Boundaries and limitations of human rights. A contribution to the discussion

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***Abstract*— The study is devoted to the analysis and evaluation of principal mechanisms for limiting human rights, namely: exceptions by definition, the concept of abuse of rights, limitation clauses of general or specific nature and derogation clauses. The author puts forward the thesis that the recognition of a possibility of introducing restrictions on human rights by way of exception does not nullify the principle of full and effective enjoyment of human rights, but rather clarifies it, permitting to resolve conflicts not only between individual interests and goods, but also of individual rights and interests with collective ones. Obviously, this study does not aspire to be exhaustive. Its purpose is only to outline the topic and the problems involved.**

Keywords— human rights, exceptions by definition, concept of abuse of rights, limitation clauses, derogation clauses

I. INTRODUCTION

One of the rudimentary tasks of modern democratic states is to ensure human rights (Florczak-Wątor , 2016). Consequently, introduction of restrictions on human rights in democratic states is an ultima ratio, which means that it is only possible in situations that genuinely so require and only to the extent that the essence of these rights is not violated.

Recognition of the possibility to introduce restrictions on human rights by way of exception does not nullify the principle of full and effective enjoyment of these rights, but rather specifies it (Jasudowicz 2010: 228). This is because it allows to resolve conflicts not only of individual interests and goods, but also of individual rights and interests with collective ones.

Basically, the following methods of limiting human rights can be distinguished: 1) exceptions by definition, 2) the concept of abuse of rights, 3) limitation clauses of general and/or specific nature, 4) derogation clauses (Jasudowicz 2010: 228; Redelbach 2000: 351; Bodnar, Szuleka 2010: 151 et seq.).

In doing so, several basic principles must not be forgotten. Firstly, some human rights are iures infinitae, i.e. not subject to any limitation. Such absolute nature is attributed, for example, to the prohibition of subjecting a person to torture and inhuman or degrading treatment or punishment (Article 5 of the Universal Declaration of Human Rights; Article 7, first sentence, of the International Covenant on Civil and Political Rights; Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 4 of the Charter of Fundamental Rights of the European Union). Secondly, any limitations on the exercise of human rights must be clearly normatively mandated and may only be applied within the limits of that mandate. It should be noted that the more precise the normative anchoring of a given limitation, the fewer doubts will arise from its application. Thirdly, limitations on human rights - as exceptions to the principle of respect for these rights and their full and effective enjoyment - must not be implied. On the contrary, the principle of praesumptio in favorem iurium humanorum must apply. Fourthly, limitations to human rights must not be interpreted or applied extensively. Indeed, a requirement applies to interpret them as strictly as possible.

II. LIMITS AND RESTRICTIONS ON HUMAN RIGHTS

Literature of the subject (Brzozowski 2021: 41; Piechowiak, 2009: 68-69; Brzozowski, 2007: 70-71; Starck, 2007: 47-50) highlights the difference between boundaries of human rights and limitations of human rights. Limits are a consequence of delimitation of the protected substance of individual human rights, and thus derive from their very definitions and express their autonomy. Each human right refers to a certain field of human autonomy and social relations and covers a certain category of states of fact. Consequently, certain states of fact

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will ‘fall’ within the scope of a given human right and others will not. It can be concluded from the above observation that human rights are, in a way, self-limiting. The legal definitions of human rights, together with the body of interpretative law developed by international, European and national case-law and legal science, constitute in essence a list of conditions for the protection by international, European and national institutions respectively. Leaving a given manifestation of human activity outside the framework of a given human right so established is undoubtedly a form of limiting it, which - due to its nature described above - should be referred to as an internal (conceptual, original) limit to this human right.

Restrictions on human rights, on the other hand, are external (secondary) in nature, as they annihilate or deform the already existing forms of these rights. They constitute an encroachment on the scope of the protected substance of individual human rights, as delimited by their internal (conceptual, primary) boundaries. Clearly, in order to conclude that there has been a limitation of a particular human right, it must first be established that a factual situation in question falls within its boundaries at all.

III. Exceptions by definition

Exceptions by definition include such norms on individual human rights which - directly regarding delimitation of the scope of the protected substance of a given right - indicate expressly that something remains or may be left outside the scope of the right (Jasudowicz 2010: 229). Thus, exceptions by definition exclude from protection specific factual situations falling under a given norm as delimited by its internal (conceptual, primary) boundaries. Both the manner in which an exception is formulated from the point of view of legislative technique and its degree of specificity may differ. Most often, a main clause expressing a principle of protection is followed by a subordinate clause using the formula: "unless," "except," "shall not include," "shall not be construed," etc.

