
WOLNOŚĆ CZŁOWIEKA

I JEJ GRANICE

14

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HUMAN RIGHTS AND FREEDOMS IN SYSTEMS OF HUMAN RIGHTS PROTECTION

Wolność ludzka
w systemie ochrony praw człowieka

Preliminary remarks

Standardisation of human rights and freedoms embodies the modern understanding of morality, which provides the foundation for relationships, law and international order¹. It is commonly believed that the process of establishing standards for human rights and freedoms (lat. *iura hominum*) has already been completed². Moreover, the idea of human rights protection is frequently perceived as the main idea of the twenty-first century. It is beyond any doubt that taking bold moves aimed at protection of human rights is the obligation of any state as a part of international community. The actions are interconnected to such an extent that they may be joined into arrangements ordered according to specifically defined criteria known as systems (gr. *σύστημα*)³. *Differentia specifica* of the term *system of human rights protection* compared to the term *system of law* is embodied by the following characteristics: multicentricity, complexity and comprehensive regulation, as well as the degree of fulfilling specific state law norms⁴.

¹ D. P. Forsythe, *Human Rights in International Relations*, Cambridge University Press, Cambridge 2012, p. 3-7; R. Tabaszewski, *Prawo do zdrowia w systemach ochrony praw człowieka*, Lublin 2016, p. 19-20.

² Deklaracja Wiedeńska I Program Działań. Światowa Konferencja Praw Człowieka z dnia 25 czerwca 1993 r., U.N. Doc. A/CONF.157/23.

³ C. Gearty, C. Douzinas, *Introduction* [w:] *The Cambridge Companion to Human Rights Law*, eds. C. Douzinas, C. Gearty, Cambridge University Press, Cambridge 2012, p. 1-14.

⁴ B. Banaszak, *Zagadnienia podstawowe. Terminologia* [w:] *System ochrony praw człowieka*, B. Banaszak et al., Kantor Wydawniczy Zakamycze, Kraków 2003, p. 15.

The concept and term of human rights and freedoms as human rights

Institutions of human rights law ordered in terms of a specific normative conception constitute a defined system of human rights protection, which enables creation of standards, patterns of behaviour and institutions aiming at protection of these rights. Moreover, the system gives the institutions opportunities of drawing up procedures providing citizens with the opportunity to pursue their rights. Last but not least, the system fosters conciliatory procedures whose purpose is to prevent breach of human rights⁵. Authors studying the subject still debate whether there is one international system of human rights protection or, minding the multicentral approach, there are several, equal systems. The theory of subsystems or the theory of self-contained régimes in a way provides a resolution of the above-mentioned conflict. It assumes the difference between the normative protection ensured on the global, regional, national and local level⁶. Thus, it is vital to consider the elements constituting the system of human rights protection: the global level, regional subsystems and national subsystems.

Particularly in the normative terms, there is still no clear, legal definition of human rights. In result, international human rights law as an academic discipline is not yet fully developed⁷. According to *Bouvier Law Dictionary*, human rights – the subject of this study – are *inherently connected to human beings*⁸. Maurice Cranston defines the rights as *something that all people, no matter where and when, must possess and something that no one can be deprived of without severe violation of justice, something that must be guaranteed to every human being, because he or she is one*⁹. The foundation of human rights lays in the belief that each human being is worth more than the whole material world altogether¹⁰. Moreover, each human being may act in a specific manner defined on the basis of the natural law. Human way of acting includes both actions and neglect specified by the provisions of statutory law. It must be noted that human rights are no less than normative expression of the idea of equality rooted in human dignity¹¹. The norms are created by states, international organisations and other institutions of international public law.

Human rights and freedoms in the global system

Following Jean Salmon's statement that human rights are *set of basic human rights and freedoms stemming from inherent human dignity*, it must be noted that each system of human rights protection guarantees the fulfilment of these rights and freedoms¹². Human rights and freedoms constitute the substantial element and hard core of human rights law. Current legal construction of *rights and freedoms* in the global system is inspired by F.D. Roosevelt's policy and his idea of four freedoms (freedom from want, freedom from fear, freedom of speech and freedom of worship), which was approved by the representative of members states and is reflected in the Charter of the United Nations (the UN Charter) in fine. Art. 1 point 3 of the UN Charter states that one of the objectives of the United Nations is to establish international cooperation, including support and motivation for *respect of human rights and basic freedoms for everyone, irrespective of their race, gender, language or religion*.

Human rights and freedoms, understood as normative categories, are mentioned in numerous documents constituting human rights law on the global level. According to the Universal Declaration of Human Rights (UDHR), complete fulfilment of human rights and freedoms is determined by their common understanding. Thus, (...) *member states obliged themselves to ensure common respect and fulfilment of human rights and basic freedoms in cooperation with the UN*¹³. Other provisions of UDHR prove personal approach to rights and freedoms granted implicate to everyone, who *have the right to such social and international order which respects rights and freedoms included in this Declaration*¹⁴. A human being has been deemed the main subject of human rights and basic freedoms and thus is their main recipient and should participate in the fulfilment of the rights and freedoms. The universal nature of human rights and freedoms defined by the rules of the UDHR was confirmed by the Vienna Declaration and Programme of Action which stated that if a human being is the central subject of the human rights law, the universal nature of the rights and freedoms is beyond any doubt¹⁵.

