The Position of Human Rights Within the Framework of the International Legal Order

Goran Milojević and Dejan Novaković

University Business Academy, Novi Sad, Serbia
Faculty of Law for Commerce and Judiciary

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Author Note

Goran Milojević https://orcid.org/0000-0003-3752-9883
Dejan Novaković https://orcid.org/0009-0007-2333-9662
We have no known conflict of interest to disclose.
Corresponding author: Goran Milojević
E-mail: milojevic@pfbeograd.edu.rs

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The position of human rights within the framework of the international legal order

Abstract

Human rights achieved their full affirmation in the period following the Second World War. Although the origins of the idea of incorporating human rights into the international legal order date back much earlier, their legal validation is primarily associated with legal instruments adopted under the auspices of the United Nations. Consequently, their specific features must be assessed in light of the normative solutions contained in the core international legal instruments. This paper will employ a broad methodological framework, with emphasis on the comparative method, historical method, content analysis, systematic approach, linguistic analysis of legal texts, among others. The application of these methods will be directed towards a better understanding of the various legal solutions which, in certain respects, exhibit significant differences. The paper will provide a general definition and understanding of human rights, the development of the idea of human rights at the level of legal theory, the possibility of their lawful limitation, the current state of their practical implementation, and related issues. Recognizing the importance of the practical application of human rights, the paper will refer to judgments of the European Court of Human Rights in Strasbourg. Particular attention will be paid to the judgments in which the Republic of Serbia was found to have violated human rights through various forms of conduct by state authorities. The aim of the paper is to present the field of human rights in a manner that enables the reader to properly understand their legal specificities. This aim is considered justified in circumstances where the phenomenon of human rights is widely exploited in the media across the world, often accompanied by inaccurate assessments of their scope in the practical application of legal provisions.

Keywords: human rights, theoretical concepts, application, limitations, legal instruments

Introduction

The sphere of human rights is attracting growing public interest, with the central purpose of enhancing citizens' understanding that they possess and are entitled not only to the enjoyment of these rights, but also a need to recognize and protect their rights, which is essential for protection of security in everyday life (Bjelajac, 2017). In everyday contexts, numerous initiatives are undertaken to ensure that human rights are adequately interpreted for the general public. However, such attempts often reveal a certain degree of misunderstanding regarding the very concept and meaning of human rights in terms of their international legal recognition. This stems from the fact that the phenomenon of human rights is commonly attributed to the modern era, more precisely the 20th century. That was a time marked by the greatest human suffering, which necessitated the introduction of new criminal classifications, such as the crime of genocide. The need for such criminalization was directly prompted by mass atrocities and the systematic destruction of entire groups. The core of the most horrific war crimes was rooted in Nazi ideology, which was fundamentally driven by hatred towards other nations. The subsequent wars in the second half of the 20th century further demonstrated that human rights continued to be brutally violated. This primarily concerned the right to life, health, physical liberty, bodily integrity, voting rights, privacy, and others. In such circumstances, the violation of human rights was often awkwardly justified by so-called higher interests, typically aligned with the ideological needs of the time in which key events occurred.

Unfortunately, history teaches us that victorious leaders were often de facto amnestied for numerous atrocities that involved the violation of fundamental human rights and freedoms of individuals and entire "undesirable" groups. These acts were justified by the supposed demands of a new era, in which there was no place for past events. Moreover, previous events were seen as a real obstacle to the establishment of new world orders.

The development of awareness regarding human rights has not progressed in parallel with their legal recognition. It could be said that such awareness was initially limited to the individual efforts of people seeking to promote the affirmation of human rights within their immediate environment, including the state in which they reside. Within broader efforts to elevate awareness of human rights beyond individual initiatives, a widely accepted view has emerged that human rights are an integral part of the democratization process of a society. However, the development of democracy should not be equated with the development of human rights, even though they may be mutually reinforcing. In essence, human rights are respected and their violations are subject to legal proceedings in democratic societies, whereas their disregard and the absence of institutional response are characteristic of autocratic regimes.

