordance with the philosophical and legal postulates of liberal communitarianism also seems important [15]: "Fulfilment by the state of its constitutional obligation to provide enhanced social protection to servicemen, persons liable for military service or reservists is intended not only to ensure the social protection of each of them individually, but also to facilitate the fulfilment by citizens of Ukraine of their duty to protect the motherland - Ukraine, its sovereignty, independence and territorial integrity" [14]. The need to find an optimal balance between the public interest (first and foremost the constitutional value of defense) and the individual rights of each person was also emphasized by CCU Judge V.V. Lemak in his dissenting opinion on the decision in question: 'In times of war, it is unacceptable to draw a sharp contrast between the public (state) interest, relevant constitutional values, on the one hand, and respect for individual human rights, on the other, as has often happened in times of peace.

The perception of the public interest (e.g. defence, national security), which accumulates individual rights and freedoms, is most evident in times of war. For example, restrictions on the movement of citizens (curfews, checkpoints) or even the confiscation of citizens' property for defence purposes are aimed at protecting the most basic human rights and freedoms - the right to life, dignity and liberty (for example, protection from the activities of enemy sabotage and subversive groups). This approach is confirmed not only theoretically, but also by the harsh realities of the defensive war in Ukraine [16].

Developing the above legal positions, the CCU in its decision of 12.10.2022 No. 7-r(II)/2022 ("on social guarantees for defenders of Ukraine") states that "from the content of the Basic Law of Ukraine follows the constitutional obligation of the state to provide citizens of Ukraine serving in the Armed Forces and other military formations, members of their families, as well as persons armed to defend the sovereignty, territorial integrity and inviolability of Ukraine during the aggression of the Russian Federation against Ukraine, which began in February 2014, with the provision of high-level social guarantees in accordance with this status" [17].

In another wartime decision - in the case of guarantees of social protection for civil servants - the CCU stated: "The failure of the state to provide a legislative basis for the operation of an effective legal mechanism for recalculating the amount of pensions, other types of social benefits and assistance, which is the main source of subsistence, in particular due to legislative omissions in the regulation of social relations, indicates the illusory nature of constitutional guarantees of the right to social protection and the violation of a number of constitutional norms and principles." [18]. At the same time, the CCU determines the mechanism of implementation of its decision, taking into account the conditions of martial law: "...in order to reconcile the private interests of the subject of the right to a constitutional complaint and other persons entitled to a pension under Article 37 of the Law of Ukraine "On Civil Service" and the public interest in maintaining the balance of the State budget of Ukraine during the period of martial law in Ukraine... the CCU considers it appropriate to postpone the expiration of the first subparagraph of Paragraph 2 of Section XI "Final and Transitional Provisions" of the Law of Ukraine "On Civil Service" [18]. According to the reasonable opinion of the CCU Judge O.V. Hryshchuk [19], the above is a development of the CCU's position declared in its previous decisions, according to which "in case of a significant deterioration of the financial and economic situation, the declaration of martial law or a state of emergency, the need to ensure the national security of Ukraine, the modernization of the social security system, etc., the state may carry out an appropriate redistribution of its expenditures in order to maintain a fair balance between the interests of the individual and society" [20].

In one of the last decisions on the analyzed issues - in the decision of 22.03.2023 no. 3-r (II)/2023, the CCU "considers that in accordance with the provisions of Articles 1, 3, 8, 21, 28, 46, 48, paragraph 6 of Part One of Article 92 of the Constitution of Ukraine in their interconnection the social state is responsible for protecting human dignity, ensuring a sufficient and decent standard of living and, for this purpose, is obliged to create appropriate and effective national legal mechanisms for the realization of the constitutional rights to social protection and an adequate standard of living of a person and his or her family, In particular, to fully guarantee at the legislative level the subsistence minimum as the minimum standard of basic social protection of a person from poverty, which is inviolable and belongs to the components of the essential content of these constitutional rights in a welfare state, as it is aimed at satisfying the basic human needs for a decent and sufficient standard of living" [21]. In this context, the statement by the head of the Ministry of Social Policy of Ukraine, O. Zholnovych, during a telethon about plans to abandon the subsistence minimum as a basic state social standard, on the basis of which state social guarantees are determined, appears at least controversial [22]. After all, the implementation of such plans requires a number of amendments to the Constitution of Ukraine.

Conclusions:

First, the welfare state is a state based on the rule of law. The concept and the actual formation of such a state in no way deny the main principles of the rule of law, the existence of which is inseparable from the establishment of the "first generation" of human rights - civil and political. The welfare state is a new, progressive stage in the development of the rule of law.

Second, there is certainly a dialectical unity between the concepts of "rule of law" and "welfare state", between the principles of freedom and material equality, between the two

"generations" of human rights, and within the "framework" of this unity certain conflicts and tensions.

Third, based on the practice of the CCU (which is not sufficiently consistent) and the positions of the Constitution and laws, social rights in the national reality are much "broader" compared to their entrenchment in other European countries; there is a general prohibition about "narrowing" and "abolishing" these rights;

Fourth, under martial law in Ukraine, the exercise of the social function is focused on such vulnerable groups as wounded veterans of military service, internally displaced persons, etc. And the state is subject to strict requirements for its functioning, in particular, the unity of public authorities and other institutions in the exercise of the defense function, which is confirmed by the practice of the CCU. And here the opinion of the retired CCU Judge M. Kozyubra is quite correct that "the intention of the state and the entire Ukrainian people to ensure human rights and freedoms and decent living conditions, which is the primary duty of the state according to Article 3 of the Basic Law, as well as the right of every individual to respect his or her dignity, which is enshrined in Article 28 of the Constitution, oblige the state, even in times of war, to ensure social rights, including their judicial protection. Moreover, under these conditions, the consistent fulfillment of its constitutional obligations can increase public confidence in the State, which is an important guarantee of the effectiveness of legitimate expectations - one of the significant indicators of the principle of legal certainty as a component of the rule of law" [23, p. 49].

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