Chapter I. Conceptual framework and general principles of human rights

Every legal system, including that of public international law, uses its own conceptual framework and sets out its own core principles. This chapter will present the relationship between human rights law and public international law. The interrelation of these systems, the impact of international human rights law (IHRL) on domestic law requires a precise definition of what human rights normatively are, what their function or role is, and what their phenomenon consists in. **1**

Human rights have important specific features as regards other elements of the international law system. This is due, on the one hand, to their purpose of protection, but also to their essence, manner and method of human rights regulation. Assuming that there is, as a rule, only one normative system with all the concepts of a universal, multicentric or subsystemic view of international law, then international law, through the model of ratification, becomes the law within the limits of the national system, which does not change the fact that each branch of law defines certain converging issues independently and autonomously. **2**

Since it is necessary to 'reconcile' the normative orders of many jurisdictions, the autonomy of international human rights law is much broader than in the case of other branches of law. However, this is only possible with human rights themselves being correctly placed and a correct normative assessment of their source being made. Similarly, the application of human rights principles allows for this type of regulation. One may attempt to define each legal system according to the same criteria: the object of regulation, the subjects being regulated, the manner in which it is regulated, and the possibility of imposing sanctions. The human rights system can also be described according to this scheme.

§ 1. Conceptual framework

The specific nature of human rights requires that the process of the formation and normative evolution of the legal system be presented. This also **3**

involves a presentation of the history of human rights, since their international regulation is a process that has commenced relatively recently and is still in progress. The essence and history of human rights allow for them to be defined normatively, and to demonstrate the differences between human rights and freedoms.

I. History of human rights

4 The codification of human rights and fundamental freedoms developed in two ways: on the one hand, civil rights appeared in the provisions of national law (constitutions, statutes, privileges and covenants), and on the other – through the provisions of acts of international law (agreements, reservations to peace treaties, conventions). All of these instruments were then incorporated into domestic legislation.

5 For centuries, human rights have addressed international issues such as: religious freedom, the slave trade, the exchange of prisoners of war and the rules of war, providing protection for citizens abroad. However, they have never been compiled in a single document, with the first catalogue of human rights, common to all states and nations, being contained in the Universal Declaration of Human Rights (UDHR) adopted on 10 December 1948. This, together with the International Covenants on Human Rights of 16 December 1966, makes up the Charter of Human Rights.

6 However, the process of human rights development was initiated much earlier. At the dawn of history, under conditions of state division and a model based on the economic and political exploitation of the individual by rulers, human rights were not respected. Certain elements of the protection of human interests can be found in the norms of the customary law of the ancient Egyptians, Persians and Greeks (e.g. the right of asylum, the right to family life). In addition, elements of the protection of political and civil rights (e.g. the right to court and the right to vote in elections) appeared in the ideas of the ancient Romans, who based the concept of individual rights on natural law and the concept of justice (Cicero).

7 It was not until the development of the legislation contained in the Bible, with its components of basic human rights (e.g. the right to life, the right to security, the right to liberty, the right to enjoy property and the right to due process), that emphasis was placed on the need for public authorities to treat human beings as people. The requirement to respect another human being as a legitimate subject must be read from the directive expressed in the Letter to the Galatians: 'There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus' (Gal. 03:28).

This message could be achieved after Christians gained religious freedom, as expressed in the 313 Edict of Milan.

8 The first documents of a legally binding nature, codifying certain rights and freedoms of the citizen appeared in the Middle Ages and regulated the relationship between the monarch and the noble state. In England, these were: The Great Charter of Freedoms of 1215 (Latin: *Magna Carta Libertatum*), the *Habeas Corpus Act of* 1679 and the Declaration of Rights of 1689). The *Magna Carta Libertatum* guaranteed, among other things: the prohibition of unlawful arrest and imprisonment or deprivation of property, outlawry, exile, or oppression of any kind (Article 39). The Habeas Corpus Act prohibited public authorities from arresting a citizen without court authorisation. In contrast, the Declaration of Rights systematised the political and civil rights of the English nobility.