The legal recognition of human rights is grounded in the core international legal instruments adopted under the auspices of the United Nations. Initially, these instruments enshrined fundamental human rights and guaranteed their observance within the framework of international law. The evolution of these rights has been conditioned by broader geopolitical developments, in which global ideological divisions significantly hindered the universalization of human rights. As a result, the classification of human rights is based on a generational framework, centered around international legal instruments that have had the greatest impact on their identification and legal recognition.

The basis of this paper is the need for a theoretical and normative determination of the concept and meaning of human rights, the methods of their classification, and the development of the idea of human rights as expressed in legal theory and legal documents. In order to examine the full extent of the practical application of human rights, it is important to consider judgments declared by the European Court of Human Rights (ECtHR) in Strasbourg. These cases concern violations of specific human rights arising from actions or omissions on the part of domestic state authorities.

The concept and meaning of human rights

The development of the idea of human rights can be traced through various theoretical approaches and orientations. These provide the theoretical foundations in which the genesis of the later emergence of human rights can be discerned. Given the large number of theoretical perspectives that, among other topics, address human rights, it is necessary to identify those that exert the greatest influence in this area of law.

The theoretical determination of human rights must begin with Hans Kelsen's Pure Theory of Law, which defines law as a system of norms separated from psychological, sociological, ideological, and other "burdensome" elements. In developing his Pure Theory of Law, Kelsen asserts that one must answer the question of what the law is, rather than the question of what the law ought to be, or what it should be made to be. In this way, law may be distinguished from politics (Kelsen, 2007, p. 11). The fundamental weakness of Kelsen's "pure" theory lies in its detachment from morality and justice. Ronald Dworkin

criticizes him with regard to this detachment from legal philosophy. According to Dworkin, law should not be conceived as a rigid system of rules that exists outside of society (Milanović, 2023, pp. 32–33).

If we start from the normativist approach in the theoretical definition of the concept and meaning of human rights, we tread a rather uncertain path. This practically means that human rights can be considered legally regulated de jure even in totalitarian systems, provided that there is a constitution and laws that guarantee them.[1] Setting aside the fact that autocratic rulers do not respect their own laws or even "utilize" discriminatory provisions against "undesirable" groups, whose basis may lie in their religious, national, ideological, political, or other affiliations, this reveals a fundamental weakness of Kelsen's theory of law, which also reflects on the domestic regulation of human rights.[2]

Contractual or Social Contract theories rest on diametrically opposed foundations regarding the definition of law and its role in society, as well as, most importantly, the sources that legitimize the application of legal norms.[3] At the core of this theory is the determination of the most appropriate way in which authority is legitimized. Contractual theories start from the premise that citizens are the bearers of sovereignty, and therefore have the right to govern the state. They transfer their right to govern to the state authority by entering into a form of contract with it. Although such a contract is not formally concluded, by participating in elections, citizens consciously relinquish part of their sovereignty in favor of their political representatives who, while exercising authority, are expected to protect them. "The condition for the emergence of political society is the formation of a common authority. Locke emphasizes that political society exists only if every member of society has renounced their natural authority and transferred it to the community, to which they may appeal in order to secure protection based on the laws established by that community. There is no political society without authority that safeguards the property of all and punishes members of society for their offenses" (Gajin, 2012, p. 259).

The fundamental weakness of this theory lies in its reliance on the will of the majority, which decides on behalf of all citizens. It is well known that elections or referenda are decided by majority vote,

[1] "A totalitarian regime can very convincingly defend its system of values and its framework of social relations and respect for human rights, since during its time in power the crime rate is minimal, and citizens can live without any fear for their lives, bodily integrity, or property. Who can deny the human right to security from crime, to a life free from fear of criminal acts? A liberal regime, on the other hand, could present a compelling counter-argument, asserting that such a situation reflects severe oppression by the regime and that crime is virtually non-existent because people live in fear of police and state torture. Who can deny the human right to live without fear of oppression and police torture? In any case, it would be antihumanistic to judge the matter by suggesting that it is more humane to live in fear of crime but not fear the police, or vice versa. Likewise, it would be unjust to answer the question of what justice is by stating that justice is what a classic communist system of enforced egalitarianism but with relatively significant social security offers as a response (Ćirić, 2000, p. 72).

