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HUMAN RIGHTS: AUTONOMY? INTEREST OR SPECIFIC NEEDS?

Abstract. Any attempt to analyze the human rights discourse is confronted with the complexity of the related terminology. Independent of the wide range of already existing rights, there are numerous efforts aiming to formulate a generally applicable theory of rights. These are supposed to provide an answer on the normative questions like: Who should have rights; what are these rights supposed to consist of; resp., what do we need the rights for? This chapter discusses two currently most sound theories of rights. Although primarily concerned with the function of the human rights, these theories also allow to address the questions listed above.

Keywords: human rights, autonomy, interest, specific needs, function of human rights

PRAWA CZŁOWIEKA: AUTONOMIA, INTERESY LUB SPECYFICZNE POTRZEBY?

Streszczenie. Jakakolwiek próba analizy dyskursu o prawach człowieka zderza się ze złożonością terminologiczną. Bez względu na szeroki zakres praw istnieją próby stworzenia ogólnej teorii praw, która byłaby odpowiedzią na pytania normatywne: Kto i jakie powinien mieć prawa i dlaczego są one nam potrzebne? W tym artykule skupiono się na analizie dwóch obecnie najbardziej zaawansowanych teorii, które prezentowane są głównie jako teorie o roli praw człowieka, a w rzeczywistości otwierają drogę do udzielenia odpowiedzi na powyższe pytania.

Słowa kluczowe: prawa człowieka, autonomia, interesy, specyficzne potrzeby, funkcja praw człowieka

Introduction

Any attempt to analyze the human rights discourse is confronted with the complexity of the related terminology, what refers to the diversity of legal forms and legal relationships that establish the human rights or the diversity of their content and the diversity of right holders. Independent of the wide range of already existing rights, there are numerous efforts aiming to formulate a generally applicable theory of rights, that would answer normative questions such as: Who should have rights and what these rights should be? Respectively, why do we need rights? This chapter discusses two currently most sound theories of rights. Although primarily concerned with the function of the human rights, these theories also allow to address the questions listed above. Proponents of the will theory interpret human rights as a consequence of the recognition of individuality and free will of every single human being. These individual requirements have special force and are tenable against the general interests and objectives. By contrast, the proponents of the interest theory construct a human right as a sphere of protection of the interests of the individual, who has a duty to promote these interests.

1. Autonomy or interests?

According to the will theory the central point and the key feature of precepts of law guaranteeing certain rights is the respect for personal choice. I. Kant is considered to be the founder of the will theory of individual rights. From the modern legal theorists, this theory was maintained for example by H. L. A. Hart, according to him, the individual rights are based on the fact that "the entitled person is granted sole control over behaviour that leads to the fulfilment of obligations. ... entitled person therefore becomes a small-scale sovereign." [Hart 1982, p. 183]. In other words, rights are entitlements which enable the right holder to enforce that others behave in a certain way. An individual owns them and may have a right, including the possibility to waive the right, and by doing release the responsible person from liability. The necessary condition of legal claim is that the right must be claimable by the power of the right holder. It means that the right holder must have the ability to demand the fulfilment of the obligation connected with their right or the ability to give up this right. Rights are thus powers that enable the right holder to use them in a way that they consider appropriate. This freedom is such a strong element of this theory, that there cannot exist rights, which cannot be waived.

Interest theory that stands in opposition against the will theory, offers a completely different view of the function and nature of rights. According to the interest theory the function of rights is to protect the interests or well-being of their holders. In theory, this

theory is based on the theory of Bentham's theory of rights. A modern version of special-interest theory of individual rights is offered by J. Raz. The core of this theory is the idea of the right holder as the entitled person, who places obligations on others or as someone whose interests provide justification for these obligations [Raz 1984, p.209; Raz 1986, p.181]. According to Raz, rights play rather mediating role between interests and responsibilities. "The interests establish rights and rights establish obligations [Raz 1986, p.181]. In terms of interest theory the right holder has no moral right to give up on it or cancel it. This implies that the interest that is protected by law must be enforced, so must be a guaranteed mechanism for its enforcement [Kramer 2002, p.64]. Furthermore, according to the interest theory, the rights may also be carried by communities, whereas these rights are not only the sum of individual rights [Kramer 2002, p.62]. According to this theory, it is not important whether the right holder has the competence to require the fulfilment of obligation associated with their right.