In all of these acts, liberties and rights were limited in subject, object and time: they were available only to the nobility, applied only to the personal sphere and could be suspended for the duration of a threat to public safety. Similar laws were gradually introduced in other monarchies: in 1188 in the Kingdom of León, and in 1222 in Hungary (Golden Bull of King Andrew II).

9 In Central and Eastern Europe, similar regulations were issued to guarantee the personal inviolability of the nobility. The polish Privilege in Czerwińsk in 1422, and then in Jedlnia in 1430 and in Krakow in 1433, contained many rights, e.g. the rule that a person of noble status would not be imprisoned without a court sentence (Latin: *neminem captivabimus nisi iure victum*). The powers of the nobility were successively extended by the Sejm constitutions, beginning with the *Nihil Novi Constitution* of 1505, granting them political rights, including the right to participate in, elect and be elected to the nobility's assemblies. A special kind of freedom granted to the nobility was the ability to exercise *liberum veto*.

10 On the other hand, in Poland, the civil right of resistance (*ius resistendi*) against the authorities, resulting from the privilege of Mielnica of 1501, was guaranteed in the Henrician Articles of 1573. These principles were broken only by the adoption of the Constitution of 3 May 1791, the first in modern Europe, which retained the principle of statehood. Formal equality and personal freedom were only guaranteed by the Constitution of the Duchy of Warsaw of 22 July 1807, which was imbued with the ideas of French republicanism.

11 The postulate of protection of rights by the international community (Latin: *totus orbis una respublica*), propounded by Francisco de Vitoria, had a fundamental impact on the development of international law. However, it was drowned out during the period of absolutism, an idea that reduced man to nothing more than labour force, completely subordinate to the will of the monarch.

In many of the treaties concluded at that time, regulations can be found regarding the religious freedom of individual national minorities and religious groups (for example, Article 28 of the Treaty of Westphalia of 24 October 1648, bringing to an end the Thirty Years' War, guaranteed peace between Protestants and Catholics; Article IV.2 of the Treaty of Oliva of 3 May 1660 between Poland and Sweden, bringing an end to the Swedish Deluge, provided for the right to 'freedom of worship and observance of the rites of one's own religion, without inquisition or persecution'). The response to absolutist tendencies came in the eighteenth century as a period of transposing into national legislation the philosophy of the Enlightenment, which was presented specifically by the lawyer Charles Louis de Secondat, Baron de la Brède et de Montesquieu, the philosopher John Locke, the writer Thomas Paine, and the educator Jean Jacques Rousseau.

12 John Locke, the father of English classical liberalism and founder of the modern school of natural law, was the founder of the triad of basic human rights: the right to liberty, the right to life, and the right to property, which was supplemented by the principle of equality and the principle of religious tolerance. As a critic of patriarchalism, in his 1690 work titled 'Two Treatises on Government', he set out the concept of limited power divided by competence, and the relationship between government and citizens. He proclaimed the voluntary nature of membership in this civil society and granted individual members the right to resist and remove the government by force in the event of an attack by the government on the freedom and property of individual citizens.

13 Montesquieu was a representative of the modern concept of the state as a guarantor of the personal security of the individual. In his work titled 'The Spirit of the Laws' (French: *De l'esprit des lois*), he recognised that it was the duty of the public authority to guarantee the rights and freedoms of all citizens of the state. At the same time, it is the only reason why individuals enter into a contract creating the state, also called a social contract (French: *le contrat social*). Thus, the quality of a state and its system (despotism, monarchy, aristocratic republic or democratic republic) is measured by the degree to which its representatives respect the freedom and interests of its citizens. In turn, civil rights can be enforced by the strict separation of legislative, executive and judicial powers. The above ideas were reproduced by Thomas Paine, the forerunner of the idea of a democratic legal state, whose 1791 work Rights of Man included the concept of rights and freedoms based on the inherent dignity of man.

