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CRITICAL ASSESSMENT OF THE OBLIGATION TO RESPECT HUMAN RIGHTS IN CONNECTION WITH A GLOBAL EPIDEMIC

KRYTYCZNA OCENA OBOWIĄZKU POSZANOWANIA PRAW CZŁOWIEKA W ZWIĄZKU Z GLOBALNĄ EPIDEMIĄ

Abstract: The primary beneficiary of human rights is an individual. The obligation to comply with them rests primarily with public authorities, employers, and formal and informal organizations. In the acts of international law and in the Constitution of the Republic of Poland, we have formulations which indicate that such an obligation is imposed on state organs. The global epidemic stimulates reflection on the structure of this duty shaped in this way. Beginning with the Second World War, the concept of a human being who is the sole beneficiary of human rights developed in the general consciousness. Meanwhile, the global pandemic requires a change in such shaped mentality. In critical situations, such as undoubtedly a global pandemic, the individual is also responsible for respecting human rights towards others. The aim of the work is to show those areas of human rights, the implementation of which depends primarily on the individual. Hence, the research hypothesis is that effective respect for human rights also depends on the person him or herself. This claim is also the basis for increasing the sense of security of the entire society. The legal-dogmatic and

descriptive method will be used in this study. The descriptive method will allow us to present circumstances where respect for human rights depends solely on the individual.

Keywords: human rights, global pandemic, respect for human rights, individual security.

1. INTRODUCTION

The subject of this study is a critical analysis of the current obligation to respect human rights. An occasion for this reflection is the epidemic caused by COVID-19. This global crisis situation creates the need for a critical assessment of the obligation to respect human rights, traditionally assigned to public authorities, legal persons and organizational units without legal personality. A human being, to defend her or his rights, has legal instruments (provisions of substantive and procedural law) and institutional instruments (for example: the Human Rights Ombudsman or the European Court of Human Rights). In this perspective, the natural person who is under no obligation to respect human rights is the only eligible party.

The debate on human rights and observance of them finds its justification in the inherent dignity of human being, which places her or him among other beings in the first place. This concept was already shaped in the circle of the ancient culture of Greek philosophy, in Roman law and in the Judeo-Christian religion. Today they are considered as the universal and inalienable rights[1]. Nevertheless, their content is slowly redefined under the influence of various factors[2].

[1] M. Maciejewski, *Początki koncepcji oraz regulacji praw i wolności człowieka do czasów oświecenia.* In**:** ed. A. Bator, M. Jabłoński, M. Maciejewski, K. Wójtowicz (red.) *Współczesne koncepcje ochrony wolności i praw podstawowych* / Wrocław: Uniwersytet Wrocławski: Wydział Prawa Administracji i Ekonomii, 2013, p. 9.

[2] M. Sitek, *Prawa (potrzeby) człowieka w ponowoczesności*. Warszawa: C.H. Beck, 2016, pp. 9-10.

The concept of human rights for the western culture of the 21st century has become the basic system of values which increasingly replaces the system of Christian values which has been dominating for over a thousand years. They are the touchstone of a democratic state ruled by law. Failure to respect human rights by the government of a country may give rise to various types of international retaliation, mainly of an economic and political nature (Judgment of the Court of Justice of April 14, 2015, C-409/13).

Similar consequences will affect legal persons or organizational units without legal personality, which violate human rights. The international institutions, such as the United Nation or the European Union, and the state bodies, including the Human Rights Ombudsman, as well as the public opinion using social media on the Internet may lead to stigmatization and, consequently, to the complete elimination of such an entity.

The basis of the adopted research hypothesis is the emerging doubt as to the validity of the commonly accepted concept, according to which the addressees of the obligation to respect human rights are only legal persons or organizational units without legal personality. In my opinion, such way of understanding the obligation to respect human rights is not correct from a practical and social point of view.

Actions taken by public authorities in order to stop and to combat the global COVID-19 pandemic are proving insufficient. Support from the entire society is necessary but above all from the particular individuals. Therefore, it seems necessary to redefine the subjective obligation to respect human rights. Consequently, it is necessary to introduce appropriate changes to the system of international and national law in this regard. In particular, in critical situations, such as the global COVID-19 epidemic, an

individual is not only entitled, but also responsible for respecting human rights towards others.

Hence, the aim of the study is to find an answer to the emerging research doubt regarding the question whether only a legal person is obliged to respect human rights, and a natural person has only a right to these entities. This question is justified by the fact that the right of a natural person to respect their inherent rights by other subjects of law may make them feel that they do not have to respect these rights themselves.