The fundamental meaning of rights and freedoms as normative category on the global level has been simultaneously developed in the binding peremptory norms. International Covenant on Civil and Political Rights (ICCPR)¹⁶ provided the ground for the *obligations of States to support the common respect and fulfilment of hu-*

⁵ J. Krukowski, *Wstęp do nauki o państwie i prawie*, TN KUL, Lublin 2004, p. 123-124.

⁶ J. A. Rybczyńska, *Prawa człowieka [w:] Międzynarodowe stosunki polityczne*, red. M. Pietraś, Wydawnictwo UMCS, Lublin 2007, p. 396-397.

⁷ L. Leszczyński, *Istota oraz typy ochrony praw i wolności człowieka [w:] Ochrona praw człowieka w Europie. Szkic zagadnień podstawowych*, L. Leszczyński, B. Liżewski, Wydawnictwo Verba, Lublin 2008, p. 14-15.

⁸ F. J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Redakcja Wydawnictw KUL, Lublin 2001, p. 12.

⁹ „The rights inherent in each person”, *Rights of man [w:] Law Dictionary and Concise Encyclopedia*, J. Bouvier, Vernon Law Book Company, Kansas City 1913.

¹⁰ M. Cranston, *What are human rights?*, Ampersand Ltd, New York 1962, p. 11, 36.

¹¹ J. Maritain, *Christianity and Democracy, the Rights of Man and Natural Law*, Ignatius Press, San Francisco 2012, p. 73.

¹² J. Locke, *Dwa traktaty o rządzie*, tłum. Z. Rau, Wydawnictwo Naukowe PWN, Warszawa 1992, p. 204-207.

¹³ Universal Declaration of Human Rights, Paris, December 10, 1948, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948).

¹⁴ J. Morsink, *The philosophy of the Universal Declaration*, „Human Rights Quarterly”, 1984, No. 6, p. 309.

¹⁵ M. Piechowiak, *Pojęcie praw człowieka [w:] Podstawowe prawa jednostki i ich sądowa ochrona*, red. L. Wiśniewski, Wydawnictwo Sejmowe, Warszawa 1997, p. 14.

¹⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

man rights and freedoms defined in the UN Charter. The States obliged themselves to provide everyone whose rights or freedoms have been violated with an effective means of legal protection. The normative idea of human rights and freedoms included in the similar Pact, i.e. International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷ has much poorer axiological justification. The content of article 13, obliging the state to introduce human rights is crucial in this context. The States agreed that *the learning process shall result in full personal development, the sense of human dignity and improved respect for human rights and fundamental freedoms.*

Human rights and freedoms in regional systems

Regional systems, including the continental protective systems, use the term of *rights and freedoms* explicitly as elements of human rights law. The term *human rights and fundamental freedoms* has become the axiological foundation for the construction of the Council of Europe. The expression appeared as many as 13 times only in the Convention for the Protection of Human Rights and Fundamental Freedoms (CPRFF)¹⁸. According to the preamble to the CPRFF, one of the objectives of the Council of Europe is to improve the union of its members and *one of the means of achieving this goal is to protect and develop human rights and fundamental freedoms.* In this context, freedoms are the foundation of justice and world peace and their fulfilment depends on both: *truly democratic political system; and equal understanding and respect for human rights which are strictly connected to freedoms.* The objective mentioned above was repeated in the preamble to the European Social Charter (ESC)¹⁹. However the core and central element of fundamental rights protection of the European Union (UE), which at the same time provides tools for their enforcement can be found in article 47 of the Charter of Fundamental Rights of the European Union (CFR)²⁰. According to the article, should the rights or freedoms of a person, guaranteed by the EU law be violated, the person is entitled to pursue his/her claims before court. In the preamble of the Treaty on European Union and various acts of primary legislation the EU proved its focus on the principles of freedom, democracy, respect for human rights, fundamental freedoms and lawful state as its inspiration²¹.

The term *rights and freedoms* understood as the axiological substrate of the concept of *human rights* include legal acts constituting the system of the Organisation for Security and Co-operation in Europe (OSCE). In particular, (...) *respecting human rights and fundamental freedoms, including freedom of thought, conscience, religion and belief* are the normative and axiological basis of the Organisation drawn from the Final Act of the Conference for Security and Co-operation in Europe²². The Document of the Copenhagen Meeting on the Human Dimension of the Conference for Security and Co-operation in Europe proved that rights and fundamental freedoms are the essence of human rights²³. The Charter of Paris of the New Europe explicitly states that rights and freedoms are inherent, cannot be taken away or assigned and are guaranteed by law. Moreover the fulfilment of the rights and freedoms and (...) *full use of the rights and freedoms are the basis for freedom, justice and peace*²⁴. In the Act of Budapest "For the true partnership in the New Era", which confirms the *ratio entis* of rights and freedoms, the principle of respecting the rights is accompanied by the claim suggesting the deficiency of the rights and freedoms of the individual²⁵.

Freedom and right

The normative material discussed above suggests that the term *human rights* has multiple meanings and poses difficulties of its full explanation. Terms *rights* and *freedoms* as elements of the concept of human rights as well lack normative and legal definition²⁶. Polish systemic practice does not provide clear definition of rights and freedoms as well. There is a substantial ontological and axiological difference between the two terms, which determines the admissibility of the individual being protected by the state, influencing the scope of such cognition and the possibility of exercising effective means of protection²⁷. Irrespective of the accepted normative and legislative conception, establishment of the substrate of meaning for this term involves the existence of stable value of rights and freedoms or, depending on the assumed, changing circumstances, their essence may be modified according to current factual and legal state²⁸.