14 In Central and Eastern Europe these ideas were introduced by Hugo Kołłątaj, who not presented his own concept of cardinal rights in the work titled 'Natural rights and duties of man developed and demonstrated according to the eternal, immutable and necessary laws of nature' (French: *Les droits et les devoirs*

naturels de l'homme développés et démontrés d'après les lois éternelles, immuables et nécessaires de la nature). Based on Kołłątaj's understanding, cardinal laws (Latin: *lex cardinalis*) meant principles close to the essence of human rights, as the most general, but having the greatest force, derived from natural law (French: *la loi de la nature*), which were to constitute the basis for the enactment of both constitutional acts and subordinate acts: codes and laws. In Kołłątaj's understanding, the natural powers of man meant the power, resulting from natural law, which is completely free and independent, to acquire, possess, dispose of and use anything that is necessary to preserve and enjoy life.

15 The representative who combined republican and democratic ideas, including those concerning the separation of powers and the relationship of its representatives and citizens, based on the principles of liberty (French: *la liberté*) and equality (French: *l'égalité*), was Jean Jacques Rousseau. In his 1762 work titled 'The Social Contract' (French: *Du contrat social*), he noted that both free will (French: *la volonté particulière*) and the interest of the individual (French: *l'intérêt particulier*) are not always compatible with the interest of society as a whole, and therefore – despite the formal equality of all human beings – the individual should subordinate them to the state, whose task it is to harmonise them with his or her interest. If individual rights were violated, citizens would have the right to reorganise the state.

These principles were also invoked by representatives of the American and French revolutions, who incorporated them into their fundamental laws (the U.S. Constitution of 17 September 1787, the Constitution of the Kingdom of France of 3 September 1791) and supplementary basic acts containing a list of human rights and freedoms.

16 On the American continent, where the libertarian ideas of John Locke, Thomas Paine, and George Mason were modelled, such solutions were contained in the Virginia Declaration of Rights of 12 June 1776, the first normative act founded on the concept of the rights of man as the basis of the state system. It preceded the U.S. Declaration of Independence of 4 July 1776, guaranteeing inalienable rights to all citizens (e.g. rights to resist, to life, to liberty and happiness). An event that affected the international community was the adoption of ten amendments to the Constitution (the Bill of Rights), passed on 25 September 1789, authored by James Madison.

Once ratified by all the states, the amendments, which became effective on 15 December 1791, guaranteed basic freedoms and liberties, including:

1) freedom of religion, press, speech, petition and assembly (I);
2) the right to keep, bear and handle arms (II);
3) the prohibition on quartering soldiers in private residences in times of war (III);

4) the rights of personal integrity, property, freedom of habitation and documents (IV);
5) the principles of incurring and meting out criminal liability, including applying the death penalty (V);
6) the rights of accused persons, including the right to be informed of the charges and the right to counsel (VI);
7) the right to a trial (VII);
8) the prohibition on inflicting and imposing disproportionate and cruel punishments and fines (VIII);
9) the extent to which extra-constitutional rights and freedoms are exercisable (IX–X).

17 In France, in the context of the revolution (1789–1799), the ideas of extreme republicanism, assuming the primacy of the idea of equality, the symbol of which became the guillotine used on a large scale, were modelled on the principle of equality. The main slogans of the Revolution: liberty, equality and fraternity (French: *liberté*, *égalité*, *fraternité*) were then used in the 20th century to classify human rights as follows: first-generation, known as blue human rights; second-generation, known as red human rights; and third-generation, known as green human rights. According to another classification, these are: freedom rights (first generation), social rights based on the principle of equality (second generation), and solidarity rights (third generation). On 26 August 1789, the National Assembly, 'considering that ignorance, forgetfulness or contempt of the rights of man are the sole causes of public miseries and the corruption of governments,' resolved to set out in the Declaration of the Rights of Man and of Citizen (French: *Déclaration des Droits de l'Homme et du Citoyen*) the 'natural, inalienable and sacred rights of man.'

