Sympóziá, kolokviá, konferencie

Communication as a Measure of Protection and Limitation of Human Rights. Information in Relation to Human Rights

Collection of Papers from 12th International Conference on Human Rights held on June 1-2, 2012 in Bratislava

Univerzita Komenského v Bratislave, Právnická fakulta
Bratislava 2013

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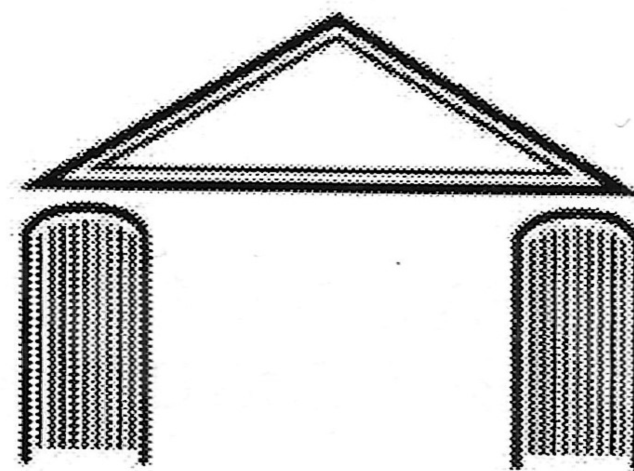

Comenius University in Bratislava
Faculty of Law
2013

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Communication as a measure of protection and limitation of human rights : information in relation to human rights : collection of papers from 12th international conference on human rights held on June 1-2, 2012 in Bratislava / Editors: Lenka Dufalová, Katarína Lenhartová, Vladislav Mičátek, Daniela Čičkánová, Ján Sombati, Miriam Janečková – 1. vyd. – Bratislava : Univerzita Komenského v Bratislave, Právnická fakulta, 2013. – 661 s.
(Sympóziá, kolokviá, konferencie)
ISBN 978-80-7160-345-0

342.7
•ochrana ľudských práv
•právo a náboženstvo
•právo na informácie
•zborníky

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ISBN 978-80-7160-345-0

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ORIGIN OF HUMAN RIGHTS

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Abstract: Resolving the question of origin for human rights we can distinguish two basic tendencies. Legal positivism refers to the competence of the supremacy. Natural law theory is based on the attributes that characterize human nature. After a brief overview of the history of human rights topic and presentation of understanding of human rights in the most important documents we come to the concept of person. The analysis of this concept gives us the ability to find the most adequately explaining, why is every human being and only human being bearer of fundamental, changeless and inalienable rights.

Key words: human rights, human nature, human dignity, person, natural law, legal positivism

1 INTRODUCTION

One of the important and often solved topics of our times is the problem of human rights. All around us we can read or listen to news about breaking the human rights, there are many organisations on different levels which monitor their compliance. People often try to gain something by saying „I have right to it".

The matter of human right and their compliance was a touchy topic during govern of communists. The regime officially proclaimed that socialist system building "communist classless society" is the best protector of human rights. The Czechoslovak Socialist Republic belonged to 35 signers of the Helsinki Final Act signed on 1st August 1975. As for international law, the document was actually without any obligation and there was no possibility to enforce its compliance by law. For countries of the Soviet bloc the most important was the principle of non-interference in the internal affairs of states. It served as a pillar for possible refusal of any monitoring of human rights compliance by other governments and non-governmental organisations.

This document supported the activities of Charter 77 in Czechoslovakia and Solidarność in Poland which later contributed to the transformation in 1989.

International law contains many documents of different kind (declarations, treaties)[1] and legal force. Particular states[2] acknowledge them in their law systems at different degrees. Variance in ways of interpretation of this topic by every single subject (institutions, media, and individuals) shows the insufficient apparentness of the matter. The term *human rights* is often used although being unaware of its meaning. What actually human rights or rights generally are, what belongs to them, where they are from, who is their bearer and what forms their content. Answers to these questions lead to solving the problems through enforcement, deprivation or restriction and for example the question of their possible change, as well.

This paper will not solve the legal or political aspects of the topic but it focuses on the basic philosophical question – why do people have any rights. Hypothetically, there are two or three fundamental possibilities.

1. We have human rights just because we are humans. Basic documents dealing with human rights come out of this assumption. For example, Charter of Fundamental Rights of the European Union in its preamble states that the European Union "places the individual at the heart of its activities"[3]. Universal Declaration of Human Rights states without any further explanation that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[4]. There is one more question: why just humans and if humans only are the bearers of rights. There are many opinions against. They claim that a being is a bearer of rights e. g. because of capability of feeling pain and sorrow[5] or just because of being alive. Therefore this

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[1] Ľudské práva: výber dokumentov OSN.