[2] "Robert Walter, longtime president of the Kelsen Institute, has precisely called upon all legal scholars to further develop—or more accurately, to refine—Kelsen's theory and legal positivism itself, given that these concepts and relationships are in constant evolution. Nevertheless, it should be borne in mind that by presenting law as it is, the Pure Theory of Law must, in contemporary conditions, necessarily engage with the study of certain aspects of natural law, such as human rights. It should not be forgotten that Kelsen persistently defended his views, published numerous responses to his critics, and in doing so became aware of his own mistakes within his theory. Some of these he partially corrected in later editions of his General Theory of Law (Ćorić, 2009, pp. 252–253).

[3] In this context, it is important to emphasize that the Social Contract theory initially emerged as a political theory. It sought to provide answers to questions regarding the legitimacy of governance and the legal basis of political obligation. Therefore, the term "political contract" would be more appropriate than "legal contract," as it was conceived as a means of limiting state power (Dobrijević, 2011, pp. 29–30).

to which those who voted differently must submit. In this sense, it is not possible to speak of a general consensus but rather of a majority decision-making system. Considering that human rights concern every individual, it can be observed that they are not fully respected in relation to each of their holders or beneficiaries. In the literature, democracy is often described as the "tyranny of the majority over the minority," which stands in opposition to the idea and concept of human rights and freedom.[4]

Marxist theoretical thought is based on the idea of the necessity to uphold fundamental socialist values, in which the central role is attributed to working people and citizens. In practice, this is embodied through communist ideology, which ultimately envisions the withering away of the state. Under such conditions, communist totalitarian regimes developed, in which fundamental human rights (such as life, physical liberty, property, and others) were most brutally violated. Moreover, Marxist authors considered political and civil rights to be bourgeois constructs with no place in the socialist social reality. Although practice has confirmed these claims, it is useful to point out the substantial discrepancy between the original teachings of Marx and the later interpretations that were abused to justify the establishment of totalitarian regimes. This should be supplemented by later critics of Marx's thought and his conception of human rights within the framework of building a socialist society. "To add here one indicative case from everyday European life: in 2011, the European Court of Justice ruled, in response to a claim by a Russian designer, that the Soviet emblem — a globe with a hammer and sickle and a five-pointed star — could not be registered as a trademark in the European Union, as this symbol was considered inappropriate in some Union member states. The Court recalled that, under Hungarian law, the hammer, sickle, and five-pointed star are symbols of despotism, and that their use would constitute a violation of public order and morality" (Kalik, 2018, p. 60).

Summarizing Marxist theoretical thought, which arose from the foundations of historical materialism, it can be concluded that it did not contribute to the affirmation of human rights. Its contribution must inevitably be assessed within the framework of an ideology that was intolerant of dissenting opinions and, consequently, made the conceptualization of human rights impossible. Since human rights belong to every individual, it is impermissible to selectively apply them based on a person's ideological, political, or any other affiliation in relation to others.

Classification of Human Rights

The general cataloging of human rights began after the Second World War and continues to the present day. The process of their discovery and legal verification exhibits fluctuating trends across different historical periods. Furthermore, geopolitical developments at both global and regional levels have influenced the affirmation of certain human rights, as the interests protected by those rights were more vulnerable at specific times. Regardless, the process of cataloging human rights remains unfinished and continues to be supplemented by newly recognized rights. Therefore, it is necessary to classify human

[4] "Following this duality—majority vs. minority—it should be noted that at the heart of democracy lies the application of the majority principle. Democracy is often (and unjustifiably) equated with majority rule. For an equation between the two to hold, societies must be relatively homogeneous, and such societies are virtually nonexistent. Of course, the intensity of differences along ethnic, linguistic, religious, or cultural lines is not always the same, but if we consider societies so divided that majority rule effectively means the dictatorship of the majority, it can be said that special mechanisms are needed to overcome these divisions" (Cvetković, 2024, p. 312).