18 The Declaration of the Rights of Man and of Citizen consists of 18 articles setting out the rights, freedoms and duties of every citizen. According to Article 1, men are born and remain free and equal in rights; according to Article 2, the aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression. The Declaration of the Rights of Man and of Citizen also lists other rights and freedoms, such as: freedom of belief, freedom of expression and opinion, freedom of speech, writing and printing, while property was considered a sacred right. The declaration also provides for duties: the maintenance of armed forces, payment of taxes and public report by officials. The declaration was used as a modelled by Olympe de Gouges, who in 1791 proclaimed the Declaration of the Rights of Woman and of the Female Citizen (French: *Déclaration des droits de la femme et de la citoyenne*), proclaiming women's rights as separate from men's.

The end of the 18th century also marked the beginning of the introduction of the principle of humanitarianism in criminal legislation. The French Declaration of the Rights of Man and of Citizen established numerous guarantees for the accused, including the presumption of innocence, legality and the prohibition on inflicting disproportionate punishments. In the legislation of many other European countries, dishonourable punishments (known as mutilations) were banned and torture as evidence was abandoned (in Poland, it was abolished in 1776). **19**

The era of the Napoleonic Wars, at the turn of the eighteenth and nineteenth centuries, also saw the emergence of the first international philanthropic institutions to preserve human existential and livelihood rights. Some of these rights were incorporated into national constitutions and legislation, such as: the right of the poor to assistance, the universal right to education (Constitution of the Kingdom of France of 1791) and the right to voluntary social security (introduced in 1790 in the Kingdom of Denmark). **20**

In the 19th century, the development of human rights was based on regulations incorporated into peace treaties and the findings of international conferences. The Congress of Vienna (1814–1815) affirmed many rights and liberties, including personal and religious liberty, and established a special committee on the international slave trade. In subsequent decades, more and more standing expert committees and intergovernmental commissions were established to deal with specific human issues. Technical solutions developed by specialists were reflected in international agreements. This was the result of the Industrial Revolution and the human capital theory, which held that it was in the interest of the state to regulate issues such as reducing mortality, improving working conditions, providing decent sanitation, regulating communications and ensuring the flow of information. **21**

The development of human rights in the 19th century also took place on the Latin American continent, one of whose representatives was Simón Bolívar (1783–1830) known as the Liberator (Spanish: *El Libertador*) promoting universal civil, political and religious freedom. **22**

In Europe, the acceleration of the codification of civil and political human rights was sealed by the events of the Spring of Nations of 1848. Under the reforms of Franz Joseph, the citizens of the Austrian Empire, and subsequently of the Austro-Hungarian Monarchy, were granted the right to a name, the ability to appear in court in person and the right to participate in public life. The rights guaranteed to the citizen by the Constitution of 21 December 1867 were supervised by the State Tribunal, which began operating in 1869 as the prototype of today's Constitutional Tribunal. The expansion of political and electoral rights on the basis of universality, equality, secrecy and directness was **23**

simultaneously accompanied by the abolition of property-based and origin-based suffrage (in France in 1848), and then gender-based and education-based suffrage (in Poland and the United Kingdom in 1918), which allowed equal access of women and men to all positions and offices.

24 The turn of the 20th century saw the development of labour and social rights incorporated into successive conventions and sanitary agreements. They concerned the regulation of working time and quality, the prohibition on slave labour, the prohibition on the employment of children and women in certain industries, and the obligation to pay wages for labour. Germany also saw the first of the Bismarck Laws on a general welfare system, providing for state aid in the form of health (1883), accident (1884), and old age pension (1889) benefits. Social rights, understood as rights enjoyed by every human being, were confirmed by Pope Leo XIII in his 1891 *Rerum Novarum*. The institutionalisation of organised protection of labour rights was made possible by the International Labour Organisation (ILO), established on 28 June 1919, as an international autonomous organisation attached to the League of Nations, and now as a specialised organisation of the United Nations. By 1933, the ILO had adopted 40 conventions on working hours, maternity leave, unemployment, working conditions at night and for women and children, equal pay, rules for maritime labour, forced labour and freedom of association.