[2] Dôležité dokumenty a ľudskoprávne orgány. In: Ministerstvo zahraničných vecí a európskych záležitostí Slovenskej republiky [online]

[3] Charta základných práv Európskej únie. In: EUR-Lex Access to European Union law [online]

[4] Ľudské práva: výber dokumentov OSN. p. 9

[5] SINGER, P. Animal liberation. A new ethics for our treatment of animals.

is statement which requires other substantiation and explanation beyond legal documents.

2. We have human rights because we got them. This statement is more of religious nature as it supposes some higher Authority that is transcendent and that has power and competency to give such rights. Again, there is a question why just humans and if humans only got some rights. Answers differ according to different religions. The big monotheistic religions (Christianity, Jewishness and Islam) are anthropocentric in this matter. Many, mainly oriental religions (e. g. Buddhism, Jainism and many more) acknowledge the same or similar status to other forms of life as to human being. Both trends are noticed by non-religious thinking people. Some award law subject only to humans, others see no difference between humans and animals.

3. We have human rights because we made an agreement on it. We got them by a mutual agreement. This possibility leads to the same problem as the previous ones. We are able to create a system of rights as we are free and intelligent creatures. Is it possible only because we are humans or can it be achieved by other subjects as well?

We can find many ways of solving this problem with a few mutually penetrating types of theoretical origin of human rights among them[6].

The first type of concept deduces the fundamental human rights from positive law. According to them, a human has rights because they are confirmed in documents of international law, to which particular states profess and which are implemented in their law systems. If we accept positivism of law to such a level that the only basis for law will be positive law promulgated in particular time by particular legislative authority, there is no other way. However, human rights understood in this way can lose their timeless and universal character. Legislator, who has got a right to make decisions about them, has got the same right to change or repeal them and define the circle of subject that can be their bearers. In this instance we cannot speak about real human rights any more. There is a set of some competences left, which can be cancelled by the will of legislator or by the purposefully rigged public opinion.

The next possibility is proposed by the concept of evolution where the law has functional basis. As one of the evolution products (along with morality, religion, culture etc.) it is an instrument to survive. It provides basic function of society and victory in natural selection and it guarantees processes which create and protect common good. Specifically, rights of an individual show up in society gradually, according to level of its development and retrospectively allows the further development. Instrumental character of rights is a threat to their nature. In compliance with such concept, modified conditions could ask for another set of fundamental rights on behalf of society progress. Various groups of people in competition fight with others would have different concepts of rights that would ensure them their own prosperity at the expense of others. The term of common good as well as good of an individual would become instrumental, too, and it would lose sense.

The third type of concepts derives rights from the human freedom as its product and instrument for its protection. An example of such concept can be the legal theory of Immanuel Kant[7] who tried to defend the autonomy of free-acting subjects. The rights are then inferred from the human will to live in accordance with the will of others. Here is the basis of often repeated pragmatic opinion that the freedom of a human ends where the freedom of someone else starts. An individual carries out his freedom by his own choice of aims and the other person could be understood as an obstacle to achieve them.

Another possibility is to deduce the rights from the axiological basis. Rights come out from some type of values accepted in particular society. The duty (not) to act in particular way[8] is then deduced from the particular values. Some people regard values as for objective reality[9] independent on will and knowledge of each person, some ideal facts that are organized in a hierarchical manner. Others claim that values themselves as well as their organisation are subjective. Theories, in which values are product of culture, stand as a compromise between these two borders. This is the way to deduce particular norms of acting but not the rights themselves.

Finally, the fifth alternative are the concepts which deduce human rights from human nature, from character natural to each human. We can find many concepts applying only particular features (e. g. ability to feel pain, expectations to future) and legal subjectivity is conferred only to those who dispose of

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[6] PIECHOWIAK, M. Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony. p. 198 – 223

[7] KANT, I. Základy metafyziky mravů.

[8] ZIEMBIŃSKI, Z. Logika praktyczna. p. 91n, 231n.

[9] SCHELER, M. Místo člověka v kosmu.

them. Legal entity then would not belong to all people but to some animals it would[10]. If we speak about human rights that are general and inalienable, these can be meaningfully deduced only from the human being itself, from features that characterize a human regardless which state or conditions it is currently in.

