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HUMAN RIGHTS. BETWEEN A PHILOSOPHICAL AND A LEGAL PERSPECTIVE

Summary. The field of Human rights is a branch connected to morality and law. Human rights refer to freedom, equality, security of human dignity, life and property. They are understood as moral authority which belong for everybody, irrespective of sex, race, flesh-colour, language, belief and religion, political opinion, national and social origins, adherence to a national or ethnical group, property, gender or a different social status. In a legal terminology, the notion of human right is used to refer to a group of subjective laws formulated in national constitutions and international human-right's documents.

Keywords: human rights, human dignity, morality, law.

PRAWA CZŁOWIEKA. POMIĘDZY FILOZOFICZNYM I PRAWNYM PUNKTEM WIDZENIA

Streszczenie. Dziedzina praw człowieka jest gałęzią połączoną z moralnością i prawem. Prawa człowieka odnoszą się do wolności, równości, zabezpieczenia ludzkiej godności, życia i mienia. Są one rozumiane jako autorytet moralny, który przysługuje wszystkim, bez względu na płeć, rasę, kolor skóry, język, wyznanie i religię, poglądy polityczne, pochodzenie narodowe i społeczne, przynależności do grupy narodowej lub etnicznej, majątek, płeć lub inny status społeczny. W terminologii prawniczej pojęcie prawa człowieka jest używane w odniesieniu do grupy subiektywnych przepisów sformułowanych w konstytucjach krajowych i międzynarodowych dokumentów odnoszących się do praw człowieka.

Słowa kluczowe: Prawa człowieka, godność ludzka, moralność, prawo.

Introduction

The field of Human rights is a branch connected to morality and law. Human rights refer to freedom, equality, security of human dignity, life and property. They are understood as moral authority which belong for everybody, irrespective of sex, race, flesh-colour, language,

belief and religion, political opinion, national and social origins, adherence to a national or ethnical group, property, gender or a different social status. In a legal terminology, the notion of human right is used to refer to a group of subjective laws formulated in national constitutions and international human-right's documents. On one side, a specificity of norm that guarantees humans right consists in too abstract formulations, uncertainty and vagueness of concepts what consequently questions their extension. On the other side, a condition of their applicability presupposes the existence of clearly stated legal norms. Due to this indeterminacy human right must be subject to an interpretation which is then legally obligatory. However, classical methods of interpretation (linguistic or grammatical, logical, systematic, historic or genetic) have only restricted use in the exposition of human rights. For, if concepts like human dignity or a security of physical integrity are parts of a norm, it is difficult to delineate boundaries of their defence in a particular case¹. Moreover, the problem of human rights gets complicated nowadays. We witness a certain change of view towards the status of human rights in contemporary democracy influenced by new threats, terrorism and organised criminality. It needs more useful tools of security of society, even regardless of the price of restriction of human right of individuals and groups. For this reasons, it is not always clear what the concrete content and extension of a given law is; also, it is not clear who its receivers are; most importantly, it is not clear which commitments follow from it and who is committed to it. Therefore, to find a balance between conflicting interests is for authorities a very difficult task.

The differentiation between moral and legal rights as two separate categories of human rights is important for understanding their basis and application. This paper aims at philosophical analysis of the notion of human rights. It tries to identify particular aspects of the concept. In the first part, we focus on the relationship between human right as moral authority and their interpretation in law. We will go through the views of selected contemporary legal philosophers, namely E.W. Bockenfender, R. Dworkin and R. Alexy. We have for it that they pave way to contemporary discussion about the interpretation of basic rights. In the second part, we ask whether there exist absolute right which cannot be broken under any circumstances and what consequences follow from such a feature.