Even if we accept the fact that only those rights that have a function can be considered rights, in both theories there remain the problem of how to clarify the specific normative features of human rights and their universality and indivisibility. To repeat, the core of modern will theory is the idea of the right holder, who has the power to amend, waive, cancel or otherwise control the obligations imposed by rights. In this case, the will theory seems to be inconsistent with the idea of the indivisibility of human rights, according to which no one can abridge of these rights. For example, in the case of fundamental rights, it is questionable whether such rights can be waived. We can illustrate it on the court trials for war crimes against humanity. They concern the condemnation of crimes against human rights and the way of law enforcement of the victims. Will theory has a problem and that is to defend the rights of victims, because only the holder of the right has the power to enforce its compliance.¹ Other authors believe that the will concept of human rights without highlighting the moral duty bound with the right does not correspond to Kant's understanding [for details, see Zyberlman 2015]. The right according to Kant is not only a claim for independence towards others, but it also means correlative obligations on the side of others. These two functions work at Kant as constitutive conditions of any claim to right. In Kant's interpretation, rights are inalienable in the sense that right holder lacks the power to waive the obligation of others who are correlative to their right.

One of the most controversial issues of the will theory is the protection of the rights of children, people with intellectual disabilities, dementia or people in coma. The idea of a self-confident adult man, who can not only take care of themselves, but who is already versed in their interests and rights, and can also reasonably articulate, on which the will theory relies, reaches its limits here. That is to say, some theorists were worried that to confer legal rights to young children and severely mentally ill would undermine the concept of rights, because they

¹ The most obvious form of this type of criticism is formulated by M.K. Kramer. For details, see Kramer 2002, p. 71-72.

do not have the appropriate capability of legal action [for details, see Wellman 1995, p. 126-131]. It shall include a person's capability to acquire, modify or cancel entitlements by own legal action and take on obligations, namely to establish, alter or cancel legal relationships. The obligation of the subject of the legal relationship to take on legal responsibility and the associated legal consequences for any caused unlawful conduct are connected with this. Finally, there is the procedural capability, that is the capability to be the party of a proceeding and act in the actual proceeding. Eligibility for legal action may be limited due to age or illness. However, it does not deprive these people of the ability to be bearers of rights, because then we would, for example, accept the argument that children or disabled people have no right not to be tortured, as valid. This issue questioned the requirement that the rights of an individual must be enforceable themselves. The thesis, that these people do not have legal capabilities, however, they have a legal representative for their rights to be executed, was accepted [for details, see Aiken 1968, p. 508]. It turned out that it is necessary to distinguish between the ability to be a right holder and the capability to take legal action. Nobody can be deprived of the capability to have right.

The above-mentioned reservations to the will theory do not negate the meaning of autonomy as one of the key values. Kant's model of moral legislation according to which the criterion of moral validity of norms is, every rational human being could agree with every them, offers a way to apologise the assignment of certain rights and a way of determining what rights we should have. However, it is needed to expressly point out that a unilateral focus on autonomy can only have very limited success when justifying human rights. The value of autonomy is one of the basic needs of the individual, which should be morally accepted. However, it cannot be made superior to other fundamental rights. There are other reasons such as respect for autonomy, on which the foundations of duties should be built. H. Shue, for example, distinguishes between fundamental rights and other rights so that fundamental rights are those that must be met for a person to ever meet any rights. Fundamental rights in this sense are physical integrity, certain existential minimum and certain rights to freedom [Shue 1980, p. 18-20; 26]. The one, who has these rights not guaranteed, cannot fulfil their political rights.