25 World War I and its accompanying events (such as the Bolshevik Revolution) resulted not only in a new political order, but also in the need for innovative legal solutions based on the concept of natural rights, taking into account the rights of certain categories of people: national minorities, workers, enslaved persons, indigenous people, women and children. As a result of the provisions of Part I of the Treaty of Versailles, signed on 28 June 1919, the League of Nations was established with its headquarters in Geneva, operating from 1920 to 1946. It was the first universal international organisation dedicated to protecting the rights of the aforementioned groups and combating cross-border issues that threaten humanity. To this end, more regulations were passed under the auspices of the League of Nations, including: the Declaration of the Rights of the Child of 26 November 1924 (known as the Geneva Declaration) and the International Opium Convention of 19 February 1925. Representatives of national minorities could appeal to the Council of the League of Nations, as the body guarding the observance of the Minority Treaties of Versailles, in which they reported violations of their rights. The foundations of cultural rights were developed within the framework of the Commission for International Intellectual Cooperation of the League of Nations, operating since 1922, whose successor is today's United Nations Educational, Scientific and Cultural Organisation (UNESCO).

The League of Nations, as part of a collective security mechanism, failed **26** to prevent the outbreak of World War II, the criminal nature of which was a denial of all rights. The idea of universal rights enjoyed by all human beings was addressed by Pope Pius XII, who presented several rights on Christmas Eve 1942, including labour rights and the right to social and family integrity.

The concept of human rights based on personal dignity was expanded by Pope John XXIII in his 1963 *Pacem in terris* to include third-generation rights. Pope John Paul II affirmed this, expanding it to include the experience of Central and Eastern Europe, while Popes Benedict XVI and Francis warn against the abuse of human rights, noting that the inflation of subjective rights and the proliferation of individual rights threaten to destroy the idea of natural human rights.

The concept of rights recognised and sanctioned by international law has **27** been supported by politicians. In his 1941 speech to the Congress, U.S. President Franklin Delano Roosevelt enunciated four essential human freedoms on which the post-war order was to be based:

1) freedom of speech and freedom of expression,
2) freedom to worship God,
3) freedom from want, and
4) freedom from fear, which was to be manifested, among other things, in a reduction of armaments.

These freedoms became the basis for future declarations:

1) The Atlantic Charter of 14 August 1941, signed by Winston Churchill and Roosevelt on the battleship HMS Prince of Wales, providing, among other things, for the right to security and the enjoyment by all nations of equal access to trade and raw materials;
2) The United Nations Declaration of 1 January 1942 (known as the Washington Declaration).

Influenced by these ideas, in 1943 Hersch Lauterpacht, came up with the **28** idea of a draft International Bill of Human Rights, containing personal, social and economic rights and freedoms, which would be binding on all peoples and nations of the world, and which would also include a norm of a guarantee nature, constituting an obligation on the part of state authorities to make it a reality. Ideas for the adoption of such a document were partially implemented within the United Nations (1948 and 1966) based on the idea of dignity for every human being.

Despite the formal and legal establishment and acceptance by the United **29** Nations of respect for human rights as a principle, there are still perceptible problems with the selective respect and enforcement of these rights in the context of global problems. In recent decades, the United Nations has given

explicit priority to the principle of sustainable development, as established in the Declaration on the Human Environment, adopted on 16 June 1972 at the Stockholm Conference, and further developed at the Second Rio de Janeiro Conference in 1992 and at the 2002 World Summit on Sustainable Development in Johannesburg. In the Millennium Development Goals, the UN committed developed countries to improve living conditions by supporting developing countries until 2015. In 2015, the Millennium Development Goals were replaced by Sustainable Development Goals which are characterised by a much broader horizon of planned actions and a perspective to 2030. In implementing the 2030 Agenda, which contains 17 sustainable development goals as well as 169 more specific tasks, countries must not forget that human beings, who have the right to a healthy and creative life in harmony with the environment, should be placed at the core of state management.