rights in order to better understand them and thereby improve their practical application in various real-world and legal contexts. Prior to this, however, it is essential to highlight the fundamental characteristics of human rights, which can be summarized as follows:

– Human rights are acquired at birth;
– Human rights are the rights of the individual;
– There are no more important or less important human rights;
– The catalog of human rights is not final but is supplemented by newly recognized rights;
– Human rights are not unlimited but are subject to so-called permissible restrictions;
– Human rights are primarily protected by international legal instruments;
– Holders of human rights can also be collectives (e.g., persons with disabilities, national minorities, religious communities, etc.);
– The discovery and legal verification of new human rights cannot be made at the expense of already existing rights (e.g., a new human right cannot be introduced while simultaneously abolishing a previously recognized one);
– It is essential to distinguish human rights from subjective rights (e.g., the right to appeal) because they are of different nature and enjoy a different legal status within the international legal order;
– In English-speaking countries, there is a terminological distinction between objective law or legal system ("law") and individual human rights ("right"), which is not the case in our country where the term "pravo" is used for both;
– It is necessary to distinguish human rights from human freedoms.[5]

The Universal Declaration of Human Rights of 1948 represents the fundamental legal instrument in the field of human rights, whose effect extends even to those countries that have not signed or ratified it within their domestic legal systems (1948, December 10). As such, it is often referred to in legal literature as the "constitution of human rights," which marks it as a foundational legal source in this domain. Human rights can be classified in various ways, indicating the possibility of applying different criteria. However, the most common classification in the literature is the distinction of human rights by generations. This typology follows the historical timeline of their recognition and legal codification, as well as the nature of the goods they are intended to protect.

Following the chronological development of international legal recognition of specific human rights through foundational legal instruments, three generations of human rights can be distinguished. Within each generation, a number of rights can be identified that share similar characteristics and therefore belong to the same group.

The first generation of human rights consists of civil and political rights. The International Covenant on Civil and Political Rights of 1966 guarantees individual human rights such as: the right to life (Article 6); the right to physical liberty (Articles 8–12); the right to freedom of thought, conscience, and religion (Article 18); the right to freedom of expression (Article 19); the right to freely associate with others, including

[5] „This is a more precise term for human rights. Its use as well as the distinction between human rights and freedoms aims to emphasize that individuals or groups are entitled to demand active conduct from the state in order to ensure the enjoyment of guaranteed rights. In contrast, in the case of freedoms, what is at stake is protection from state interference—meaning that the state is expected to refrain from action that would hinder the exercise of those freedoms. (Krivokapić, 2017, p. 11)

the right to form and join trade unions for the protection of one's interests (Article 22), as well as other rights in this area (1966, December 16).

The second generation of human rights consists of economic, social, and cultural rights. The International Covenant on Economic, Social and Cultural Rights of 1966 guarantees individual human rights such as: the right to work (Article 7); the right of everyone to form trade unions and join a union of their choice (Article 8); the right of everyone to social security, including social insurance (Article 9); the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production (Article 15), along with other rights in this legal domain (1966, December 16). It is important to highlight that this Covenant explicitly obliges the member states to ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights (Article 3). Accordingly, member states may restrict these rights only by law and only to the extent that is consistent with the nature of these rights and solely for the purpose of promoting general welfare in a democratic society (Article 4).