The research will be based primarily on the legal and dogmatic method, thanks to which it will be possible to analyze the provisions of international and Polish law. The work also contains comparative elements or references to the regulations of other countries. There will also be descriptive elements, especially in the field of philosophy and history, mainly Roman law.

2. POLARIZATION OF RIGHTS AND OBLIGATIONS AS A REASON FOR LIMITING THE OBLIGATION TO RESPECT HUMAN RIGHTS TO LEGAL PERSONS

In contemporary public narrative, a human being appears as a subject of law. Such a subjective concept of a human emerges primarily from civil law, and mainly from the part concerning obligations. A similar approach to human being is found in other areas of law, although it is not uncommon for certain social groups to be appreciated. Consumers, employees, children, the elderly and the disabled are more protected. This tendency is visible not only in the provisions of substantive law, but above all in jurisprudence. The legislator, through stronger protection of certain social groups, aims to balance inequalities that arise between

people for various reasons, most often for economic reasons. In this way, the legislator aims to maintain the constitutional principle resulting from the article 32 of the Polish Constitution, i.e. equality of all people before the law. The final conclusion from the above analysis is the statement that the protection of human rights may be different in relation to certain social groups.

The unilateral limitation of the obligation to respect human rights only by public entities or legal persons is undoubtedly related to the concept of obligations in civil law. There is a well-established concept of subjective rights in civil law science, which has a large impact on the shaping of the concept of human rights.

The concept of subjective rights was formed in the views of XIX century law philosophers, in particular in the views of F.H. v. Savigny and B. Windscheid (the theory of will, i.e. the ability to reveal the will by an individual in a manner protected by law) and R. v. Iherning (theory of interest - subjective rights are the basis of individual inversions.)[3]. The concept of "subjective right" is a designation of universally protected interests (values and goods) defined by legal norms. Thus, the concept of subjective rights is used to regulate the relationship between various legal entities, natural and legal persons, including public authorities and organizational units without legal personality.

Both the above theories are based on the Roman conception of obligation (*creditum* - claim) and debt (*debitum* - obligation). According to the late-classical lawyer Hermoganianus, the essence of the obligation was that the creditor could force the debtor to give her or him "something" - a deal or a performance (D. 44.7.3 pr.). The basis of coercion was the legal bond existing between the

[3] T. Raburski, *Filozofia praw podmiotowych*. Acta Universitatis Lodziensis. Folia Iuridica, 2017, p. 57.

creditor and the debtor (*vinculum iuris*) resulting from legally recognized events (I.J. 3.13 pr.). It was already noted then that in the case of full bilateral obligations, both parties are both obliged and entitled at the same time, e.g. the *emptio-venditio* contract[4].

Nowadays, in an obligation relationship, the creditor has a right in relation to the debtor. Each party to the bond relationship may have, based on legal provision, the so-called a shaping right allowing for unilateral shaping of the content of an existing bilateral legal relationship, including the possibility of its termination, e.g. termination of employment by an employee or a lease agreement by a tenant. At the same time, the debtor has subjective rights in the form of the possibility of raising objections in her or his defense (*exceptiones*). Such shaped forms of subjective rights differ from the classical concept of an obligation understood as the relation between the creditor's claim and the debtor's obligation. This remark is of great importance for the further consideration of the right addressee of human rights.

The concept of subjective rights which was shaped on the basis of the 19th century philosophy of law in Germany and which also dominates in Poland, is not the only existing concept. In the English language, there is no literal equivalent of the phrase "subjective right" but there is a term "*rights*", which cannot be unequivocally translated into Polish. It can mean both the law in the sense of the Polish language, but also subjective rights. In English, the term is enriched with adjectives such as *natural rights* or *legal rights*. Translating them into Polish will not fully reflect their meaning. These phrases contain in their content not only a load of positivist concepts, but also ethical or philosophical

[4] W. Dajczak, W. *Derecho Romano De Obligaciones. Continuación y Modificaciones en la Tradición Jurídica Europea*, Santiago de Compostela: Andavira, 2018, pp. 29-33.

ones[5]. Therefore, a different vision of subjective law in Anglo-Saxon law than the one which has dominated the European legal culture since the 19th century allows for the opening of a new legal discussion on entities obliged to respect human rights.

3. ANALYSIS OF LEGAL PROVISIONS IN TERMS OF IDENTIFYING THE ADDRESSEE OF THE OBLIGATION TO RESPECT HUMAN RIGHTS

In the preamble to the 1948 Universal Declaration of Human Rights, the signatory states undertook the obligation on the universal respect for and observance for human rights. This concept of the addressee of the obligation to respect human rights has been adopted in subsequent acts of international law, including in the article 1 of the 1950 European Convention on Human Rights. Similar provisions are found in local conventions, e.g. the article 1 of the 1969 American Convention on Human Right or in conventions dedicated to certain disadvantaged social groups, e.g. in the article 2, paragraph 1 of the 1989 Convention on the Rights of the Child.