²² Akt Końcowy Konferencji Bezpieczeństwa i Współpracy w Europie, Helsinki 1975, Polski Instytut Spraw Międzynarodowych, Warszawa 1975.

²³ Dokument Spotkania Kopenhaskiego Konferencji w sprawie ludzkiego wymiaru KBWE, Polski Instytut Spraw Międzynarodowych, Warszawa 1991.

²⁴ Paryska karta nowej Europy, Wydawnictwo Sejmowe, Warszawa 1991, p. 5-6, <<http://www.ohchr.org>>.

²⁵ R. Matysiuk, R. Rosa, *Bezpieczeństwo i prawa człowieka w systemie KBWE/OBWE*, Wydawnictwo Akademii Podlaskiej, Siedlce 2008; J. Raz, *The morality of freedom*, Clarendon Press, Oxford 1986, p. 251-253.

²⁶ *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, red. M. Chmaj, Wydawnictwo Wolters Kluwer Polska, Warszawa 2008; *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, red. L. Wiśniewski, Wydawnictwo Sejmowe, Warszawa 2006.

²⁷ Orzeczenie TK z dnia z dnia 24 maja 1994 r., sygn. K 1/94, „OTK” 1994, nr 1, poz. 10.

²⁸ B. Banaszak, *Prawa jednostki i systemy ich ochrony*, Wydawnictwo Kolonia Ltd., Wrocław 1995, p. 162.

¹⁷ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N. T.S. 3.

¹⁸ D. Gomien et al., *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, Strasbourg 1996.

¹⁹ Original version of the text: E.T.S. No. 35.

²⁰ Charter of Fundamental Rights of the European Union (2007/C 303/01); Explanations Relating To The Charter Of Fundamental Rights (2007/C 303/02).

²¹ Treaty on European Union, C 2008, 115/13.

Finishing the theoretical discussion, the right shall be understood as the entitlements of an individual provided by the state for being a human being²⁹. The entitlement mentioned above is connected to obligation of positive action, which means that the rights cannot be violated, and the obligation regulated by the natural law that the rights of other individuals cannot be violated³⁰. Freedom, on the other hand, is a negative right, i.e. the right to act according to one's will, which means that the state shall refrain from any interference in the scope of capabilities of an individual³¹. Freedom is a fundamental, natural and legally protected attribute of human existence, enabling an individual to decide about oneself autonomously and truly, free choice and pursuing values, as well as free actions³². In the relationship between the right and the freedom, the former is superior to the latter³³. It shall be assumed that *while in the case of freedom the state is to refrain from actions and interference, in the case of rights the state shall be active and is expected to act*³⁴.

An individual's responsibility and obligations towards others are correlated with rights and freedoms³⁵. It shall be noted that *an individual cannot reject his/her quantum of freedoms, however, cannot reject quantum of responsibility as well*³⁶. According to the article 29 point 1 of the Declaration of Human Rights, each individual has obligations towards the society, without which free and full personal development is impossible. At the same time, the idea of freedom is connected to the idea of responsibility – the attitude which is rooted in awareness and the sense of freedom, which enables an individual to decide about oneself and accept consequences of one's actions. Thus, both rights and freedoms result in responsibilities.

Dignity as the source of human rights and freedoms

Inherent and inalienable dignity (lat. *dignitas*) is the source of all human rights and freedoms³⁷. Thus, while a human being and his/her dignity provides a stable foundation of individual entitlements, the content of human rights and freedoms is dynamic and undergoes development³⁸. Human dignity is more of a transcendental than normative nature, as a matter of fact, *the whole human history should be interpreted through the prism of this dogma*³⁹. Dignity is not only the key condition of belonging to the human race, but also a foundation, basis for human rights, main objective and the crown of the legal construction of the rights⁴⁰. Hence, human rights stem from dignity, are axiologically and normatively rooted in dignity and aim at its protection⁴¹.

The concept of human dignity proves that each person is the superior good, autotelic value, which cannot be degraded to useful or pragmatic good. This unique character of an individual is reflected in human psychological and physical construction, as well as health. A person is entitled to dignity for being human. As a consequence of this fact, in the positive context dignity means the order of subjective approach to human being as an objective of human activity, while in the negative context dignity means that instrumental approach to other human being is forbidden. Irrespective of the context, respecting the inherent human dignity may be treated as both: a standard and a provision of international law.

The UN Charter is based upon the idea of respecting human dignity, the Declaration of Human Rights refers to the concept as well. It must be noted that the Declaration is viewed as a normative background of several normative acts in the global system. Human dignity is mentioned in: the normative part of ICCPR (art. 10), ICESCR (art. 13), as well as in preambles of these documents inspired by the principle of respecting dignity discussed in UDHR. A similar legislative construction may be found in such documents as: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁴², Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴³, Inter-

²⁹ P. Kuczmą, *Prawa człowieka w zarysie*, Wydawnictwo Dolnośląskiej Wyższej Szkoły Przedsiębiorczości i Techniki, Polkowice 2011, p. 12-15; C. Mik, *Koncepcja normatywna europejskiego prawa praw człowieka*, Comer, Toruń 1994, p. 17-18.