By way of example, reference can be made to Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which proclaims the right to life in the first sentence of Paragraph (1), and in the second sentence of Paragraph (1) and in Paragraph (2) provides for situations in which deprivation of life will not be contrary to the principle of its protection. An analogous situation exists with Article 6(1) and (2) of the International Covenant on Civil and Political Rights.

Another example is Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, in Paragraph (2), lays down the prohibition of forced or compulsory labour and, in paragraph (3), lists situations that cannot be treated as such labour. An analogous approach can be found in Article 8(3)(a) and (b)-(c) of the International Covenant on Civil and Political Rights.

Of course, there are also less typical ways of formulating an exception by definition. For example, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms proclaims the right of everyone to assemble peacefully. A contrario, assemblies which cannot be assigned such peaceful character will, therefore, remain outside the scope of this right.

IV. The concept of abuse of rights

The concept of abuse of right consists in assuming that certain behaviour will not be considered realisation of a particular human right even though its content could prima facie justify such understanding. Consequently, what is at stake here are acts and omissions that fall under the human right in question, delimited by its internal (conceptual, primary) boundaries. Nevertheless, due to a contradiction between such behaviours and the purpose of the human right in question or the principles of social co-existence, they are not qualified as exercise of the right and do not enjoy protection.

By way of example, it may be pointed out that both under international (Article 29(3) of the Universal Declaration of Human Rights; Article 20 in conjunction with Article 5(1) of the International Covenant on Civil and Political Rights) and European (Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 54 of the Charter of Fundamental Rights of the European Union) human rights law, promotion of certain contents is directly prohibited because it does not fit into the axiology of democratic legal space (judgment of the Constitutional Tribunal of 11.10.2006, P 3/06). This applies, inter alia, to messages expressing racial, national, ethnic or religious hatred, propagating totalitarian ideology (Nazism, fascism, communism) or inciting violence with a view to gaining power or influence on state policy. Their communication eludes the commonly accepted interpretations of freedom of expression and - as a rule - it is qualified in terms of abuse of the law, as “freedom is not granted to the enemies of freedom” (Garlicki, 2010: 813).

In this way, certain contents are not analysed at all as to whether they fall within the permissible limits of restricting a given human right. They are simply not recognised as manifestation of that right (Bodnar, Szuleka, 2010: 151).

A situation in which a specific human right would be interpreted in such a way as to confer on any state, group or individual the right to take action or perform an act aimed at nullifying or restricting other human rights to a greater extent than resulting from the normative anchorage of those rights (see Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 5(1) of the International Covenant on Civil and Political Rights) may also be treated as an abuse of rights.

As an aside, it should be mentioned that the Convention for the Protection of Human Rights and Fundamental Freedoms also provides for the concept of abuse of purpose (Article 18). It is based on the acknowledgment that limitations on human rights permitted by the Convention may not be used for purposes other than those for which they were introduced.

V. LIMITATION CLAUSES

The positive legislator may introduce into the legal system certain prerequisites whose fulfilment will allow - subject to a number of conditions of guaranteeing nature - to limit the scope of human rights. The provisions defining these facts (or more precisely: the values to which priority is then given), accompanied by a list of prerequisites to the limitation (requirement of statutory form, principle of proportionality, prohibition of violation of the essence of the right), are usually referred to in the literature as limitation clauses.

According to Tadeusz Jasudowicz, several characteristics of limitation clauses can be distinguished (Jasudowicz 2010: 234-235; cf. Redelbach 2000: 351 et seq.). Firstly, they describe the prerequisites of interference by means of open-ended concepts (so-called general clauses) that do not specifically point to the content of authorisation. Secondly, they permit interference with the protected substance of human rights during the normal functioning of the state. Thirdly, their application may arise from the need to protect both individual and public interests. Fourthly, they have a specific structure, comprising three elements: 1) the lawfulness of interference, 2) its necessity in a democratic society, and 3) its pursuit of a legitimate aim.

