



Izhikov M.Yu.♦

DOI: 10.25108/2304-1730-1749.iolr.2018.57.176-202

“Horizontal” human rights and positive obligations

Abstract: Theory of horizontal human rights is one more attempt to substantiate direct action of international law in sphere of domestic relations. Such attempts presuppose that international norms direct regulate the relations of private individuals (individuals and corporations), create mutual rights and obligations to them.

This theory hides not a bit of threat as it tries to extend a sphere of action of international law due to interfering in an area of domestic relations. Such theoretical ‘expansion’ is carried out by the western states, which, as it known, not frequently avoid commission of international obligations in an area of human rights. USA is a bright sample, which until now has not ratified most part of main agreements on human rights.

Keywords: ‘horizontal’ rights; international law; positive obligations; person; state; Universal Declaration of Human Rights of 1948; American Declaration of Human Rights and People of 1981; Convention on Protection of Human Rights and Fundamental Freedoms of 1950; European Court of Human Rights; Inter-American Court on Human Rights.

Acute theoretical and practical nature has become the issue of the scope of international human rights law. It concerns the range of actors in the industry. By other words, problem is posed like this: who are obligations on observance of human rights addressed to, which provided by the sources of international law of human rights? [1, p. 57-62].

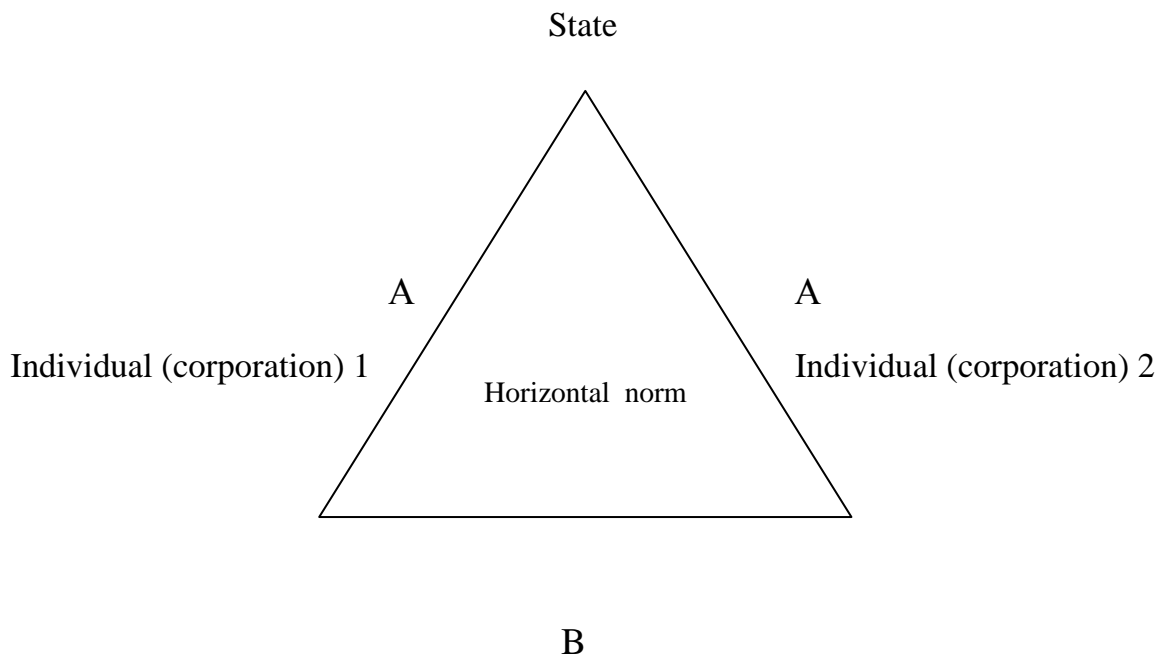
♦ **Izhikov Maksim Yuryevich** - PhD in Law, a lawyer, Moscow, Russia. E-mail: office@izhikov.com



Until recently time there was common recognized an imagination about the fact that international law of human rights entrusts on state the obligation on observance and ensuring certain human rights, wherein does not regulate directly domestic relations of public ('vertical') character between an individual and state. That is it was talking about the fact that international law only creates obligations for the states, which in further should be realized by the states to available means in national level. Moreover a doctrine of international law proceeded from the fact that the norms of international law of human rights do not regulate direct 'horizontal' domestic relations between individuals or corporations [5, p. 1]. However the situation began to change in process of development of international law.