However, the interest theory has several limitations. The crucial feature of interest theory of rights is the idea that the right must be justified instrumentally as a means of protection of rational goals. Human rights are inalienable because they protect particularly important interests. With their emphasis on the inability to waive rights and the role of the state in safeguarding the interests, this theory is important in terms of enforcement of protection of right. Interest theory, however, does not explicitly define to which interests such a value that should be protected by right, ought to be granted. This is according to this theory, the role of political philosophy and politics [for details, see Kramer 2002, p. 79]. The supporters of this theory differ when characterizing fundamental interest. Human rights may be necessary to protect the ability to choose and follow own concept of value of life [Griffin 2009] or basic

human capabilities [Sen 1995; Nussbaum 1997] respectively wellbeing [Tasioulas 2007]. It should be added that the conditions necessary for at least the good life are always linked to a given culture or society, which raises the question of universally shared interests.

Interest theory of rights also has a problem with the apology for inviolability of human rights. For example, if the total well-being can be achieved by denying the right to freedom, then there is no reason to believe that this basic human right could not be denied. In the case when the state has no reason to refuse this right, then the individual has no reason to give up their rights in return for greater benefits. These cases illustrate further difficulties related to the universality of human rights. However, if it is possible to waive certain human rights to increase one's living standards then the concept of human rights would fail and would reduce the positive right, the validity of which is conditional on the adoption of a legal right. This would mean that certain human rights would have a character of higher goals (e.g. right to a decent standard of living). Human rights are thus degraded to the level of objectives, policies and values. Thereby losing their deontological character of a categorical rule with a strong normative force and a strict priority. They become the principles which we can always discuss about, which can be considered and if necessary waived. They do not apply universally, but are preferred, depending on the circumstances of the case.

The essential difference between the two theories is also in the process of right enforcement. According to the will theory the enforcement of the corresponding duties is a matter of choice of the individual holders of rights. Conversely interest theory attributes the main role to the state when it comes to enforcement of duties. If the law exists, its enforcement is the role of politics and in the process of its implementation the balancing of various competing interests has an important role [for details, see Simmonds 1998, p. 225].

2. Who are the potential rights holders?

Conceptual disagreements between the will theory and interest theory of rights in the issue of what the rights are, lead directly to the second question, who has rights? The question is whether we can attribute rights to entities other than humans. For example, to animals, nature. It is also an open question whether the rights are individual claims of individuals or whether they can be attributed to groups? How can we apologize specific human rights of certain groups?

In the will theory, rights include the exercise of the will of the right holder. We have shown that this theory has problems to explain on what basis the rights are attributable to children, people in a coma or people with intellectual disabilities. Similarly, in terms of this theory rights cannot be attributed to animals because they are unable to grasp the idea of rights. In contrast interest theory can legitimize the rights of all entities which can be said to

have interests. Thus, interest theory can accommodate a variety of substantive values under the guise of interests. The question actually is, which interests establish rights respectively, what are the criteria for an interest to become right.

We have shown that the term of interest by itself does not provide clear boundaries to determine who can be the holder of rights. In the broadest sense, it can be used to describe anything that is good for that being. For example, the followers of the rights of nature or animals argue that although in relation to animals we cannot talk about their legitimate requirements, we must understand their rights as moral rights, to the application and the respect of which they are entitled, even though they cannot defend them verbally. The interpretation of the above-mentioned concepts comes to defending the rights of the human intervention that should guarantee space for the "free development" of plants and animals, thus the right to peaceful existence. The use of the term right in this regard is ethically significant because it morally equalizes all natural species, including humans. Granting rights to other natural forms obliges us not only to have respect towards them, but also to promote and protect them.

The problem with the concept of uncertainty of the term of interest for the identification of human rights remains at the level of human rights. Which components of human existence determine the content of human rights? What interests should have the moral significance in order to be the subjects of legal protection? How can specific human rights of certain groups be justified? How can new human rights be introduced into the existing structure?