Two types of limitation clauses should be distinguished. The first allows to introduce limitations on an entire catalogue of human rights laid down in a given normative act under one general limitation clause. By way of example, reference can be made to Article 52(1) of the Charter of Fundamental Rights of the European Union, according to which: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

The second type of limitation clauses allows for the restriction of specific human rights under individual clauses related to them. In this case, several specific limitation clauses arise, each providing a basis for interference with a different human right. Examples include Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("The exercise of these freedoms entailing duties and responsibilities may be subject to such formal requirements, conditions, restrictions and sanctions as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation and rights of others, and for the prevention of the disclosure of confidential information or for guaranteeing the solemnity and impartiality of the judiciary.") or Art. 19(3) of the International Covenant on Civil and Political Rights ("The exercise of the rights provided for in paragraph 2 of this article entails special obligations and special responsibilities. It may consequently be subject to certain limitations, which shall, however, be expressly provided for by law and which are necessary in order: a) to respect the rights and reputation of others; b) to protect State security or public order or public health or morals.").

It should be noted that individual limitation clauses are much more common in international and European human rights law. Their 'popularity' can be justified by the possibility to adapt the basis of limitation to the specifics of individual human rights (Jasudowicz 2010: 237).

There are also situations in which both types of clauses occur in a single normative act. For example, the Constitution of the Republic of Poland of 2.4.1997 contains both a clause of general nature (Article 31(3)) and clauses of specific nature (e.g., Article 45(2), Article 49, sentence 2, Article 53(5), Article 64(3)). At the same time, specific clauses do not exclude application of the general clause, which is supplementary to them (judgment of the Constitutional Court of 10.04.2022, K 26/00).

What is extremely important, limitation clauses are of considerable significance not only for the entity authorised to introduce limitations on human rights, i.e. as a rule the state, but also for the beneficiary of the limited right. From the point of view of the latter, they provide a basis for verifying and, possibly, questioning the admissibility of interference.

VI. DEROGATION CLAUSES

So-called derogation clauses indicate under what conditions suspension of certain human rights is permissible in situations of particular danger. They can only apply in states of emergency (formal rationale) and only for the protection of the common good threatened by war or other grave danger (substantive rationale). Furthermore, they contain a catalogue of non-derogable rights, i.e. rights whose exercise cannot be suspended regardless of the situation. Precise specification under what terms suspension of human rights in an emergency situation is permissible is actually conducive to the protection of these rights, since - at least according to the assumptions - it protects them from arbitrary and potentially seriously abusive abrogation under the guise of a state of emergency (Radajewski 2015: 140).

As an example of such clause, Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms can be cited, according to which: "(1) In the event of war or other public danger threatening the life of the nation, each of the High Contracting Parties may take measures to abrogate the application of its obligations under this Convention to the extent strictly necessary to meet the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law. (2) Obligations under Article 2 may not be abrogated on the basis of the foregoing provision, except in cases of death resulting from lawful acts of war and the obligations contained in Articles 3, 4 (paragraph 1) and 7. (3) Each High Contracting Party shall, in exercising its right to abrogate obligations, inform the Secretary-General of the Council of Europe fully of the measures it has taken and the reasons for them. It shall also inform the Secretary-General of the Council of Europe when the measures taken cease to have effect, and the provisions of the Convention are again fully applicable."

Another example is Article 4 of the International Covenant on Civil and Political Rights: "(1) Where an exceptional public emergency threatens the existence of a nation and has been officially proclaimed, States Parties to the present Covenant may take steps to suspend the application of their obligations under the present Covenant to the extent strictly appropriate to the exigencies of the situation, provided that such steps do not conflict with their other obligations under international law and do not entail discrimination solely on the basis of race, colour, sex, language, religion or social origin. (2) The foregoing provision shall not authorize the suspension of the application of the provisions of articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. (3) Any State Party to the present Covenant exercising its right to suspend the application of its obligations shall immediately inform the other States Parties to the present Covenant, through the Secretary-General of the United Nations, which provisions of the Covenant have been suspended and the reasons therefor. That State shall then notify by the same means the date on which the suspension ceases to apply."