In the western legal literature more often are met the attempts to substantiate an existence of 'horizontal' rights in international law of human rights. It seen from analysis of these theories that under horizontal rights are understood by foreign scientists the norms provided by international standards in an area of the rights of individual that directly regulate relations the both between state and individual and domestic relations between private legal subjects (individuals or corporations), creating mutual rights and obligations to them.

At the beginning we should clear determine what horizontal relations are. Speaking about that let us address to an opinion of the British scientist, Professor of Durham University Ian Leigh. He distinguishes as a criterion of determination of horizontal relations presence or absence of legal power at one of the parties of relations. By other words, one is talking about ability to one of the parties of legal relations to change them, for instance, relations between two individuals. When there is no such opportunity and ability to one of the parties it means that we have a matter with horizontal legal relations [7, p. 60].



In the made scheme a letter ‘A’ indicates vertical relations between individuals (corporations) and state, a letter ‘B’ indicates horizontal relations between individuals or corporations. Horizontal rights, on opinion of the western jurists, regulate simultaneously vertical and horizontal relations creating mutual rights and obligations. According to this theory, an individual who possess, for instance, the right to freedom of peaceful assemblies and associations, has right to require of observance of this right not only from state, but also from other individual and legal entity of the state.

Probably, one of the first preconditions of horizontal understanding of human rights became an imagination about obligations of an individual to a society and state. So, provision of clause 1 of Article 29 of Universal Declaration of Human Rights of 1948 establishes that “everybody has obligations to society, in which is only possible free and comprehensive development of his personality”.

We should note that concretization of international obligations of a person have more concerned of the regional level. In this connection it is necessary to consider some regional sources.



American Declaration of the Rights and Duties of Man of 1948 that adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948 enshrines in Articles 29-38 the duties of individual to society: to receive an elementary education, to work, to obey the law, to serve the community and the nation, to pay taxes, duties with respect to social security and welfare, to refrain from political activities in foreign countries.

African Charter on Human and People's Rights of 1981 proceeds from the fact that every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community (cl. 1 of Article 27). Articles 28-29 of the Charter says that 'Every individual shall have the duty to respect and consider his fellow beings without discrimination; and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; to serve his national community by placing his physical and intellectual abilities at its service; not to compromise the security of the State whose national or resident he is; to preserve and strengthen social and national solidarity, particularly when the latter is strengthened; to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law; to preserve and strengthen positive African cultural values; to pay taxes.

Duties of individual to state and society are the element of public (vertical) legal relations inside the state. These relations, in opinion of the followers of the theory of horizontal human rights are directly regulated by international law. However, these scientists go further and put question about the fact whether the direct action of the norms of international law of human rights is also disseminated onto the horizontal domestic relations.

In respect of the rights stipulated by the Convention on Protection of the Rights and Fundamental Freedoms of 1950, this issue was a subject of special



consideration in Strasbourg. European Court of Human Rights (hereinafter, the ECHR) noted that in certain situations, first of all connected with Article 8 of the Convention, the states-members must protect positive rights of individuals, and not only to refrain from interference in their rights. In some cases the ECHR points out that the state must be responsible for the fact that it would not notified the legal act of an individual who violated realization of conventional rights other person. The Court also concluded that respect to Article 8 of the Convention can cause the complex of the measures directed to protection to private life, even in sphere of relationships between the individuals themselves [7, p. 72].