Human Rights as the Constitutional Principles

Since the expansion of human rights in Europe in early 70's, the demand for a correct theory of human rights and its implications in sphere of basic laws, have increased. The co-existence of various European and international agreements generates the disagreement

¹ Ku klasickým výkladovým metódam v práve pozri: Gahér F.: Interpretácia v práve. Filozofia, 2015, roč. 70, č. 8, s. 647-658.

between opinions regarding the concrete and focused application of human rights. In this context a majority of constitutional lawyers points at a paradox based on a tension between the nature of constitution on one side, paradigm of direct application on the other. The nature of Constitution is general, incomplete and contains basis rights and liberties which require prior concretisation in order to be executable in applied law. The paradigm of direct application presupposes the existence of applicable norms². A specific nature of basic rights leads some authors to the conclusion that the interpretation of basic right should follow from overall context of a given Constitution. It has a close connection to character of the state and mirrors its constitutional identity. According to E. W. Bockenforde, a famous German theoretician of law and previous federal constitutional judge, legal interpretation and application of human rights express certain jurisdictional and interpretational methods. They then reflect not only the codified content of human rights, but also their socio-political context³.

Bockenforde has formulated five theories which aim at interpretation of basic laws. They are the following: the liberal theory; the institutional theory; the value theory; the democratic-functional theory; and the theory of basic human rights in social state. It is clear that since their distinct theoretical postulates, the theories imply different views of interpreters regarding the importance and function of human rights. In practice, this fact is manifested in their different approaches to real problems. This thesis is illustrated by hypothetical example of the freedom of the press. Freedom of the press is one of the basic human rights entrenched in international agreements on human rights.

The liberal model respects the principle of individual laws. The laws guarantee the autonomy of private sphere. From the liberal point of view, the freedom of an individual should be understood as a sphere into which state cannot intervene. An intervention is justified just in case it is both necessary and required for preservation of the freedom of other individuals. The function of basic laws is to secure a free sphere of an individual against the intervention from a public sphere. Such an understanding of freedom implies that the state is not obliged to enable individuals to fulfil the freedom. This also connects to the basic problem of liberal theory of the Constitution. For, it is its relative "blindness" against conditions of realisation of constitutionally guaranteed freedom⁴. For instance, the fact of guaranteed freedom of press in a given state does not mean that there is a broad spectrum of independent press.

² Bližšie pozri: Hollander, P.: *Filosofie práva*. Plzeň: Vydavatelství Aleš Čeněk, 2006, s. 160; tiež: Böckenförde, E.W.: *Die Methoden der Verfassungsinterpretation : Bestandsaufnahme und Kritik*. In: "Neue juristische Wochenschrift : NJW." München : Beck, ISSN 0341-1915, ZDB-ID 2001469. - Vol. 29.1976, 46, p. 2089-2099

³ Ernst-Wolfgang Böckenförde: *Grundrechtstheorie und Grundrechtsinterpretation* In: *Neue juristische Wochenschrift : NJW.*- München : Beck, Vol. 27.1974, 35, p. 1529-1538.

⁴ Böckenförde, E.W. 1974, s. 1531.

The institutional theory offers another view on the function of state. While classical, liberal theory of basic laws secures exclusively subjective right of an individual, institutional theory stresses their objective function. Namely, they prefer to restrict, or negatively delineate, the sphere of state's activity. According to this understanding, basic laws are a primary guarantee of certain institutions. Basic laws are conceived as basic elements of objective order in society. They may include a security of independent justice, autonomy, property, family or free healthcare. In other words, institutional guarantee is understood as constitutional guarantee of public, state, political, religious as well as private institutions. These institutions are so valuable that a legislator decided to secure them against changes from legislators to the extent stated in Constitution. The guaranteed institution might be amended, but can be neither deleted from the body of laws, nor violated in its nature and purpose. Given the above, the freedom of the press is one such institution. This view explicitly defines how the freedom of the press is to be understood. At the same time, it guarantees that media that fulfil the conditions will not be restrained. In fact, this attitude opens various options of legal normalisation as well as creation of new, constitutionally secured, areas⁵. Bockenforde points out at two tendencies in interpretation of human rights in using this theory. First, the theory sustains status quo, meaning that the state is untouchable. The character of the state is determined by what has been institutionally formed and to change the actual social order is problematic. The second tendency rests on the fact that an individual has no constitutional security against what has been prescribed by the state.