³⁰ B. Banaszak, *Podstawowe obowiązki prawne jednostki*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 1997, p. 34-35.

³¹ Z. Hołada, *Prawa człowieka. Wiadomości wstępne* [w:] *Prawa człowieka. Zarys wykładu*, red. J. Hołda et al., Wydawnictwo Wolters Kluwer Polska, Warszawa 2014, p. 11-12; S. Gilliam, *Civil Liberties*, ABDON Publishing Company, Edina 2008, p. 9.

³² D. Dudek, *Zasada ochrony wolności i praw człowieka* [w:] *Zasady ustroju III Rzeczypospolitej Polskiej*, red. D. Dudek, Wydawnictwo Wolters Kluwer Polska, Warszawa 2010, p. 105.

³³ M. Piechowiak, dz. cyt., p. 28-29.

³⁴ W. Skrzydło, *Komentarz do rozdziału II* [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, W. Skrzydło, Wydawnictwo Wolters Kluwer Polska, Warszawa 2013.

³⁵ F. J. Mazurek, *Stanowisko Kościoła wobec Deklaracji Praw Człowieka*, „Ethos”, 1999, nr 45-46, p. 242.

³⁶ A. Zoll, *Godność człowieka jako źródło wolności i praw* [w:] *Hominum causa omne ius constitutum est. Księga jubileuszowa ku czci Profesora Alicji Grześkowiak*, red. A. Dębiński et al., Wydawnictwo KUL, Lublin 2006, p. 280-281.

³⁷ K. Complak, *O prawidłowe pojmowanie godności osoby ludzkiej w porządku RP* [w:] *Prawa i wolności obywatelskie w Konstytucji RP*, red. B. Banaszak, A. Preisner, C.H. Beck, Warszawa 2002, p. 65.

³⁸ J. Mazurek, *Pojęcie godności człowieka. Historia i miejsce w projektach Konstytucji III Rzeczypospolitej*, „Roczniki Nauk Prawnych”, 1996, nr 6, p. 6.

³⁹ Jan Paweł II, *Poszanowanie praw człowieka warunkiem prawdziwego pokoju. Orędzie na XXXII Światowy Dzień Pokoju*, „L'Osservatore Romano”, 1999, nr 1, p. 4.

⁴⁰ K. Orzeszyna, *Godność ludzka podstawą praw człowieka* [w:] *Człowiek – jego prawa i odpowiedzialność*, red. R. Tabaszewski, Lublin 2013, p. 17.

⁴¹ M. Piechowiak, *Godność i równość jako podstawy sprawiedliwości z perspektywy międzynarodowej ochrony praw człowieka*, „Toruński Rocznik Praw Człowieka i Pokoju”, 1992, z. 1, p. 43, 46-48.

⁴² International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966).

⁴³ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46.

national Convention against Apartheid in Sports⁴⁴ and Convention on the Rights of the Child (CRC), whose normative part frequently features the expression (art. 23, art. 28 item 2 point c, art. 37, art. 39, art. 40)⁴⁵. The notion of respect for human dignity laid the foundation for the Universal Declaration on the Human Genome and Human Rights (art. 1, art. 2, art. 6, art. 10, art. 15, art. 21, art. 24)⁴⁶.

Similarly, regional systems, including the continental ones state, directly and indirectly, that all human rights stem from *human dignity and inherent value of an individual*⁴⁷. Dignity is the key term for the EU system, which constitutes the starting point for CRF and other acts of European law stating fundamental laws⁴⁸. The European Council incorporated the notion of *human dignity* on the treaty level quite late. Lack of the term in CPHRFF before the preamble to article 13 was explained as a direct reference to CPHRFF and its tradition. Irrespective of this fact, the Strasbourg case-law proved that *human rights constitute an integrated system of human dignity protection*⁴⁹. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (the Oviedo Convention) elevates the value of human dignity and treats it as a normative axiom⁵⁰. Article 1 of the Oviedo Convention proves the protection of human dignity and identity and guarantees respect of human integrity and rights while using biology and medicine for all people without exceptions. European Social Charter (Revised) treats dignity in a similar way – as the starting point for ensuring protection of all employees⁵¹.

Human dignity is perceived as the principal idea in the majority of national orders of the developed countries⁵². According to article 30 of the Polish Constitution and its Introduction, inherent and inalienable human dignity viewed as the source of human rights and freedoms is deemed a legal principle⁵³, where (...) *in the con-*

*text of the constitutional law dignity has yet another meaning and definition than one of the categories of personal good defined in the civil sense: health, freedom, worship, freedom of conscience, name, image, etc.*⁵⁴. In this context dignity is not only a legal principle but also a subjective right of an individual⁵⁵. The charge of violation of dignity in the national system entitles one to file a constitutional claim. While evaluating such claim, these are objective factors that prevail (such as public opinion) over subjective opinion of the affected person⁵⁶.

Generative and integral nature of human rights and freedoms

The philosophical origins of rights and freedoms dates back to ancient times, it may be understood in the axiological, moral, propedeutic and legal sense as well. However, they started to be perceived as positive norms valuable for the development of the international community only in 1945. From then on human rights and freedoms have been viewed as the priority of the international human rights law. Yet, from some time we have been observing another path of development of human rights protection⁵⁷. Currently, the development of human rights is based upon the harmony between two paradigms: the dilemma of atomisation of rights and freedoms; the dilemma of integrity of the rights. While some specific rights and freedoms may be ordered and classified by given normative and non-normative standards, human rights are indivisible, as they constitute integral and interdependent whole⁵⁸.