As confirmation of the horizontal character of the rights enshrined in the Convention on Protection of Human Rights and Fundamental Freedoms of 1950 is considered to be examined by the TCHR case of Pla and Puncemau v. Andorra. Particularity of this case is that it was not connected with discrimination by the state. The point was about discrimination will of the ancestor [2]. The ECHR believed that national courts had to be seen a discrimination in the will of an ancestor. And if they did not do that then they had made a judicial deprivation of adopted child to rights of inheritance, i.e. violated Article 14 of the Convention. The Court noted that there is no discrimination in the law of Andorra, but such was the interpretation of disposition of the will. Wherein, the decision of the ECHR the disposition of the will was not indicated as a subject of assessment of the European Court, and opposite, is recognized an exclusive object of interpretation of national court. Two important conclusions come from this decision: 1) the ECHR has interfered in the rules of interpretation of private legal documents applied by a national court; 2) the ECHR created a precedent of application of the Convention to relations of the private persons [6, p. 468, 478].

Above-stated practice of the ECHR says that execution of discriminatory a will might be a violation of the Convention. This is used as confirmation of the horizontal character of rights stipulated in the Convention [6, p. 10]. At the same



time, the next moment remains unresolved. If provisions of the Convention are the horizontal ones then its rule about necessity limitations of man's rights in democratic society should also be the same. So, the reasons to restrict human rights can be emerged to the both the state and individual. In this connection, an issue about what namely limitation measures should be recognized as necessary is to be corrected.

Special international rules also dedicated to the horizontal human rights. In 2003 the UN Commission on Human Rights introduced for consideration two documents that able to re-design the law of human rights into horizontal plane: private subjects will bear responsibilities to individuals and society. The first document is a Project of Declaration on social responsibility of man. Second one is the norms on responsibility of transnational corporation and other commercial organizations in respect of human rights. The Commission had no time to approve them before its replacement by the Council on Human Rights in 2006. The Council did not consider these documents.

The draft of the Declaration determines social responsibilities of person, organization, group, professional category, official authorities (Art. 4). Referring to Article 29 of the Universal Declaration of Human Rights of 1948, the Project establishes that every individual is obliged to participate in protection and promotion all human rights recognized in this society and for these purposes to cooperate with the state (Art. 6). The document provides the wide-ranging list of duties of an individual among which are: to make contribution in ensuring the fact that a process of protection and promotion of human rights in international level will be performed with respect to aims and principles of the UN Charter (Art. 9); to exercise his rights and freedoms with care and respect to the rights of other persons, to security of society and its moral (Art. 12); to protect his family, social group, society in whole (Art. 13); to care on environment (Art. 15); to work (Art.



24); to develop his intellectual, spiritual, physical and emotional abilities (Art. 25) etc.

Norms on responsibility of transnational corporations and other commercial organization in respect of human rights enshrine the duties on protection of human rights in international and national levels (Art. A); ensuring of equal possibilities and absence of discrimination (Art. B); refrain from crimes against man and other violations of humanitarian law (Art. C); observance of labour rights (Art. D); observance of the norms of national law and respect of sovereignty (Art. E); care on consumers and environment (Art. F, G).

Special work of John Knox, Professor of an American University Wake Forest dedicated to studying of the two abovementioned documents. The author divides the duties of man into the two groups: 1) backward duties and 2) correlative duties [5, p. 2-3].

Backward he calls those duties, which individual has to the state and society, for instance, the duty to obey to the law of the state. In opinion of J. Knox, though these duties might be seemed the horizontal, in reality they are vertical ones as are charged with the state that acting behalf of society. They correspond to the vertical duties to the state to promote and protect human rights. Backward duties are able to undermine human rights as states can use them balanced against its duties to individuals. Due to this danger international law of human rights tries to avoid a fixation of the list of backward duties and restrains the state from their usage as a pretext to restrict human rights.

According to position of J. Knox, correlative duties indicate to man to respect the rights of other people. These duties are really the horizontal as they emerge between subjects of the one legal level. Moreover, the correlative duties attribute to further development of human rights. However international law of human rights does not enshrine them in details, having expected that the states themselves must protect human rights from violations at side of other private subjects. International



law leaves detailing and ensuring of these duties to the states. The correlative duties might be presented in form of pyramid, in lower level of which interference of international law is minimal and on upper one is maximal.