Yet another interpretation of basic rights proposes value theory. The basic idea behind this theory is that state is defined as a certain process towards cultural and value society. Basic rights are constitutional elements which enable to reach the aim. As in the institutional theory, value theory takes basic rights as having the character of objective norms. Their objective content is derived from an assumption that human rights secure particular valuable good for society. The prevention of life, physical integrity, property and plurality of attitudes are taken to be important because society is dysfunctional without them. Rights guaranteed by the Constitution then define values which integrate the society. Public interests as a security of public order or morality might overweight a reporter's freedom of the words.

Democratic-functional theory is oriented towards public and political functions of basic rights. This means that the meaning of basic laws rests on them being constitutional factors of independent democratic process. This means that basic rights and liberties are guaranteed so as to enable independent democratic process. Basic rights do not belong to individuals, nor are they means for realisation of individual freedom. They belong to members of society and serve for the security of public interest. This function legitimises basic rights and defines their content. An important aspect of this approach is a so-called functionalization of freedom. This means that the content and extent of freedom is given by the function to secure democratic

⁵ Bockenförde, E.W. 1974, s. 1532.

process. For example, we guarantee the freedom of the press in order to built a common repute. Consequently, entertainment media do not fall under the freedom of the press.

Social democratic state theory tries to overcome the difference between legally guaranteed and real freedom. The basic idea is that more and more people loose social conditions for realisation legally guaranteed liberty. Therefore, they cannot fulfil formally stated freedom. In contrast to liberal theory, this theory takes basic laws as not only having restricting function against the state, but it also commits the state to guarantee necessary social conditions for realisation of real liberty. One feature of such an approach is that guaranteed rights are restricted by financial capacity of the state. In this case, the question of distribution of public goods transforms to the question of priority of basic rights.

Bockenfordef showed that by using particular chosen theories, we create such differences in the content of the Constitution and the content of basic rights, which do not rest on mere nuances, but on substantial differences in constitutional norms.

Human Rights as Triumphs of Political Morality

Since the fact that the admission of an individual's liberty is crucial for human rights, liberalists appear to be the main proponents of theory of human rights. Modern liberal theory of human rights is formulated in *Taking Rights Seriously* by Ronald Dworkin⁶. Dworkin's starting point is a political postulate according to which governments must approach to all their citizens with interest and respect. Every valid discourse about the law must respect this basic postulate. For Dworkin, body of law is not reducible to a system of rules. He argues that law must respect other kinds of standards too, namely principles and politics. Politics are standards which demarcate aims to be reached. As a rule, the aims to be reached are better economic, political or social situation. Principles are standards which should be followed because "they are requirements of justice, fairness, or some other dimensions of morality"⁷. For example, politics is a standard according to which we should decrease the number of car accidents. A principle, on the other side, is a standard that no one can have a profit from his or her unlawful act.

These standards differ from rules in several interconnected respects. Rules either hold or don't. If a rule is valid and conditions for its applicability are fulfilled, its normative consequences must follow. In case of a conflict between two rules, only one of them holds.

⁶ Dworkin, R.: *Taking Rights Seriously*. Cambridge: Harvard University Press, 1978. V tomto texte vychádzam z českého prekladu Dworkin, R: *Když se práva berou vážně*. Praha: OIKOYMENH, 2001 (překl. Zdeněk Masopust), s.116.

⁷ Dworkin, 2001, s. 44.

The second has to be cancelled, or reformulated and supplemented by exceptions⁸. On the other hand, principles delineate the direction towards which the decision should be directed, taking them all into account is a matter of weighing the pros and cons. They cannot be cancelled. They are normative reasons for a particular decision. In case of conflict between two principles the more important one is preferred. Nonetheless, the other one remains valid. This first difference between rules and principles leads to another one. Namely, when using a principle, we take all into account is a matter of weighing the pros and cons.⁹ Rules lack such dimension. For any two conflicting legal rules there is a meta-rule which decides which of the rules is valid.