Until the mid eighteenth century the distinction of rights was chaotic and lacked order. Moreover, the paternalistic idea of state and law was abolished by a conception based upon individuality of a person propagated by such philosophers as: John Locke, Jean-Jacques Rousseau and Charles Louis Montesquieu⁵⁹. It is claimed that this idea was reflected in the majority of political systems adopted by European countries of the nineteenth century. It was combined with the concept of admissibility of the international community's intervention in national issues, considering a *barbarian* way of ruling.

Apart from the division between rights and freedoms, the available literature features many typological variants useful in presentation of certain models of law⁶⁰. In terms of protection of the individual's rights, one may differentiate between perso-

⁴⁴ International Convention Against Apartheid in Sports, G.A. Res. 40/64, U.N. GAOR, 40th Sess. Supp. No. 53, at 37, U.N. Doc. A/40/53 (1985), 1500 U.N.T.S. 161. Polish version: Dz.U. z 1988 r. Nr 14, poz. 100.

⁴⁵ Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354.

⁴⁶ Universal Declaration on the Human Genome and Human Rights, UNESCO Gen. Conf. Res. 29 C/Res.16, reprinted in Records of the General Conference, UNESCO, 29th Sess., 29 C/Resolution 19, at 41 (1997) (adopted by the UN General Assembly, G.A. res. 152, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/152, original text: <http://www.unesco.org>.

⁴⁷ F. Bartolomei, *W poszukiwaniu „godności ludzkiej”* [w:] *Godność człowieka jako kategoria prawna (Opracowania i materiały)*, red. K. Complik, Wydział Prawa i Administracji Uniwersytetu Wrocławskiego, Wrocław 2001, p. 75-86.

⁴⁸ K. Orzeszyna, *Tożsamość kulturowa Unii Europejskiej a pluralizm religijny*, „Roczniki Nauk Prawnych”, 2007, z. 1, p. 35.

⁴⁹ Ustawa z dnia 26 lipca 2013 r. o ratyfikacji Protokołu nr 13 do Konwencji o ochronie praw człowieka i podstawowych wolności dotyczącego zniesienia kary śmierci we wszystkich okolicznościach, sporządzonego w Wilnie dnia 3 maja 2002 r. (Dz.U. z 2013 r., poz. 1044).

⁵⁰ Convention for the Protection of the Human Being with regard to the Application of Biology and Medicine: Convention on Human rights and Biomedicine, Oviedo, 4 April 1997 (E.T.S. No. 164).

⁵¹ See: art. 26, European Social Charter (Revised), Strasbourg, 3 May 1996 (E.T.S. No. 163).

⁵² A. Gewirth, *Human dignity as the basis of rights* [w:] *The constitution of rights: Human dignity and american values*, ed. M. J. Meyer, W. A. Parent, Ithaca. Cornell University Press, New York, p. 10-28; p. 174-176.

⁵³ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Wydawnictwo Liber, Warszawa 1996, p. 80, 89-93.

⁵⁴ D. Dudek, *Prawo konstytucyjne w zarysie. Wybór źródeł*, LWP, Lublin 2002, p. 23.

⁵⁵ Wyrok TK z dnia 15 października 2002 r., sygn. SK 6/02 (Dz.U. z 2001 r. Nr 178, poz. 1486).

⁵⁶ B. Banaszak, *Godność* [w:] *Encyklopedia prawa*, red. U. Kalina-Prasznica, Warszawa 2007, p. 209; Wyrok TK z dnia 4 kwietnia 2001 r., sygn. K 11/00, „OTK ZU” z 2001 r. Nr 2, poz. 33.

⁵⁷ Z. Kędzia, *Prawo człowieka do integralności*, „Ruch PES”, 1989, z. 3, p. 15-16.

⁵⁸ T. Jasudowicz, *Zasady ogólne prawa międzynarodowego praw człowieka* [w:] *Prawa człowieka i ich ochrona*, red. B. Gronowska et al., TNOiK, Toruń 2010, p. 210.

⁵⁹ T. Buergental, *The normative and institutional evolution of international human rights*, „Human Rights Quarterly”, 1997, No. 19, p. 703-723; R. Normand, S. Zaidi, *Human rights at the UN: the political history of universal justice*, Indiana University Press, Indianapolis 2008, p. 13-14.

⁶⁰ P. Kuczma, dz. cyt., p. 12-14.

nal and citizen's rights; in terms of the level of normative character of rights one may point to human rights as such and constitutional rights; considering the number of people entitled to such protection one may define individual and collective rights. Taking these criteria into consideration, the trio-partition of rights and freedoms appears to be the most adequate division; it consists of: personal rights and freedoms; political rights and freedoms; economic, social and cultural rights and freedoms.