Idea on the horizontal human rights might be met in national level in the constitutions of some states of the south part of the Pacific Ocean. So, for example, cl. 1 of Article 21 of the Constitution of Fiji Islands indicates that the Bill on Rights connects: a) legislative, executive and judicial branches of power, b) all persons doing public work. The last clause testifies on refusal from direct ‘vertical’ approach in an area of human rights.

Papua New Guinea and Tuvalu directly enshrined the horizontal human rights. According to par. 3 of the Article 34 of the Constitution of Papua New Guinea, every law is applied between individuals, equally like between state bodies and individuals, and also in respect of corporations and associations, except the cases that directly stipulated by the Constitution. Similar provision stipulated in par. 1 of Article 12 of the Constitution of Tuvalu.

Clause 2 of Article 8 of the Constitution of South Africa Republic contains the same norm. It says that human rights legally bind the physical persons and organizations, what is more if it is possible with considering of the nature of these rights and subsequent upon their duties.

We should note that the vertical and horizontal approaches to human rights in domestic level are the extremeness. In practice there are exist many intermediate options. Therefore in pure form the vertical or horizontal approaches are the great rarity.

Adjunct-Professor of University Queensland (Australia) Jenifer Corrine citing Murray Hunt distinguishes additionally: 1) indirect horizontal approach (individuals cannot make measures against other individuals in the basis on violation of the provisions on human rights, but courts might be guided in their practice by values containing in these provisions); 2) application of human rights



to entire law (all laws subordinated to fundamental human rights; relations between private persons lose its private character, when fall under direct regulation of national law; at this stage the state like a lawmaker is obliged to act so that to protect human rights stipulated in constitution) [4, p. 3-4].

Existence of the horizontal human rights is tried to prove also by national judicial practice, including by the case of Kadic which received a blazed of publicity [3].

Thus, recognition of the horizontal human rights in modern conditions are tried to remove from international and national enforcement. However this recognition creates a number of theoretical and practical problems.

Theory of the horizontal human rights is one more attempt to substantiate direct action of international law in sphere of domestic relations. Such attempts presuppose that international norms direct regulate the relations of private individuals (individuals and corporations), create mutual rights and obligations to them.

This theory hides not a bit of threat as it tries to extend a sphere of action of international law due to interfering in an area of domestic relations. Such theoretical 'expansion' is carried out by the western states, which, as it known, not frequently avoid commission of international obligations in an area of human rights. USA is a bright sample, which until now has not ratified most part of main agreements on human rights. Wherein, the countries of the West are aspired to develop the international rules that allow them to render international pressure in other states. This is confirmed by a Report of International Commission on Intervention and State Sovereignty 'Responsibility for Protection' of 2001, in which it was substantiated an idea about the fact that the state grossly violates the rights of its citizens then other members of international community are obliged to begin humanitarian intervention against this country. In the basis of the Report is the same idea on direct act of international right in an area of domestic relations.



Horizontal rights do not exist in international of human rights. Being international norms, the provisions of international law of human rights objectively deprived an opportunity to regulate domestic relations as between the state and individual so and between private persons.

However, said above does not mean that states are free from 'positive' duties in an area of human rights protection. These duties indicate to the states to create necessary conditions for human rights protection even in private relations.

Theory of positive duties appeared in the practice of the ECHR, later it was accepted by Inter-American Court of Human Rights (hereinafter, the IACHR), where it went formation in several stages [8, p. 2].

The first case of the IACHR, in which got a question of applicability of fundamental human rights in private relations, became the case *Velasquez Rodriguez v. Honduras* 1987. In decision the Court pointed out that states-members of American Convention on Human Rights of 1969 is obliged to respect and guarantee the rights stipulated in the Convention, therefore any violation of these rights is the act for which the state is responsible. The Court stated that the state might be called to international responsibility not for the act, but for absence of proper efforts to prevent the violations or reacting on it. If state apparatus remains violation unpunished and does not restore a victim in full extent in violated rights in shortest time, the state is also considered to be as violated its obligations.