In the paragraph 5 of the preamble to the Charter of Fundamental Rights of 2000, it was established that the Member States of the European Union are the entities obliged to respect and protect human rights and fundamental freedoms. Such a linguistic construction leaves no doubt that the European Union wants to maintain the traditional concept of human rights[6].

[5] T. Raburski, *Filozofia praw podmiotowych*. Acta Universitatis Lodziensis. Folia Iuridica, 2017, p. 59.

[6] J. Menkes, *Karta Praw Podstawowych Unii Europejskiej a konstytucja Europy*. Studia Europejskie, 2001, p. 37.

From the functional side, this construction of the obligation to respect human rights is not something new. It is an indirect heir to the solution developed in ancient Rome. In the 4th century, the *defensor civitatis* office was established, whose task was to protect citizens, especially members of the poorer social classes, against abuses done by representatives of public authority[7] [8]. This polarization of the imperious position of officials and the weaker individuals subordinate to them (natural persons) understood as subjects of law, has been continuing to this day from the times of ancient Rome.

However, an issue worth attention in the Charter of Fundamental Rights is the wording in paragraph 6, which states: *enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.*

The solution adopted in the acts of international law was incorporated into the constitutions of individual states as well as to various laws. And so in the article 30 of the Constitution of the Republic of Poland, the constitution-maker stated that: *The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities*. The final wording of this normative formulation clearly shows that respecting and protecting human rights is the responsibility of public authorities. The source of this obligation is the primary and prior origin of human rights in relation to the state and its structures. Hence, the norms of positive law

[7] B. Sitek, *Dominat – późne cesarstwo rzymskie (284-565)*. in: A. Jurewicz et al. *Rzymskie Prawo Publiczne. Wybrane Zagadnienia*, Olsztyn: UWM, 2011, p. 92.

[8] R. M. Frakes, *Late Roman social justice and the origin of the defensor civitatis*. The Classical Journal, 1994, pp. 337-348.

do not so much define the content of individual rights, although they undoubtedly make them more precise and adapt them to the changing social, economic and political conditions, but provide the basis for their protection[9].

Similarly, obligations are found in other European constitutions. And so in the article 2 of the Italian Constitution it was decided that the Republic recognizes and guarantees inviolable human rights. In the article 1 paragraph 1 of the German Constitution it is also stated that respecting and protecting human dignity, which means human rights, is the duty of all state authorities.

Such a strong formulation of the obligation to respect human rights by a public authority does not appear in the Spanish Constitution. In the article 10, paragraph 1 of the Constitution, the constitution-maker decided that the dignity of the individual, the inviolable rights which belong to her or him, and the free development of his personality constitute the basis of public order and social peace. There is no clear obligation to respect human rights solely by public authorities.

The analysis of the provisions of international and national law conducted above shows that the concept of the state's obligation, or in a broader sense – the obligation of legal persons and organizational units without legal personality, to respect human rights and responsibility for all forms of violation of these rights is very well established. This position, i.e. the obligation to respect human rights by the state, is well-established in European case law (Decision of the European Court of Human Rights of 12th October 2010, 33502/09) and in Poland (the judgment of the Supreme Court - Civil Chamber of 18th December 2019, II CSK 581/18).

[9] L. Bosek, *Komentarz do art. 30 Konstytucji RP*. in: M. Safjan, L. Bosek (ed.), Konstytucja RP. Vol. I. Komentarz do art. 1–86, Warszawa: C.H. Beck, 2016.

4. POSSIBLE EXTENSION OF THE SUBJECTIVE SCOPE OF THE OBLIGATION TO RESPECT HUMAN RIGHTS

It should be realized that a possible extension of the scope of entities obliged to respect human rights to include natural persons is very difficult. The well-established position on this matter in international law and in national legal orders, and consequently in jurisprudence, is difficult to change. After all, it is based on the normative and philosophical premises, even derived from the Roman law.

An example of such a view of the subjective scope of the obligation to respect human rights may be the EU case law on the protection of the right to privacy of natural persons with regard to the processing of data on websites. By the judgment of the Court of Justice of the EU of 24th September 2019, C-136/17 issued in connection with the case of GC and others vs. Commission nationale de l'informatique et des libertés (CNIL), the interpretation of the provision of the article 8, paragraphs 1 and 5 of Directive 95/46 / EC of the European Parliament and of the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal of the European Union of 1995, No. 281, p. 31 - currently the article 9 of Regulation 2016/679, Official Journal of the European Union of 2016, No. 119, p. 1) was extended. As a result of an extended interpretation the aforementioned article 8 should be understand as: *the prohibition or restrictions on the processing of special categories of personal data referred to in these provisions apply, subject to the exceptions provided for in this Directive, also to the search engine operator within its obligations,*

competences and possibilities as a data controller processing data while the search engine is running on the occasion of an inspection carried out by that operator under the supervision of competent national authorities, following a request from the data subject (quoted from the judgment). A similar position is held in the national judiciary.