2 BRIEF LOOK INTO HISTORY

Generally there is an opinion that the topic of human rights is product of the French Revolution, or the Enlightenment[11]. According to T. G. Masaryk[12] together with Christian ideal of human another one, which slowly becomes Antichristian or "Overchristian", is formed at these times. As well as in many other cases, here it is seen that the concept of rights of each human being is older. Medieval philosopher, Thomas Aquinas, presented the concept of human rights more accurately, better explained and substantiated than enlighteners[13]. But he also did not come with this concept as a new one as it came out of the discussion between ancient tradition and biblical concept of a human.

We don't find the term of rights, which would belong to every human being, in ancient times. In antiquity the law had instrumental character. Above all, it was a repressive instrument which served to ensure operation of society. It was in hands of ruler (τύραννος). World order was personified by goddess Θέμις. Her name is derived from the word τίθημι, meaning *put, lay*. Applying of this order settled by gods was the responsibility of her daughter Δίκη[14]. Their names later became the basis of the law terminology. *Themis* is denomination of order which is on the earth by the will of gods; *diké* means its use at dispute solving. There can be νόμος (nomos) joined to them as a denomination of norms of human origin. *Themis*, *diké* and *nomos* were key concepts of ancient legal system which was understood mainly as a way of organizing the operation of human society. The main tools to enforce it were punishments for inadaptable ones. Some step forward to personal value began in urban state (πόλις), where citizens (πολίτης) got decision powers in ancient democracy[15]. Parts of stated order were various privileges and prerogatives for some groups of people like Athenians or Romans.

Likewise, medieval rulers gave privileges to persons, towns, guilds and other communities by the power of their authority (e. g. *Golden Bull of 1222* issued by King Andrew II of Hungary).

Stoic distinguishing of three kinds of law – *lex æterna*, *lex naturalis* and *lex humana*[16] brought the scope for change of point of view. *Lex æterna* is eternal law understood as Λογος, i. e. cleverness and harmony of space arrangement. *Lex naturalis* – natural law is regularity to which the events in nature are subordinated. In stoic meaning, human nature is part of nature[17] and therefore a human is to follow and respect this order by his acting. Human law – *lex humana* is to be subordinated to this order, as well. According to Cicero, laws in contradiction with it are unfair. State governed by unfair laws is not a real state[18]. Concept of human nature as a part of nature leads stoics to teaching about world citizenship and equality of all people[19].

Theory of natural law as a basis of moral order which arises from cognition of human nature was developed in medieval times by Thomas Aquinas[20]. From the fact that a human is a sensible being[21] able to decide freely[22], he states human dignity as a value that belong to each person. This is the fundamental difference from the ancient understanding when human dignity was bind only to social status and function

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[10] SINGER, P. Practical ethics.

[11] porov. BRIŠKA, F. Problém človeka a humanizmu v politickej filozofii.

[12] MASARYK, T.G. Ideály humanitní.

[13] porov. PIECHOWIAK, M. Filozofia praw człowieka. p. 33

[14] TOKARCZYK, R.A. Filozofia prawa w perspektywie prawa natury. p. 71

[15] LYSÝ, J. Dejiny politického myslenia. Staroveký Blízky východ, antika, Čína, India, islam. p. 26 n

[16] KOŚĆ, A. Podstawy filozofii prawa. p. 39

[17] LYSÝ, J. Dejiny politického myslenia. Staroveký Blízky východ, antika, Čína, India, islam. p. 68

[18] LYSÝ, J. Dejiny politického myslenia. Staroveký Blízky východ, antika, Čína, India, islam. p. 80

[19] SUCHÝ, M., JAKSICOVÁ, V. Malá antológia z diel filozofov I. s. 69

[20] AQUINAS, T. Summa Theologica. Prima secundae partis. q 91, q 94

[21] AQUINAS, T. Summa Theologica. Pars prima. q 29 a. 3 ad 2

[22] AQUINAS, T. Summa Theologica. Pars prima. q 59 a. 3 Sc

in state[23]. Just (*ipsa res iusta*)[24] is then only the one that belongs to human as he is the bearer of this value.

Modern-time departure from theory of natural law to legal positivism is brought by theory of Thomas Hobbes. According to him the state arises by agreement of sensible egoists who want to end or at least keep the "*war of all against all*" in acceptable borders. Therefore part of their rights is pragmatically transferred to ruler who is authorised to issue laws. Their justice is given only by the fact they were stated by ruler. A man then gets to hands of state which is compared to biblical demon Leviathan[25]. Those who do not agree with some law because of their conscience are recommended by Hobbes "to follow Christ in martyrdom". It is the first of modern theories which do not deduce state from human nature, that is social by its nature, but from the social contract.