In case *Godinez Cruz v. Honduras* of 1989 the IACHR noted that the state bear double obligation. The first is to respect rights and freedoms recognized by the American Convention of 1969. The second is to guarantee free and full exercise of the fundamental rights to everybody in the frames of its jurisdiction. Performance of the second obligation does not end with issue of normative instruction, but requires such further behaviour from the state, which would provide existence of effective guarantees of free and full using human rights.



In course of further judicial practice of the IACHR concluded that obligation to respect fundamental human rights provided by the Convention is entrusted not only in state power, but also acts in relations between private individuals (case Peace Community of San Jose).

Culmination in development of considered doctrine became consultative conclusion of the IACHR no. OC-18/03 of 17.09.2003. It (§ 140) says that “positive obligation of the state to ensure effectiveness of protected human rights causes legal consequences in respect of third persons (*erga omnes*). This obligation was developed in the legal works, especially in theory *Drittwirkung*, according to which fundamental rights should be observed the both in the public power and individuals in respect of individuals.

Unlike there is a sense to argue with the fact that fundamental human rights should be also respected in private relations. So, in labour relations of private character an employer is obliged to respect the rights of his workers. However, it is obviously that if he does not do it then does not violate thereby international law of human rights. Situation receives other shade if the violations of workers’ rights would be caused by the consequence of the fact that the state does not provide effective protection of their rights, does not undertake of proper efforts to prevent violations or reactions on them. In this case, according to the theory of positive obligations, the state will bear international legal responsibility, even if a private person acted as direct offender.

Since the positive obligations have addressed to the states, they have public-legal nature and as such do not regulate directly the private relations. However they motivate the state maximal effectively to protect the rights of dependent persons including in private relations. This distinction from previous considered theory of the horizontal rights has a principle character.

Thus, the theory of positive duties explains a mechanism of international obligation of the state for the violations caused by behaviour of the private



subjects. We believe that so named 'horizontal' human rights should be interpreted just through the theory of positive duties of the state.

References

1. Malinovski O.N., Kubrak V.S. K probleme absolyutizatsii prav cheloveka i ikh ogranicheniyi v kontekste Konventsii o zaschite prav cheloveka i osnovnykh svobod 1950 g. i rossiyskogo zakonodatel'stva [To the problem of absolutisation of human rights and their restrictions in context of the Convention on Human Rights and Fundamental Freedoms of 1950 and the Russian legislation]/ Obschestvo: politika, ekonomika, pravo [Society: policy, economics, law]. Issue no. 9, 2018, pp. 57-62.
2. Decision of the European Court of Human Rights of 15.12.2004 on case Pla and Puncernau v. Andorra. [Internet resource]. Available at: <http://cmiskp.echr.coe.int>
3. Decision of the Second District Appeal Court of the USA of the case Kadic of 1995 [Electronic resource]. Available at: <http://www.tjssl.edu>.
4. Corrin Jennifer. From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific // Social Science Research Network. 2008. [Internet resource]. Available at: <http://www.ssrn.com/abstract=1287450>.
5. Knox John. Horizontal Human Rights Law // Social Science Research Network. 2007. [Internet resource]. Available at: <http://ssrn.com/abstract=1014381/>
6. Kay Richard. The European Convention on Human Rights and the Control of Private Law // European Human Rights Law Review. - 2005. - Issue 5.



7. Leigh Ian. Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth? // *International and Comparative law quarterly*. – 1999/-vol. 48, part 1.

8. Mijangos y Gonzales Javier. The doctrine of the Drittwirkung der Grundrechte in the case law of the Inter-American Court of Human Rights // *Social Science Network Research*. [Internet resource]. Available at: <http://www.ssrn.com/abstract=1371114>