The third generation of human rights encompasses a diverse range of rights that emerged toward the end of the last century. Although there is a somewhat broader timeframe for their recognition and legal codification through various legal instruments, these human rights are linked by the fact that they are a product of the modern age and the need to adequately protect individuals from the challenges of contemporary life and violations of these rights. In the literature, they are also referred to as solidarity rights, as their realization depends not only on the affirmative or negative obligations of the state but also on the conduct of every individual. Hence, they are not primarily aimed at the protection of the individual, but rather of collectives, which refer to various social groups. The catalogue of third-generation human rights includes: the right to development, the right to peace, the right to a healthy environment, the right to privacy, and others (Kolednjak & Šantalab, 2013, 326*).*

Although international and regional legal instruments provide a broad basis for the protection of human rights, it should not be overlooked that these rights are not unlimited. These are legally permitted restrictions that do not infringe upon the essence of human rights. For example, the right to life is lawfully limited in countries where the death penalty is imposed; the right to physical liberty is restricted in the context of detention and institutional criminal sanctions; and the right to privacy may be limited through the application of special evidentiary measures in criminal law, among others.

Finally, increasingly vocal opinions within certain segments of the academic and professional community suggest that human rights could be more effectively protected. This could be achieved by basing the existing system of control and oversight on coercive mechanisms. "In support of the thesis that it is not necessary for the monitoring mechanisms of compliance with human rights treaties to be coercive, it is argued that states simply respect human rights treaties on the basis of the rule pacta sunt servanda. In this sense, some authors propose a managerial model according to which the state should not be forced, but rather persuaded to comply with certain rules" (Budak, 2018, p. 563). It is important here not to conflate institutional mechanisms for the protection of human rights with criminal law protection, which is provided within the framework of each country's criminal legislation. This type of protection is found in the special part of substantive criminal law, where individual human rights are safeguarded through specific criminal offences. For example, criminal law protection of the environment is considered a last resort in cases where other forms of legal protection prove ineffective and insufficient (Joksić, 2011, p. 23).

Human Rights in the Case Law of the ECHR

In the decades-long practice of the European Court of Human Rights (ECHR), there exists a significant number of cases in which Serbian citizens initiate proceedings against their own country. The literature emphasizes that the judgments rendered by the Court have a substantial impact on national legislation, leading to its harmonization with the standards developed by the ECHR (Kovačević, 2023, pp. 82–83). An application to the Court in Strasbourg must be submitted in accordance with the prescribed form, including a mandatory specification of the particular human right, as provided by the European Convention on Human Rights and Fundamental Freedoms, that has been violated or endangered (November 4, 1950). By analyzing a substantial number of cases involving Serbia, it has been established that a significant proportion of applications aresubmitted due to violations of the right to property and the right to a trial within a reasonable time. In the case of Ivić v. Serbia (17871/23)[6] the application was brought against the Republic of Serbia pursuant to Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).[7] The applicant alleged that his human right to property guaranteed by the ECHR was violated. This concerns the provisions guaranteeing the right to a fair trial (Article 6 of the ECHR)[8] and the right to property (Article 1 of Protocol No. 1 of the ECHR).[9] The factual description of this case boils down to the applicant's claim regarding the non-enforcement of a domestic decision issued in her favor against a state/social enterprise. Since the decision was rendered in her favor, the applicant possesses standing to bring this proceeding.

The Court accepted the applicant's application based on the following legal reasoning and factual arguments. The enforcement of a judgment rendered by any court must be considered an integral part of the "trial" within the meaning of Article 6. The Court also refers to its case law concerning non-enforcement or delayed enforcement of final domestic judgments (see Hornsby v. Greece, no. 18357/91, § 40, Reports of Judgments and Decisions 1997-II).

The Court further notes that the decision in this application requires the undertaking of a specific measure. Accordingly, the Court considers that the contested decision concerns "possessions" within the meaning of Article 1 of Protocol No. 1. In the leading case of R. Kačapor and Others v. Serbia, no. 2269/06

[6] https://www.zastupnik.gov.rs/sr (available June 1, 2025.).