John Locke in his concept joins theory of natural law with theory of social contract.[26] State arises to protect fundamental rights which belong to each human and are inferred from human nature that is basically sensible. His liberalism comes out from scholastically formulated Christian concept of a human. Gradually opinions refusing concept of human nature and natural law spread in modern liberalism. The trend was influenced also by dynamic understanding of human existence by existentialists.

Sartre refused the opinion that human is an owner of human nature which is common to all people. "*There's no human nature as there is no God to create it.*"[27] A human exists first and even then he is "defined", i. e. in advance he is nothing, he will be such as he will be created.

Thus we have two different concepts of human nature and character of human rights, as well. One of them says that human nature is permanent, each human is its bearer and therefore he becomes a person. Human rights are then apolitical and they are given by human dignity[28]. The second one finds human nature artificial, being a human is not natural determination of type but only a cultural role gained by education[29] or gradually changed by evolution. Human rights are then mainly politics. Their formulation as well as acceptation are dependent on current power in state and reside in positive law. This attitude leads to constructivism – what we consider human rights can be changed if define them again[30].

3 HUMAN RIGHTS DOCUMENTS

Nuremberg Trials set natural law above every positive law[31]. How are human rights justified by particular relevant documents? Medieval and first modern charters came out from the authority of a ruler or parliament. Among the most important belong: *Charter of Liberties* declared in 1100 by King Henry I. English, *Magna Charta Libertatum*, which was issued in 1215 by King John I. Lackland, the law on personal integrity *Habeas Corpus Act*, accepted in 1679 by English Parliament during reign of Charles II. and *Bill of Rights* – rights of English Parliament ratified in 1689 by William of Orange and his wife, Mary II.

Enlightenment **Declaration of the Rights of Man and of the Citizen** established by the National Assembly meeting on 20, 21, 23, 24 and 26 August 1789 and received by the king[32] in the preamble it is stated that the representatives of the French people **decided to „declare** natural, inalienable and sacred rights of man". These rights are "*acknowledged* (by National Assembly) *and declared in the presence and under the auspices of sovereign Being*" whose cult was officially established by Maximillian Robespierre in 1794 within dechristianization programme. It brings an effort to join legislative authority of National Assembly to respecting of rights that belong to man and citizen. It also states that the requirements of citizens will be "*henceforth*" founded on the incontestable principles. Authors of declaration seem to be somewhere between two attitudes. On one hand they want to express respect and acknowledgement of rights, on the other hand they act like those who promulgate the rights by their own authority. Considering the diversity of philosophical concepts of enlighteners (Montesquieu, Rousseau) is this ambiguity

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23 PIECHOWIAK, M. Filozofia praw człowieka. p. 271

24 AQUINAS, T. Summa Theologica. Secunda secundae partis. q 57 a.1 ad 1

25 HOBBES, T. Leviathan.

26 LOCKE, J. Druhé pojednání o vládě.

27 SARTRE, J.-P. Existencionalizmus je humanizmus. p. 19

28 MATLARY, J.H. Ľudské práva ohrozené mocou a relativizmom. p. 125

29 SOKOL, J. Filozofická antropologie. Člověk jako osoba. p. 147

30 MATLARY, J.H. Ľudské práva ohrozené mocou a relativizmom. p. 125

31 MATLARY, J.H. Ľudské práva ohrozené mocou a relativizmom. p. 125

32 Ľudské práva: výber dokumentov OSN. p. 9

comprehensible. Uniting the terms like "man and citizen" practically allowed not to give these rights to those who were during the terror established by Robespierre („*La Grande Terreur*") marked as "enemy of Revolution".

In Declaration the fundamental rights are stated as the right to liberty, the right to property, the right to security and the right to resist oppression. Freedom is defined as the ability to do anything that would do no harm to others.

Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly resolution 217 A (III) of 10 December 1948[33] clearly sets out the fact that human rights are based on the „*inherent dignity*" and belong to „all members of the human family". Justice and peace are possible only if these rights are **recognized**. This declaration goes beyond all previous documents by not just stating the human rights but also by justifying them in the first article. The basis for freedom and equality „*in dignity and rights*" is in accordance with the above concept of Thomas Aquinas fact that each person has a sense and conscience. It is interesting that the word „conscience" is missing in some Slovak translations. UN Declaration that is based on human dignity as a fundamental anthropological category comes out more from the medieval concept of Thomas Aquinas than from the enlightened understanding which based human rights only on liberty, equality and fraternity.