A certain guide to the identification of human interests is offered by Jeremy Bentham, for whom the interests are interpreted as pleasure and absence of pain. Anything that is effective in increasing pleasure and minimizing pain of a living creature is in its interest because it is essential to maximize the overall long-term well-being. This is the ultimate goal, against which we measure the moral outcome of actions [Bentham 1982, p.11-50]. As if utilitarianism counted with a man's ability to foresee all the consequences of the actions and summarize them in the form of benefit and damage. The second objection is directed against utilitarian egalitarianism in the field of suffering and benefit. Utilitarianism implies that both suffering and benefit are felt by everyone at the same intensity. Special rights are the field that are not addressed by the utilitarian principle and it does not give us clear instructions on how to build them. Serious objection is the fact that if we follow the principle of utilitarianism, our actions could be seen unfair and immoral from the viewpoint of indifferent observer. Not always the greater benefit is associated with morality. In addition, utilitarians are inconsistent in their definitions of good and it is not clear which form of goodness should be valued and for what reasons they should be given priority. For example, J. Bentham is known as hedonistic utilitarian because of the value which he confers to pleasure. J.S Mill however argued that pure pleasure is not the only criterion for assessing consequentialism as illustrated by his famous statement: "It is better to be a dissatisfied man than a satisfied pig; better to be dissatisfied Socrates than a satisfied fool" [Mill 2005, p.480]. For Mill, there were higher and lower pleasures, although his characteristics of those pleasures are not very clear.

Counterproposal to such traditional approach of identifying interests can be found in the Aristotelian concept of the good life and environmental well-being (flourishing). Life well-being or the good life consists, I will use the formulation of Amartya Sen, of the current human capacity to "take up the different things, the performance of which he personally appreciates." [Sen 1995]. In this perspective the conversion of procedural forms of the goodness takes place as the level of income and wealth to the current type of life that people live. After all, the conditions that the person values are always something different in terms of age, gender, disability or illness, but also something fundamentally different in healthy or polluted environment, in a secured safety or criminal area. A fundamental starting point here remains the dignity of life, but also anti-Kantian, anti-procedural plurally given dimension. One advantage of this approach is that it interprets the problem of deficit competencies as a problem of social justice and human rights. Recognition of the vulnerability of every living creature, in the diction, becomes a fundamental way of the constitution of the new approach of definition of the meaning and significance of rights.

3. The recognition of differences

In recent decades, a whole new set of human rights that are aimed at protecting certain groups are established. Disadvantaged groups often protested that the standard lists of human rights do not take sufficiently take into account the different risks faced by the members of these groups. For example, domestic violence, trafficking in women and exclusion of entire groups of people from society [Kuzior 2009]. These criticisms are based on the criticism of the principle of impartiality as applied in liberal human rights discourse. Impartiality requires that the decision-making takes place at a certain level of generalness and far-awayness of particulars, so that the result is a general principle with which any individual would agree. This principle then acts as a means of ensuring the legitimacy of human rights and constitutive link of law and justice.

The core of the arguments for the recognition of differences and specific human rights is the reconceptualization of social justice by policy of differences, which allows the participation of excluded groups in public life. In contrast to the prevailing understanding of procedural justice, that assesses justice in terms of impartiality and unified understanding of people, the policy of differences highlights the idea of human diversity and calls for greater respect for differences and emphasis on similarities between human beings. This approach establishes the issue of justice in the Hegelian concept of recognition, which can be supported by the concepts of Ch. Taylor, A. Honeth and I. Young. For theorists of recognition as the cornerstone of justice, the recognition of reciprocal relations to what constitutes subjectivity. This aspect is put into contrast with individualistically oriented distribution concepts of

justice, because social relations are superior to an individual and recognition is associated with Hegel's idea of *Sittlichkeit* that stands against morality. Therefore, the recognition supports the self-realization and fulfilment of good life as opposed to procedural justice. This means that if we want to get to what has an urgent moral impact, we have to deal more with the identification of the rights of women, children, seniors or people with disabilities than with the rights of every human being [for details, see Young 1990]. Though, this approach defends justice through individual rights to fair conditions for self-development and self-determination of each individual, but these can only be provided by recognition of disadvantaged groups. This leads to the fact that the classical human-rights articles such as the prohibition of discrimination, the right to life and health, protection of personal freedom or access to education and work are progressively reformulated taking into account the needs of the persons of a specific group and which contain over the international agreements in force more precise specification.

4. Conclusion

The contribution examined the concept of human rights from philosophical perspective. It tried to answer the question whether a rationally and universally valid definition of human rights is possible at all. It is argued that the basis of human rights is defined variously and that due to different values giving the legitimacy to human rights we have various lists of the latter. It is this ambivalent basis of human rights that subverts their moral authority.

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