30 Following the WHO's announcement of the COVID-19 pandemic on 11 March 2020, national authorities in many countries restricted a number of conventionally and constitutionally guaranteed rights and freedoms. In addition to traditional limitation and derogation measures applied on a hitherto unknown global scale, many countries used previously unknown extraordinary restrictions and extra precautionary measures such as a lockdown. Societies accepted these constraints in the full exercise of rights and freedoms as *ultima ratio* measures, hoping that these emergency regulations would be temporary solutions and would be lifted as soon as the pandemic is over. National authorities may not prolong the application of precautionary measures that, even indirectly, have the effect of limiting rights and freedoms in a manner that is constraining and burdensome beyond the limits prescribed by law.

II. Definition of human rights

31 In order to properly define what human rights are and to place them in a normative framework, the aims that human rights are intended to achieve must be indicated. Every part of the legal system serves some purpose. Every legal institution has a role to play. The fact that the legal systems of various jurisdictions use the same normative solutions on a global scale indicates that certain mechanisms, institutions and systemic solutions make it possible to pursue the general purpose of law, i.e. giving effect to the idea of justice. States use normative solutions developed and used in other countries. Examples of this can be found in the application of the French-based or German-based concept of copyright, the adoption of civil law principles based on German law, etc.

Since human rights as a philosophical idea are so influential that they are regulated and protected, despite being purely declaratory, in most states, the source and purpose of human rights must determine the 'power and impact' of those rights. Paraphrasing Hugo Kołłątaj, it should be stated that human rights are norms of the most general level in the legal order, while having the highest impact. This is not to say that human rights derive directly from natural law, for that is a discussion in the philosophy of law. From the perspective of the practical and actual impact of human rights, there must be a normative value behind them of such 'weight' that its disregard is strongly objectionable. Human dignity is such a value (see Chapter I, § 2). **32**

Human rights are intended, more or less effectively, to give normative expression to inherent human dignity in a system of legal norms, rather than in a system of purely moral norms. This task can be fulfilled by general norms defining other important 'layers' of dignity through specific human rights.

Consequently, the human rights system is the normative system closest to dignity, which is the source of all individual rights. Legal norms, unlike moral norms, provide for a legal sanction for their non-observance. Obviously, the use of sanctions is flawed in international law, though the exception to this seems to be precisely the human rights system and international criminal law, which protect against extreme human rights violations. This is because human rights, while referring directly to dignity, express the truth about man as a rational being endowed with dignity. **33**

One of the scientific claims of Karol Wojtyła was the indication that the truth has the power to determine as well as create moral norms. Developing this thought, it should be stated that, since human dignity expressed in the normative system of human rights emphasises the truth about man himself, it has the power to determine and create norms of a lower order. This emphasis on dignity and measures to protect it 'give power' to human rights. If human rights do not express this manifest truth about man and do not protect dignity, but become a political, social or purely formal legal postulate, they become devoid of this 'power' and no longer offer effective protection to the individual. Such a concept is an alternative to the school of postmodernism of Jürgen Habermas, who attaches the leading role of human rights to morality. This school derives human rights primarily from morality. **34**

Considering the impact of human rights, the definition offered by Cezary Mik, who claims that human rights are 'specifically stratified, natural human capabilities, in principle individual, but socially determined, equal, inalienable, durable temporally, universal in terms of the subject, object and territory (also culture to a certain degree), necessary (enforcing legal protection) and always resulting from the inherent personal dignity of every human being.' This **35**

definition coincides with the views of the Chicago School of human rights of Martha Nussbaum. It is a functional definition. However, for the purposes of the science of law, a normative definition of human rights should be adopted, which will allow all their elements to be reproduced.