The **International Covenant on Civil and Political Rights** and the **International Covenant on Economic, Social and Cultural Rights** (both of 16 December 1966)[34] following an appeal to the principles proclaimed in the UN Charter expressly state that „rights derive from the inherent dignity of the human person".

The assumption that human nature is not something established by culture or education and later constituted by its own efforts but it belongs to everyone without any distinction is supported by the **Declaration of the Rights of the Child**, proclaimed by Resolution 1386 (XIV) of 20 November, 1959[35]. The bearers of all the rights in the Universal Declaration are all people without any distinction. This allows granting these rights to a child, even if he or she does not fully express his or her personality. The children are the same bearers of rights although their freedom, reason and conscience are not fully developed yet. They are equal to others in rights as they are bearers of human dignity – the child is human, as well. Vice-versa, their infancy requires special protection. They need to be educated to use sense, freedom and conscience. The preamble states that: „the child, by reason of his physical and mental immaturity needs special security and care, including appropriate legal protection, before as well as after birth".

International conventions on human rights, especially the newer ones, by used formulations may cause wide-spread feeling that we have the rights because we have agreed on them; respectively we may set their range by agreement. In fact, since they refer to the Declaration, the agreement concerns not their content but a collective effort to respect them and their methods of institutional protection. Later documents show a growing tendency to legal positivism and pragmatism. For example, the Beijing Declaration, the outcome document of the Fourth World Conference on Women in Beijing in 1995[36], while in Section 8 refers to the UN Charter, the Universal Declaration of Human Rights and other international human rights documents, it does not cite them explicitly as the above-mentioned documents. However, more significant is there an emphasis on goals and interests than any anthropological argument. Similarly, anthropological argument of basic documents on human rights is missing in the formulation of the so-called reproductive rights in the outcome document of the Cairo Conference on Population and Development[37], which refers to the vague concept of the „*quality of life*".

After evaluating the ways of justifying the human rights in international documents, we can see a significant shift from the argument based on human nature and its dignity pertaining to legal positivism, coming out from the powers of legislature who is mainly pragmatically motivated.

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[33] Ľudské práva: výber dokumentov OSN. p. 12

[34] Ľudské práva: výber dokumentov OSN. p. 19, p. 31

[35] Ľudské práva: výber dokumentov OSN. p. 127

[36] Fourth World Conference on Women, Beijing 1995. In: United Nations Entity for Gender Equality and the Empowerment of Women [online]

[37] International Conference on Population and Development (ICPD). In: United Nations Population Information Network [online]

4 HUMAN RIGHTS BASED ON HUMAN DIGNITY

To solve the question of origin of human rights it is necessary to find difference between fundamental human rights and the rights granted by someone. **Fundamental human rights** are those that belong to each person just by being a human. They form the basic framework of requirements for a particular way of acting to him. **Derived rights** arise directly from them. They are just stating implementation to respect the fundamental rights. We cannot vote on the first or the second ones. **Granted rights** have their origin in human authority. They may be given by the general consensus, voting, authority, transfer of own rights to another one or they may be associated with the performance of any function or social service. I can give only what I have, I can grant only those rights which I hold. Thus, for example, a man can give someone else a permission to act on his behalf.

The concept of human rights presupposes the concept of man as a person. Main topics of contemporary liberal society (emancipation, civil liberties, equality, human rights) have their origin in the concept of a person which is of Christian origin.[38] It's a concept absent in ancient culture. Roman law denoted a man who was a subject to the law by the term *caput*[39] (head). The man was therefore only a free citizen of Rome. The concept of a person has its origins in theology. It was a result of discussions about Christ and the Trinity. Councils of Chalcedon (AD 451) and Constantinople (AD 553) concluded the discussion by statement that Jesus Christ is one person who is also of divine and human nature and one and the same divine nature belongs to three persons (Father, Son and Holy Spirit) who carry the same absolute and infinite being[40]. With these definitions, there was used the Greek term πρόσωπον (prosopon), which named a mask used in theatre by actors to express identity of drama figures and it also named the face. This term originated the Latin word *persona*. In the Middle Ages it was explained as a *"per se una"*, something which in itself creates unity. Christian philosophers of the patristic period accepted this originally theological term and then applied it to a human.