A particular role is played by principles in so-called hard cases. In these cases courts argue either with principal arguments, or political arguments. According to Dworkin, individual rights, in virtue of their moral nature, act as “trumps held by individuals”¹⁰ because they express the ideal of equality - the rock bottom of liberal doctrine of human rights. Due to this reason basic laws must be prior to public interests and politics. For example, race equality is so strong that it overweighs all the political arguments for race desegregation.¹¹

A drawback of Dworkin’s conception of application of human rights is the question of their interpretation in case of conflict. If two conflicting laws act as triumphs, how, in principle, can we determine which should be preferred by a judge. To rely solely on written legal principle applicable in particular cases might appear as a vague method. Such a method, however, only hardly fulfils requirements of foreseeable decision. For this reason, one of the fundamental problems of interpretation of human rights is to find rational methodology for solving conflicting cases.

The Principles of Optimalization

An important contribution presents Alexy’s *A Theory of Constitutional Rights*¹². Alexy further develops Dworkin’s theory of principles. He takes the theory to be “a key to the solution of the central problems of constitutional rights doctrine”.¹³ Alexy’s theory differs from Dworkin’s theory in one important respect: it forms a methodology of synchronizing conflicting human rights. For Alexy, basic rights are principles, while principles are mere

⁸ Dworkin, 46.

⁹ Dworkin, 49.

¹⁰ Dworkin, s.12

¹¹ Dworkin, s. 129-130

¹² Alexyho *Theorie der Grundrechte* bola vydaná v roku 1986. V tomto texte vychádzam z anglického prekladu Alexy, A.: *A Theory of Constitutional Rights*, Oxford University Press, New York, 2010.

¹³ Alexy, R.: *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2010, s. 44.

“optimization requirements.”¹⁴ They should be always fulfilled in the highest possible way and in factual and legal circumstances. The result of their application is therefore known only in a concrete situation since they are balances with other principles. In case of conflict with, say, public interest those principles are optimized via mutual balancing. The higher is the degree of intervention into one principle, the more important in the fulfilment of another one. This means that balancing is a specific form of satisfaction of those principles.

The basic form of proportionality test consists of three level structure proposed by Alexy: the principle of appropriateness via which we wonder whether a given tool is suitable to reach its aim when intervening into a basic law; the principle of a requirement via which we wonder if there is not another appropriate tool the use of which would eliminate the intervention into a basic law;

The principle of proportionality in a narrow sense which balances conflicting laws, principles and values¹⁵. The test is applied primarily in constitutional law, although its content is still a matter of dispute. The clearest examples of the test at work are those laws which can be constitutionally restricted. The typology of interventions is specific to every basic law and cannot be generalized. Alexy claims that balancing is not a process the result of which can always be rationally considered. Nonetheless, it offers solutions of some conflicting cases: “a class of these cases is interesting enough to justify balancing as a method.”¹⁶

For Alexy, basic laws do not present categorical rules with a strong normative power. Rather, they are principles which can always be disputed, balanced and we can get rid of them. However, Alexy claims that the structure of balancing is rational and the theory of basic laws should be able to answer whether basic laws are to be balanced; or there is an untouchable, hard core of crucial values none which cannot be weighted at all.

The idea of Hard core of human rights

One of the arguments against the application of the principle of proportionality is that it threatens a specific nature of human rights. J. Habermas formulates two objections. The first concerns the untouchable character of human rights, The second aims at irrationality of the whole process of balancing. Habermas criticises reduction of human right into interests which are subjects to pragmatic considerations of courts. According to him, by applying of

¹⁴ ALEXY, R: A Theory of Constitutional Rights..., s.47.

¹⁵ K testu proporcionality v podaní Ústavného súdu ČR pozri: Holländer, P.: Filosofie práva 2006, s.139-173; tiež Kosář, D.: Kolize dvou základních práv judikatuře Ústavního soudu ČR. Jurisprudence 2008, č.1, s.7-9, tiež: Ondřejek, P.: Intenzita přeskumu základních práv a svobod v ústavním právu I: Gerloch, A., Šturma, P.: Ochrana základních práv a svobod v proměnách práva na počátku 21.století v českém, evropském a mezinárodním kontextu. Praha: Auditorium, s. 261 – 268.