36 It seems that human rights should be defined along the lines of the understanding of subjective rights in civil law, as a sphere granted by legal regulations (norms) and resulting from a legal relationship, whereby a given subject is able to act in a specific way. This is because a human right is also essentially a subjective right, obviously not a civil law right, but one that has the character of a constitutional subjective right or an international subjective right. In addition, the civil law method of equality of subjects of civil law relationships and the public international law principle of equality of parties to treaties make it possible to find and apply similar legal institutions or definitions. This means that a human right is not a 'common' right, whether or not it has been granted by the legislator, but a normative category related to the 'subjectivity' of a human being. A subjective right is more than a right; it is a category derived from the essence of humanity. Man is the subject and not the object of law. As such, there is a source of this subjectivity, and it is from this source of subjectivity that human subjective rights derive. Human dignity is obviously one such source. As such, a subjective right is primary, not conferred by the legislature, and derives from man's subjectivity, not his objectivity – man is not the object of law.

Thus, a human right is an area in which a person can exercise their freedom understood as a possibility to act, or having a certain right or a competence, and the state in this case must take actions and ensure the protection of the right by creating norms in positive law. A human right is therefore a type of freedom, right or competence for the exercise of which an individual is entitled to demand protection and expect that it will be ensured by the state. Every right, including a human right, contains 'bundles of entitlements' that make up that right. Defining the constituent bundles of human right entitlements as:

1) the possibility to act,
2) entitlements,
3) competence,

makes it possible to include in a single definition all the types of specified constituent entitlements that make up a specific human right.

37 A specific feature of human rights is that the state is primarily obliged to respect human rights. This system of protection is intended to provide the individual with security against negative actions of the state apparatus, as well as to mandate the state to protect the rights and freedoms of individuals. By the same token, if we assume that a given freedom – understood as the possibility to act, a right, and/or a competence – is a human right, then the state is obliged to

build a system of positive law in such a way that it is possible to give effect to the particular rights resulting from this human right.

III. Human rights vs human freedom

From both a dogmatic and practical point of view, it is necessary to clarify the division that occurs in the human rights system between rights and freedoms. **38**

Freedom, not in the sense of personal freedom, but in the general sense, is the possibility to behave freely. On normative grounds it is the possibility to act in a certain way, e.g. acting or refraining from acting. Freedom is an area in which the state is forbidden to interfere, since it is a right in the negative sense, and an individual, within the framework of their will, exercises their freedom or not. Freedom is an expression of the reasonableness of man who, as part of his inherent dignity, is endowed with a free will which he cannot be forbidden to exercise and which he cannot be commanded to exercise.

However, one man's freedom should end where another man's freedom begins. Therefore, the state is not released from acting to protect freedoms. When there is a legally protected freedom, there are three modalities:

1) prohibition on state interference,
2) prohibition on interference by other entities,
3) requirement to provide legal protection by the state.

The state is only obliged to ensure that the limits of freedom are not violated; it is not obliged to ensure positive freedoms, e.g. the state is not obliged to ensure freedom of speech, it is only obliged to ensure that this freedom is not restricted, that the exercise of this freedom is not disturbed, etc.

A right, on the other hand, is how a person can achieve his/her freedom, but the state in this case is obliged to behave actively and ensure its protection by creating positive law that will ensure the performance of specific areas of man's possibility of behaving, rights or competences. This includes making a human right more specific by regulating bundles of rights. **39**

In the case of freedom, the state cannot normatively define the bundles of rights attached to freedom, since to do so would imply defining the content of freedom, which would constitute a restriction of freedom by defining the bundles of rights it protects. This would consequently imply an interference with freedom and its essence. This can be seen in a hypothetical attempt to determine normatively what components fall under freedom of expression (opinion). If personal freedom exists, it is in the individual's exercise of that freedom, not in the state determining what a person is entitled to do with such personal freedom. State protection concerns only the limits of freedom without **40**

interfering with its content or constituent elements. Otherwise, freedom would no longer be freedom, for this violates the essence of freedom.