Thus, the current legal system de facto punishes the perpetrators of human rights violations, the aggrieved party may receive compensation from the state or institution, but the perpetrator does not draw any conclusions from this fact which could change her or his axiology and, consequently, further proceedings in connection with the violation of human rights by her or him.

The question then arises whether it is necessary to implement the liability of natural persons for violations of human rights? And not only when the leaders commit crimes against humanity. The answer to this question must reach not only the layers of normative solutions, but also philosophical or even ethical solutions.

Human subjectivity is a value in itself, which is best seen in legal regulations created for the sake of human being. We already find such a concept in Roman law. Hermogonianus, a lawyer from the IV century, wrote that *Hominum causa omne ius constitutum* sit (D. 1.5.2). For Roman lawyers, but also for syncretic Roman philosophy, the so-called anthropocentrism in law was strongly present[10]. It was a human being who became the center of the legal system and because of her or him the law was created. Among all beings, only human is able to understand the meaning

[10] B. Sitek, *Od antropocentryzmu prawniczego do ekonomizacji prawa*, [w:] G. Dammacco, B. Sitek, O. Cabaj (ed.), *Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej*, Olsztyn-Bari, 2008, pp. 66-78.

of the law[11]. This vision of human being as a being for which all law is created may constitute the basis not only for human legal education, but also for the creation of legal provisions on the basis of which it would be possible to oblige a person as such to respect human rights, and in the event of their violation, assign her or him the guilt. Human being would become not only the subject of rights, but also of the obligation to respect human rights.

The study by Tatiana Chauvin is extremely helpful in further reflection on the obligation to respect human rights by the person her or himself. This author focuses on the issue of human subjectivity and, at the same time, objectivity. According to this author, a human being understood as a subject treats everything she or he meets as an object. In this case, another human being can also be seen as the object. Meanwhile, a human being cannot be treated as an object, but as a subject.

However, the ultimate argument in favor of the necessity to redefine the obligation to respect human rights by human beings, and thus to introduce into the system of international and national law the category of responsibility of natural persons for violations of human rights, is the argument from ethics. One of the two basic commandments in the Judaic religion and in Christianity is as follows: *You shall love your neighbor as yourself* (Leviticus 19:10; Mark 12: 29-31). This commandment contains not only a religious message, but also a moral, ethical as well as philosophical message. This commandment is addressed to every human being and does not contain any limitation or delegation of responsibility to any other entity for human rights violations committed by man himself.

[11] D. C. H. Broussard, *Hominum causa omne ius constitutum». Dall'ingiustizia all'ontoaxia della parità e ai diritti del-l'uomo*. Rivista internazionale di filosofia del diritto, 2010, pp. 1-25.

5. CONCLUSIONS

The separation of the interests of the state already formed in Roman law and then recently the separation of the interest of all legal persons, including organizational units without legal personality from the interests of natural persons, i.e. humans, left a mark on the contemporary concept of human rights. The result is the unilateral protection of natural rights. For this purpose, a whole system of national and international law provisions was built, as well as a system of institutions aimed at building a strong protection of human rights was created. Such a construction indirectly releases a person from respecting the rights of one person towards another.

Of course, this does not mean that human rights violations by people are not punished. The exception is, of course, the conviction of an individual for committing crimes against humanity, as it was the case with military leaders during the war in former Yugoslavia. In other cases, however, such human activity is perceived only from the negative side. They are defined as a crime or breaking the provisions of the law. Such a solution does not stimulate the perpetrator of such acts to reflect on his or her behavior in the light of the need to respect human rights by her or himself.

Hence, the final conclusion of the study is the postulate to introduce into the constitution, or at least into the preamble, the obligation to respect human rights by the human being her or himself, and not only by public entities. This wording could be added to new human rights legislation.

Evident violation of human rights by a human being understood as a natural person should be a reason for aggravating the punishment, e.g. in the case of human trafficking, pedophilia, the use of physical or psychological violence. A certain motivator

for such legislative changes may be the ethical dimension of the commandment of love of neighbor, which has been the imperative of human action for over 1000 years in our Western culture. It can therefore be replaced by a statutory obligation to show respect for the rights of another person.

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