An emanation of the derogation clause is also provided in Article 233 of the Constitution of the Republic of Poland of 2.4.1997: "1. A law defining the scope of restrictions on human and civil liberties and rights during martial law and a state of emergency may not restrict the freedoms and rights defined in art. 30 (human dignity), art. 34 and art. 36 (citizenship), art. 38 (protection of life), Articles 39, 40 and 41(4) (humane treatment), Article 42 (bearing criminal responsibility), Article 45 (access to court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions) and Articles 48 and 72 (family and child). (2) It is impermissible to restrict human and civil liberties and rights solely on the basis of race, sex, language, religion or lack thereof, social origin, birth and property. (3) A law defining the scope of restrictions on human and civil liberties and rights in a state of natural disaster may restrict the freedoms and rights set out in Art. 22 (freedom of economic activity), Art. 41(1), (3) and (5) (personal freedom), Art. 50 (inviolability of the dwelling), Art. 52(1) (freedom of movement and residence in the territory of the Republic of Poland), Article 59(3) (right to strike), Article 64 (right to property), Article 65(1) (freedom of work), Article 66(1) (right to safe and hygienic working conditions) and Article 66(2) (right to rest)."

VII. Conclusions

The limited framework of this study allowed to outline the difference between limits and restrictions to human rights and the important mechanisms for limiting human rights in democratic states, namely: (1) exceptions by definition, (2) the concept of abuse of rights, (3) limitation clauses of a general and/or specific nature, (4) derogation clauses. It is fair to say that these mechanisms do not actually weaken the protection of human rights, but flesh out their protected substance. They are implied by the practical realities of realising individual human rights, which very often come into conflict with the rights of other actors or even other - equally important - values, such as, for example, state security or public order. Furthermore, these mechanisms provide a basis for the possibility to hold states and their officials accountable for actions taken in the name of introducing human rights limitations.

VIII. References

Bodnar A., Szuleka M. (2010). Koncepcja „nadużycia prawa" w Konwencji o ochronie praw człowieka i podstawowych wolności a mowa nienawiści. In: Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne, ed. Wieruszewski R., Wyrzykowski M., Bodnar A., Gliszczyńska-Grabias A., Wolters Kluwer Polska.

Brzozowski W. (2007). O pojęciu granic wolności sumienia i wyznania, Studia Prawnicze 2007, No 1 (171).

Brzozowski W. (2021). Zagadnienia wstępne. In: Brzozowski W., Krzywoń A., Wiącek M., Prawa człowieka, Wolters Kluwer.

Florczak-Wątor M. (2016). Nota 30 do art. 5. In: Konstytucja RP. Tom I. Komentarz do art. 1–86, ed. Safjan M., Bosek L., C.H. Beck.

Garlicki L. ed. (2010). Europejska konwencja o ochronie praw człowieka i podstawowych wolności, Tom I, Komentarz do artykułów 1–18, C.H. Beck.

Jasudowicz T. (2010). Granice wymagalności międzynarodowo chronionych praw człowieka. In: Gronowska B., Jasudowicz T. Balcerzak M., Lubiszewski M., Mizerski R.: Prawa człowieka i ich ochrona, Dom Organizatora.

Piechowiak M. (2009). Klauzula limitacyjna a nienaruszalność praw i wolności, Przegląd Sejmowy 2009, No 2 (91).

Radajewski M. (2015). In: Międzynarodowa ochrona praw człowieka -– współczesne problemy na świecie, ed. Jabłoński M., Jurczyk T., E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Redelbach A. (2000). Prawa naturalne - Prawa człowieka - Wymiar sprawiedliwości. Polacy wobec Europejskiej Konwencji Praw Człowieka, Dom Organizatora.

Starck Ch. (2007). Wolność badań naukowych i jej granice, Przegląd Sejmowy 2007, No 3 (80).

Charter of Fundamental Rights of the European Union. Dz.Urz. UE C 303 of 14.12.2007, p. 1, as amended.

Constitution of the Republic of Poland of 2.04.1997. Dz.U. No. 78 item 483, as amended.

Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4.11.1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2; Dz.U. 1993 No 61 item 284 as amended.

International Covenant on Civil and Political Rights opened for signature in New York on 16.12.1966. Dz.U. 1977 No. 38 item 167.

Judgment of the Constitutional Tribunal of 10.04.2002, K 26/00. Dz.U. 2002 No. 56 item 517.

Judgment of the Constitutional Tribunal of 11.10.2006., P 3/06. Dz.U. 2006 No. 190 item 1409.

Universal Declaration of Human Rights adopted by the UN General Assembly by resolution 217/III A on 10.12.1948 in Paris.