[7] According to the provision of Article 34 of the ECHR: The Court may receive individual applications from any person, non-governmental organization, or group of individuals claiming to be victims of a violation of the rights established by the Convention or its Protocols, committed by a High Contracting Party. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

[8] According to the provision of Article 6 of the ECHR: Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of his civil rights and obligations or of any criminal charge against him. The judgment shall be pronounced publicly, but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, when the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[9] In this legal context, the applicant also relied on the provision of Article 1 of Protocol No. 1 to the ECHR, which states: Everyone has the right to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. However, the preceding provisions shall not, in any way, impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

and five others, dated 15 January 2008, the Court found a violation concerning circumstances similar to those in the present case.

After considering all the material submitted to it, the Court found no fact or argument capable of persuading it to reach a different conclusion regarding the admissibility and merits of these complaints. In light of its case law on this subject, the Court finds that in this case the authorities did not make all the necessary efforts to fully and promptly execute their decision in favor of the applicant. Therefore, these complaints are admissible and disclose a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

Having regard to the documents in its possession and its case law (see, in particular, the case of R. Kačapor and Others v. Serbia, cited above, as well as Stanković v. Serbia (decision), no. 41285/19, of 19 December 2019), the Court considers it reasonable to award the amounts indicated in the attached table. The Court further notes that the Respondent State has an outstanding obligation to enforce the judgment.

Conclusion

Human rights represent a legal specificum whose international affirmation was achieved after the Second World War. Their particularity is reflected in the definition of their concept and meaning, the manner of classification, and their application in the practice of the European Court of Human Rights (ECHR). In each of these segments, there is a departure from the traditional understanding of objective law and subjective rights. Therefore, in the derived sense, human rights imply the right to their peaceful enjoyment without actual or legal interference by others. A large number of human rights require classification according to the manner of their discovery and legal verification, as well as the goods they protect. Although there are several classifications of human rights, we consider the division into generations, which corresponds to the international legal instruments guaranteeing them, as the most appropriate.The full effect of the application of human rights and the degree of their observance in our country can be determined by reviewing the practice of the ECHR. Based on available data, a significant number of applications can be observed seeking protection of fundamental human rights (e.g., property), the right to a trial within a reasonable time, and the like.

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Položaj ljudskih prava u međunarodnom pravnom poretku

Goran Milojević i Dejan Novaković

Univerzitet Privredna akademija

Pravni fakultet za privredu i pravosuđe, Novi Sad, Srbija

Sažetak

Svoju punu afirmaciju ljudska prava stiču u periodu posle Drugog svetskog rata. Iako začeci ideje o potrebi uvođenja ljudskih prava u međunarodni pravni poredak sežu mnogo ranije njihova pravna validacija se vezuje za pravne dokumente nastale u okviru Organizacije ujedinjenih nacija. Otuda se njihove specifičnosti moraju ceniti u duhu normativnih rešenja prisutnih u krovnim međunarodnim pravnim instrumentima. U radu će biti korišćen širi metodološki okvir u kojem preovlađuje komparativni metod, istorijski metod, analiza sadržaja, sistematski metod, lingvistička analiza teksta i dr. Primena ovih metoda biće fokusirana na bolje razumevanje različitih rešenja koja, u određenim segmentima, pokazuju značajne razlike. U radu će biti dat opšti pojam i značenje ljudskih prava, razvoj ideje ljudskih prava na nivou teorijskih shvatanja, mogućnosti njihovog pravno dozvoljenog ograničenja, stanje u njihovoj praktičnoj primeni i dr. Uvažavajući značaj praktične primene ljudskih prava u radu će biti korišćene presude Evropskog suda za ljudska prava u Strazburu. U fokusu će biti presude ovoga Suda u kojima je naša zemlja bila tužena zbog povrede ljudskih prava u različitim načinima postupanja državnih organa. Cilj rada je da se područje ljudskih prava prikaže na način koji će omoguićiti čitaocu da pravilno razume njihove pravne specifičnosti. Ovaj cilj smatramo opravdanim u okolnostima kada se fenomen ljudskih prava medijski eksploatiše svuda u svetu a da se pritom daju pogrešne ocene njhovog dometa u praktičnoj primeni propisa.

Ključne reči: ljudska prava, teorijska shvatanja, predstavka, ograničenja, pravni instrumenti.