41 It might seem that this issue has no practical relevance, but that is not the case. In the case of a right, the state has a duty to protect each of the bundled entitlements that make up the right. When it comes to the right of defence, it has an obligation to protect, for example, the right to a defence counsel, access to an interpreter, access to files, etc. As such, an individual can demand that the state protect all the bundled entitlements that together make up a human right.

42 In the case of freedom, the state is obliged to protect only the limits of freedom, without evaluating or analysing its exercise. If freedom of religion exists, it is up to the state to protect its limits, not the content or object of that freedom. This means that the state is supposed to ensure that everyone can exercise this freedom by, for example, allowing them to participate in ritual activities or worship, but it does not have the right to determine how these activities should be performed. An individual does not have the right to demand that the state protects the 'measure' of freedom, only its limits. An individual can demand protection from the state when they have organised a lawful public speech and are communicating their views and someone obstructs or prevents them from communicating thoughts, but they cannot demand that the state arrange for an audience, provide technical facilities or ensure that anyone listen to or agrees with such views. Referring this to human rights, then, for example, becoming a lawyer would fall within the protection of the human right to property (respect for one's property), because the state must protect this bundle of rights, which touches on the protection of property rights resulting from equal and competence-based access to the profession. Thus, human rights are regulated and protected in great detail on the basis of partial entitlements, freedom is not essentially regulated by normative instruments, and in the doctrine it is defined and protected only in terms of limits. This has a practical implication, since the state cannot be successfully criticised for failing to provide protection when a constituent element of any of the freedoms are violated. If the state has ensured that the limits of freedom are protected, it has fulfilled its obligations.

43 The issue of an individual's duties is also related to human rights and freedoms. For it is not the case that an individual – a human being – has only rights. One of the fundamental duties of human beings is to respect the rights and freedoms of others. This is manifested in the horizontal impact of human rights, but also in the way that normative acts regulating human rights explicitly indicate that no one who themselves violate human rights and freedoms can seek protection.

In international human rights law, human duties are set out in Article 29 of the UDHR, which indicates that everyone has duties towards the community

and that limitations on the exercise of their rights and freedoms are subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The latter requirements in particular are later repeated in the human rights limitation clauses. Similarly, normative sources of human rights explicitly indicate that human rights and freedoms must not be exercised contrary to the purposes and principles of human rights. This follows from both Article 29(3) of the UDHR and Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November. This prohibition is often referred to as a prohibition on the abuse of human rights.

44 In Poland, the basic duties that an individual owes to the state under the national legislation are the duty to defend the homeland (Article 85 of the Constitution of the Republic of Poland of 2 April 1997) and the fiscal and tax duties. Article 83 of the Polish Constitution also sets out a general duty to observe the laws of the Republic of Poland. This duty applies in particular to respecting the human rights and freedoms of others. The Polish Constitution also provides for a duty of loyalty to the homeland (Article 82 of the Polish Constitution) and responsibility for the environment (Article 86 of the Polish Constitution). Of course, the system of duties is general, but it indicates that the subject of rights does not have only rights, but that these are always correlated with certain duties. An individual never operates in a vacuum, but in relationships with other right holders to whom they also owe duties. This translates into the vertical and horizontal effect of human rights.

IV. Human rights and public international law

45 Among the numerous legal disciplines, few have risen to prominence as quickly as human rights knowledge. Despite its interdisciplinary nature, human rights are now recognised as one branch of public international law, the oldest branch of law. Public international law and human rights pursue the same objective of achieving stability and security in relations between states, the nature of the legal norms they apply, the methods of enforcing violated law and the avenues of seeking redress before international courts and tribunals. The research method of law, which is the reliable deductive value method, is also something they have in common. Although both methods, deductive and inductive, are used in international law, it is the deductive method which is essentially applied in human rights law as is reflected by the history of these