First person who formulated the definition in this meaning was Boethius (*De persona et duabus naturis*, C3)[41]: *Persona est rationalis naturæ individua sunstantia*. A person is an individual substance of rational nature. It's a „self-owning" being, capable of self-knowledge (incl. examining his own knowledge) and be able to elect freely aims of his activities. John Damascene adds that person is not *something* you can own, but *someone* who should be respected[42]. Thomas Aquinas builds his philosophy of a person on this basis. A person is rational (*individuum rationalis naturæ*) (S. th. I, 29, 3 ad 2), who is sui juris, complete and incommunicable. *Persona est substantia rationalis, completa, sui iuris et alteri incommunicabilis* (Q. disp. de pot. p 8 a 4 c)[43]. Duns Scotus adds that a human is a person because he is able to have a transcendental relationship with God.

In Modern Times, understanding of a person regardless the religion took this concept with no fundamental change. Mostly, there are differences only in accentuating certain features of a person. Enlightenment emphasized particularly the rational aspect of a man. An official *Cult of Reason* was taken from it. This cult was to replace religion during the French Revolution. Existentialism, after the disappointments of cruelties that the cult of reason brought not only in the French Revolution, but especially during the two world wars in the twentieth century emphasizes a feature of will of a person. Postmodern thinking tends to make sense and individuality absolute.

Whether we answer the question of the origin of a human in a religious or non-religious way, to solve the origin of human rights there is a key fact what it actually means to be a human and who is a person. The basic features which characterize a person are individuality and transcendence. Individuality implies the ability to reflect oneself as an object in mind and will. A person is able to make himself the object of knowledge. The person knows himself, his knowledge and the will, he rules himself by free deciding. Even if he can share much of his knowledge and feeling, he cannot share the essence of his own "Self". He is himself. He goes beyond his current boundaries. By his will he goes beyond himself when looking for and implementing a good of someone else. He never satisfies in any borders, he always looks for something "beyond" something "over", because he himself is implaceable in some borders or in

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[38] SOKOL, J. Filozofická antropologie. Člověk jako osoba. p. 196

[39] SOKOL, J. Filozofická antropologie. Člověk jako osoba. p. 19

[40] CORETH, E. Co je člověk? p. 152

[41] CORETH, E. Co je člověk? p. 153

[42] CSONTOS, L., KRAPKA, E. Nad tajomstvom človeka. p. 22

[43] PECKA, D. Člověk. Filosofická antropologie II. p. 191

"boxes". Another expression of transcendence is human creativity, both technical and art. Only a person can invent and create something that has never been here yet.

The ability to be a master of oneself is also the ability to take responsibility for one's action. It is the ability to be aware of the moral value of acting. The basis of the responsibility is the sense and free will. If the criminal plane doubts about what is the responsibility of the offender for his actions, these two competences are regarded. It is examined whether he was able to recognize the consequences of his acting and whether he was able to freely decide in a particular situation (for example, if it happened under the influence of pressure, psychological disorders, chemicals...). Laws can bind only those who can be responsible for their actions. A person who has the obligations is also the bearer of rights. It cannot be a person who in principle and from his own nature is unable to bear responsibility. If this capability is limited due to the current indisposition of a human, he does not lose rights. Therefore, the subject and bearer of rights is also a child who has not reached full responsibility and yet it is only brought up. Since the beginning of life, as a child is a human, he himself can potentially develop this ability.

5 CONCLUSION

Legal entity – one who is committed to the law – has the rights and obligations, may be held liable. He has a conscience. Therefore, the Universal Declaration of Human Rights states conscience, reason, freedom and equality as four attributes arising from human nature and bearing the human dignity.

Even legal positivism, which rejects the idea of human nature and natural law, and wants not only laws but also right to be derived from the will of the legislator, implicitly assumes these ideas. Only a person, who is a free and reasonable being with a conscience that leads him to responsibility for his acting, is capable of decisions about rights and specific laws. Any way we would like to derive and justify human rights, finally we always get to the concept of person and human dignity with all of the mentioned attributes.

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SYMPÓZIÁ, KOLOKVIÁ, KONFERENCIE

Communication as a Measure of Protection and Limitation of Human Rights. Information in Relation to Human Rights

Collection of Papers from 12th International Conference on Human Rights held on June 1-2, 2012 in Bratislava

Vydala: Univerzita Komenského v Bratislave, Právnická fakulta ako svoju 265. publikáciu
I. vydanie. Bratislava 2013
Počet strán: 661

Zalomenie a tlač: KO & KA spol. s r.o., Tlačiareň K-PRINT, Kadnárova 102, 831 06 Bratislava

ISBN 978-80-7160-345-0