Such division is compatible with the genetic approach proposed by Karel Vasak in 1970s. He recognised three generations of human rights⁶¹. This division is based upon historical and philosophical criteria as well as on ideas inspired by the French revolution *liberty, equality, fraternity* (*Liberté, Égalité, Fraternité, ou la Mort*). Although criticised, this ideology is reflected in the literature studying human rights and in the instruments of human rights protection. This classification enables not only drawing conclusions of legal and dogmatic nature, but also to create more specific legal norms concerning some categories of rights and freedoms together with effective tools of enforcing them⁶². The advantages of the conception set forth above cannot turn one's attention from its deficiencies. It is mostly criticised for establishing hierarchy and introducing dialectic categorisation to specific groups of an individual's rights, which in fact contradicts the sole idea of human rights – the indivisible rights⁶³. Simultaneously, such classification creates the illusion of harmonious development of human rights, whose revolution was dynamic and chaotic⁶⁴.

Fundamental freedoms as the I generation of rights

It is assumed that political rights, citizens' rights and so-called fundamental freedoms constitute the I generation of human rights. This family of rights was defined by the enlightened rationalists and its normativisation was proved in the content of the American Declaration of Independence of 1776⁶⁵, the French Declaration of Human Rights of 1789 and consecutive systemic acts⁶⁶. The rights were primarily

established in constitutional systems and inspired by the liberal ideas. Thus, they are also called *blue rights*⁶⁷. Following the idea of Manfred Nowak, one may point to three categories of the I generation rights normatively included in ICCPR⁶⁸ and based upon the classification inspired by John Locke who created so called triad of existential human rights: life, freedom and possession.

The first category includes the rights concerning human existence – the hard core of citizens' rights (personal)⁶⁹. The rights include: rights connected to physical existence, i.e. right to live (art.6), the right to physical and psychological integrity (art. 7, art. 10), freedom and personal safety (art.9), the prohibition of long imprisonment for debts (art. 11); the right to inalienable goods (art. 17 of UDHR); the rights connected to psychological existence, i.e. freedom of conscience and worship, the right to express one's beliefs, the right to worship the chosen religion (art. 18 item 1, art. 19 item 1); and rights connected to legal existence, i.e. the prohibition of slavery and compulsory labour (art. 8), the right to legal personality (art.16), the right to obtain minimal guarantee in civil and criminal proceedings (art. 14, art. 15), the right of a child to have a name and citizenship (art. 24 item 2 and 3), and the right to participate in marriage and family (art. 23, art. 24).

The second category of the I generation of rights includes freedoms⁷⁰. One may differentiate between three sub-groups of such rights: freedoms and rights concerning the protection of privacy: the right to personality, integrity and autonomy – the protection of family and sexual life, inviolability of residence, confidentiality of mail (art. 17); the freedom of movement including: the right to free travel, the choice of place of residence and stay (art. 12), the right to receive asylum and protection against expulsion (art. 13); as well as rights connected to the possibility of communication with others, i.e. freedom of worship, world view, speech, transferring information (art. 18 item 2 and 3, art. 19 item 2), including the right to public safety (art. 18 item 3, art. 19 item 3, art. 20).

The last category of the I generation of rights concerns political rights⁷¹. In particular it is focused on citizens' political rights: electoral rights, the right to equal access to public institutions, the right to equal participation in democratic creation of the will of the state (art. 25). Another group includes political freedoms: freedom of expressing one's views (art. 19), freedom of assembly and public meetings (art. 21). The last group of this category involves rights focused on equality: equality of genders (art. 3), prohibition of discrimination – the principle of legal equality and the right to legal protection (art.2), the obligation of the state to provide equal

⁶¹ K. Vasak, *Les dimensions internationales des droits de l'homme*, UNESCO, Paris 1978; *The International Dimensions of Human Rights*, ed. K. Vasak, P. Alston, Greenwood Press, Westport 1982.

⁶² M. Nowak, *Trzy generacje praw człowieka. Ich znaczenie w świetle przesłanek ideowych i historycznych oraz w świetle ich genezy* [w:] *Prawa człowieka. Geneza, koncepcje, ochrona*, red. B. Banaszak, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 1993, p. 105-107.

⁶³ M. Cranston, *Human Rights: Real and Supposed* [w:] *Political Theory and the Rights of Man*, D. D. Raphael, Indiana University Press, Bloomington 1967, p. 43-51.

⁶⁴ W. Zakrzewski, *Podstawowe wolności, prawa i obowiązki człowieka i obywatela* [w:] *Polskie prawo konstytucyjne*, red. W. Skrzydło et al., Wydawnictwo Verba, Lublin 2006, p. 153.

⁶⁵ Declaration of Independence, Washington, 4 July 1776.

⁶⁶ Déclaration des droits de l'homme et du citoyen de 1789; S. Marks, *From „The single confused page” to the „Decalogue for six billion persons”: The roots of the Universal Declaration of Human Rights in the French Revolution*, „Human Rights Quarterly”, 1998, No. 20, p. 459-514; L. Hunt, *Inventing human rights: a history*, WW Norton & Co, New York 2007, p. 64.

⁶⁷ T. Paine, *Rights of man: Common sense and other political writings*, Oxford University Press, Oxford 2008.

⁶⁸ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, Engel 2005, passim;

⁶⁹ R. Wieruszewski, *Od redaktora naukowego* [w:] *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz*, red. R. Wieruszewski, Wydawnictwo Wolters Kluwer Polska, Warszawa 2012.

⁷⁰ L. Henkin, *The Universality of the Concept of Human Rights*, „Annals of the American Academy of Political and Social Science”, 1989, No. 11, p. 12.