¹⁶ Alexy, 2010, s. 402

human rights as constitutional values comparable to any other values we lose their normative character. In practice, any other interest can then outweigh human rights as degraded to one of many public interests.¹⁷ Due to the method of balancing, human rights are degraded on the level of aims, politics and values. They thus lose their deontic character and strict priority - the character of normative view. For Habermas, human rights have a character of deontic legal norms in legal discourse. We can understand them as fire walls between interest of individuals and interest of a community¹⁸. As long as we accept a thesis that human rights are not applicable universally, but we prefer them depending on circumstances, there is a danger of irrational and arbitrary decisions. It is since the lack of rational arguments in the process of preferring one of them¹⁹. The result then depends on judge's personality, her experience, ideological preferences, etc.

The idea of untouchable human rights relies on Kantian idea of human dignity. Nowadays, this concept belongs to European dictionary of legal discourse. All the agreements about human rights guarantee human dignity as a subjective right. The respect towards human dignity implies the prohibition of torture, inhuman and degrading treatment, prohibition of banishment to the country which would threaten one's life or which would violate human rights, etc. In other words, the application process and individual or normative act of public power must not contain anything what would violate basic rights understood in boundaries of human dignity. The problem of application of the concept in law rests on a normatively vague delineation of the concept. The concept of human dignity is traditionally connected to Kant's categorical imperative according to which people should not consider themselves as means for reaching other aims. Naturalistic interpretation, on the other side, prescribes human dignity to human on the basis of its intrinsic value as a specific biological kind characterised through language, rationality, disposition to love, free will, moral action, creativity and sense of aesthetics. The idea of intrinsic human value is a core of argumentation against, say, legalisation of euthanasia. Such an argumentation rests on mutually inconsistent interpretations of human dignity in terms of individual autonomy and self-determination. Another use of the notion of human dignity is connected to live in humanly worthy conditions. This phrase connects to a certain level of satisfying needs. A respect to human dignity requires ensuring certain life's minimum and freedom so that human can fulfil civil and political rights. Other theoreticians defend a view according to which the concept of human dignity cannot be delineated positively. What we can do, however, is to stipulate what violates it. From the above, it follows that human dignity develops in various dimensions and therefore can neither be confirmed nor denied by identifying one key feature. We can make a

¹⁷ Habermas, J.: *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press, 1996. (překlad William REHG, orig. *Faktizität und Geltung*, Frankfurt am Main: Suhrkamp, 1986), s.256-259.

¹⁸ Habermas, J. 1996, 258-259.

¹⁹ Tamtiež, 259.

concrete sense to the concept by mapping its roles which imply different, sometimes even inconsistent, meanings depending on different contexts. This ambiguity implies problems with prevention of human dignity. What is its content in the law? What should be prevented? When we talk about the violation in a particular case?²⁰ An interesting exemplification of the content has been offered in Federal Constitutional Court. It was formulated in decisions tied to questions about human dignity. According to the decisions, the violation of human dignity obtains in cases when the state power considers an individual as playing the role of a thing and takes it as means or as a variable constant. For example, in declaration concerning anti-constitutional law about the air security from 2006 Supreme Court states, the law does not allow to bring down aircrafts even if they are changed into bond. This holds even if there are potential victims on the ground²¹.