⁷¹ A. Florczak, B. Bolechów, *Wstęp* [w:] *Prawa i wolności I i II generacji*, red. A. Florczak, B. Bolechów, Wydawnictwo Adam Marszałek, Toruń 2006, p. 7-9.

opportunities and conditions to development and protection against discrimination (art.26).

The rights constituting the I generation are of negative nature: they are at protection, as their purpose is to maintain an individual's autonomy. The concept of the I generation laid foundation for such documents as ECHR and the construction of the rights is based upon the idea of the state as the night guard witnessing economic and social processes⁷². Taking this image into consideration, the main obligations of the state would be ensuring protection and fulfilment of the idea of human freedom. As the content of these rights is specific, they are categorical in terms of content. The family of rights is binding for the institutions of public authority and it requires them to refrain from interfering into citizens' freedom⁷³.

The II and III generation of rights and human freedom

For the liberal ideology neglected the social and economic character of an individual as the part of the society, new concepts of redistribution of national income emerged⁷⁴. It is assumed that the concept of the II generation of human rights is the result of socialist and Christian democratic movements. However, rights nowadays perceived as social may be found even in the Declaration of the Rights of Man and of the Citizen (art. 21, art. 22, art. 23)⁷⁵. The principle of social justice is of great importance for this generation of rights. It is founded on the idea that a person may enjoy life only when the state provides him or her with an appropriate welfare state⁷⁶. *Thus, the state and its institutions has been legally obliged to provide its citizens with welfare state. It is reflected in the UDHR, ISPPR and in the European system through the ESC*⁷⁷.

ISPPR differentiates between three categories of the rights of II generation: economic, social and cultural rights⁷⁸. Economic rights include: the right connected to work (art.6), the right to fair and beneficial working conditions (art. 7), the freedom to belong to a trade union, the right to strike (art.8). Social rights include: the right to social insurance (art. 9), the right of a family to protection (art.10), the right to proper welfare, i.e. food, place to live, clothing (art. 11), the right to health

protection (art. 12). The group of cultural rights include: the right to learn (art. 13, art. 14), the right to participate in cultural events, freedom of academic research, freedom of science and art (art. 15).

While fulfilment of the I generation of rights does not generate large costs, the II generation involves proper infrastructure and civilisational level, which requires the state to take integrated positive actions⁷⁹. As guarantee of fulfilment of these rights, in comparison to the rights rooted in the idea of freedom, is not possible only under a decision of court – requires specific and coordinated actions of the institutions of public authority, many national system of human rights protection this generation of rights is not perceived as human rights *sensu stricto*⁸⁰. While the I generation of rights requires immediate result of the state's actions, the II generation of rights create obligation of diligent actions⁸¹.

The III generation of rights includes solidarity or collective rights, also called green rights⁸². This results from the fact that at the end of the twentieth century human rights were no longer perceived as subjective rights of an individual. The I and II generation of rights are strictly individualistic. However, only after anti-human and anti-national experiences of WWII motivated broad international cooperation for human rights. At the end of the last century the emergence of the idea of collective development of the society was observed. Processes of juridification and internationalisation of norms founded on the idea of community as well as the development of collective safety have been launched by the Atlantic Charter (art. 3)⁸³. The creative development of these conceptions was witnessed in the 1960s. The III generation of human rights emerged due to the assumption that some rights require harmonious cooperation of individuals, groups of institutions of public authority and institutions of international law⁸⁴.

Nowadays it is assumed that there is a wide range of categories of human rights rooting from the normative approach, i.e.: the right of nations to self-determination (art. 73 of the UN Charter); the protection of national and ethnic minorities (art.1, art. 27 of ICCPR); the right to economic and social development (art. 1 of

⁷⁹ P. Sieghart, *The International Law of Human Rights*, Oxford University Press, Oxford 1983, p. 25.

⁸⁰ M. Nowak, *Trzy generacje...*, dz. cyt., p. 115.

⁸¹ B. Gronowska, *Systematyka międzynarodowo chronionych praw człowieka [w:] Prawa człowieka i ich ochrona*, red. B. Gronowska et al., Toruń 2010, p. 218.

⁸² R. Fordoński, *Standardy praw człowieka jako III generacja ius contra bellum [w:] Współczesne problemy praw człowieka i międzynarodowego prawa humanitarnego. Materiały konferencyjne*, red. T. Jasudowicz, M. Balcerzak, J. Kapelańska-Pręgowska, TNOiK, Toruń 2009, p. 249-260; E. Riedel, *Trzecia generacja praw człowieka jako strategia urzeczywistniania praw politycznych i społecznych*, „Ruch PES”, 1990, nr 3-4, p. 115-128; K. Drzewicki, *Trzecia generacja praw człowieka*, „Sprawy Międzynarodowe”, 1983, nr 10, p. 81-98.

⁸³ Karta Atlantycka, 14 sierpnia 1941, Pancernik „Prince of Wales” na Atlantyku, polish text [w:] *Wybór dokumentów do nauki prawa międzynarodowego*, red. K. Kocot, W. Wolfke, PWN, Wrocław 1969, p. 59-60.

⁸⁴ P. Kuczma, dz. cyt., p. 18; C. Mik, *Zbirowe prawa człowieka: analiza krytyczna*, Wydawnictwo UMK, Toruń 1992, p. 40-41.

⁷² B. Gronowska, *Europejska Konwencja Praw Człowieka a prawa drugiej generacji – kilka refleksji o zacieraniu granic*, „Europejski Przegląd Sądowy”, 2013, nr 9, p. 4-10.

⁷³ S. Moyn, *The last utopia: human rights in history*, Harvard University Press, Harvard 2010, p. 176 in; P. Lauren, *The evolution of international human rights: vision seen*, University of Pennsylvania Press, Pennsylvania 2003, p. 10-21.

⁷⁴ L. Garlicki, dz. cyt., p. 85-86.

⁷⁵ N. Stammers, *A critique of social approaches to Human Rights*, „Human Rights Quarterly”, 1998, No. 20, p. 459-514.

⁷⁶ K. Zamorska, *Prawa drugiej generacji a dyskurs społeczny [w:] Wokół współczesnych problemów ochrony praw człowieka*, red. W. Waclawczyk, Wydawnictwo „Erida”, Warszawa 2009, p. 139-149.

⁷⁷ G. Michałowska, *Prawa człowieka i ich ochrona*, Wydawnictwa Szkolne i Pedagogiczne, Warszawa 2000, p. 98.

⁷⁸ K. Motyka, *Prawa człowieka: wprowadzenie, wybór źródeł*, Wydawnictwo Morspol, Lublin 2004, p. 15.

ICPPR)⁸⁵; the right to healthy and sustainable environment⁸⁶; the right to natural resources⁸⁷; the right to communicate⁸⁸; the right to participate in cultural heritage (art. 27 of UDHR); rights to intergenerational equity and sustainability⁸⁹. On the other hand, the right to peace – the greatest good – determines the right to live, survive, evolve and manifest the identity of an individual or group⁹⁰. All these shall remain as unfulfilled utopia, unless the primary need for respecting one's freedom is satisfied.

SUMMARY

The distinction between rights and freedoms is not theoretical, although it may be applied for the sake of evaluation of subjects of protection and effectiveness of each right assigned to a person. Right is superior to freedom. In the case of freedom the state shall refrain from action and interference, while in the case of rights the state is obliged to act⁹¹. The superior character of rights is proven by the capacity to ration freedoms, which are not absolute in the same way as rights⁹².

Right is a space within which a full fulfilment of freedom is possible⁹³. Right shall be understood as the entitlements of an individual provided by the state for the sole fact of being a human being⁹⁴. The entitlement mentioned above is connected to obligation of positive action, which means that the rights cannot be violated, and the obligation regulated by the natural law that the rights of other individuals cannot be violated. It means that the state is bound to fulfil an individual's rights, otherwise the individual is entitled to pursue proper claims. Thus a right gives an individual an opportunity to realise freedom, entitlement or competence⁹⁵.

Freedom, on the other hand, is a negative right, i.e. the right to act according

to one's will, which means that the state shall refrain from any interference in the scope of capabilities of an individual⁹⁶. It may be perceived as both negative (as the freedom of decisions concerning specific actions by a person) and negative (as the freedom against actions aimed at the person). Understood as natural entitlement and effective *erga omnes*, freedom is a fundamental, natural and legally protected attribute of human existence, enabling autonomous and true decisions, free choice and pursuit of values, as well as free actions, including, in a sense, fulfilling human capacities.

Key words: liberties, right, duties, human rights, dignity

⁸⁵ L. Cao, *Law and Economic Development: A New Beginning?*, „Faculty Publications”, 1997, No. 329, <<http://scholarship.law.wm.edu/facpubs/329>>.

⁸⁶ Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1; 11 I.L.M. 1416; Committee on the Rights of the Child, General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4.

⁸⁷ Agenda 21: Programme of Action for Sustainable Development, Rio Declaration on Environment and Development, Statement of Principles. Final Text of Agreements Negotiated by Governments at UNCED Conference, June 3-14, 1992, Rio de Janeiro, Brazil, A/CONF.151/26 (vol. I).

⁸⁸ D. Hicks, *The Right to communicate: Past mistakes and future possibilities*. *Dalhousie Journal of Information and Management*, „Dalhousie Journal of Information and Management”, 2007, No. 3, <<http://djim.management.dal>>.

⁸⁹ S. R. Chowdhury, *Intergenerational Equity: Substratum of the Right to Sustainable Development* [w:] *The Right to Development in International Law*, Martinus Nijhoff, The Hague 1992, p. 13.

⁹⁰ J. Kukulka, *Wstęp do nauki o stosunkach międzynarodowych*, Instytut Stosunków Międzynarodowych Uniwersytetu Warszawskiego, Warszawa 2003, p. 44-45.

⁹¹ M. Piechowiak, dz. cyt., p. 28-29.

⁹² K. Orzeszyna, *Wolność* [w:] *Encyklopedia Katolicka*, t. XX, Lublin 2014, p. 395-396.

⁹³ *Droits de l'homme* [w:] *Dictionnaire de droit International Public*, ed. J. Simon, Bruylant, Bruxelles 2001, p. 396; F. Compagnoni, *Prawa człowieka*, Wydawnictwo WAM, Kraków 2000, p. 10.

⁹⁴ P. Kuczma, dz. cyt., p. 12-15.

⁹⁵ P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Zakamycze, Kraków 2003, p. 135.

⁹⁶ Z. Hołada, dz. cyt., p. 11-12.

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