However, we should not overlook European trends which interpret classic human rights in social dimension. It is primarily German *lex judicialis*_Hartz IV (2010), when court proclaimed social reform as unconstitutional. According to the view of the court, the existential minimum followed from the Constitution must be stipulated so as to be consistent with the principle of human dignity. It guarantees such an existential minimum which provides resources for securing not only physical existence of a man such as food, clothes, facilities, housing, heating, hygiene and health, but also a possibility to develop human relations and at least minimal participation on social, cultural and political life. It is since the fact that every person necessarily exists in social relationships.²² In connection to claiming social rights via Constitution, we should mention that they should be applied as legislative principles that should form social politics of particular states, depending on their economic resources. In this case, social right might become a core of disagreement between various political ideologies. When it comes to social rights, authorities have a wide autonomy and their decision is determined not only by its economic well-being, but also by political decision. Namely, whether they prefer the principle of solidarity - the higher standard of social security; or liberal principle that restricts the interference of the state to minimum and stresses the responsibility of an individual and her family. In this context we should also see the problem of the right for a worthy life, the whole social legislation and adequate financial and social security.

²⁰ Bližšie pozri Kinga, Z., Benke K. : Human dignity in the case-law of the Constitutional Courts of Germany, Hungary and Romania, Dostupné na: http://www.ccr.ro/uploads/zakarias_benke_1.pdf. 1.5.2016.

²¹ Kinga, z., Benke K., s. 47; tiež Habermas, J.: Koncept ľudskej dôstojnosti a realistická utópia ľudských práv. In: Habermas, J.: K ústave Európy. Bratislava: Kalligram 2012, s.16.

²² Pozri: BVerfG, Urteil des Ersten Senats vom 09. Februar 2010 - 1 BvL 1/09 - Rn. (1-220), odst. 135. Dostupné na: http://www.bverfg.de/e/ls20100209_1bv1000109.html. 12.5.2016.

Conclusion

This paper dealt with human rights as moral justifications and the question of the implementation into legal norms. A general formulation of human rights usually makes their applicability into constitutional law harder. At the same time, it excludes their stipulation as definite obligations. For, general formulations indicate problems with their realisation. At the end of the day this leads to a conflict with other human rights, or with collective values such as public security, environment security, etc. This paper looked for a theoretical framework for solving the conflict between human rights. The analysis of the theory of legal principles as formulated by Dworkin and Alexy enabled us to critically investigate and formulate objections against the assumption that basic laws can be identified with legal principles. The principles can, in some cases, be less important than other principle and public interests. We showed that such delineated human rights loose their legitimacy and this is a reason why they have a weaker position in legal thinking. Another reason might be their identification with subjective interests, reasons or values. In these cases the right do not present decisive arguments. The weakening of legitimacy of basic laws and their exploitation for ideological rhetoric may lead to the lack of normative power. As a contrast, we analyzed the idea of inviolability of human rights. We showed that exist absolute right which cannot be broken under any circumstances. The untouchable core of human rights is considered as a minimal standard for human rights which should be applied in relation to every man. We showed that the core includes right to life, the right not to be punished and abased, the right not be a slave, the prohibition of retroactivity of Criminal law. In this context we indicated problems regarding the constitutional security of social rights.

It seems that the biggest problem is not the question of justification of human rights, but the problem of their application. The argument on behalf of the investigation of theories of human rights is the fact that we cannot apply them without interpreting them. The fact that contemporary theoreticians still analyze the theory of human rights shows that it is neither unreasonable, nor solved problem. It also holds that the increase of pluralization of societies and uncertain economic situation bring about disagreements about the interpretation of human rights.

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http://www.ccr.ro/uploads/zakarias_benke_1.pdf. 1.5.2016.

Omówienie

Niniejszy artykuł zajmuje się prawami człowieka, ich uzasadnieniami moralnymi i kwestią wdrożenia do norm prawnych. Ogólne sformułowanie praw człowieka zazwyczaj sprawia, że ich implementacja do prawa konstytucyjnego bywa trudna. Jednocześnie wyklucza ich uznanie za określone obowiązki. Fakt, że współcześni teoretycy wciąż analizują teorię praw człowieka, pokazuje, że nie jest ona ani racjonalna, ani nie stanowi rozwiązania problemu. Zakłada jednak również, że wzrost mnogości społeczeństw i niepewna sytuacja gospodarcza przysparzają sporów dotyczących interpretacji praw człowieka.