

SUBSTANTIVE CRITIQUES OF THE HUMAN RIGHTS CONCEPT

INTRODUCTION

It has been a very long time since the first declaration of human rights was adopted. It happened during the French Revolution and was aimed to settle the set of universal and equal laws belonging to every human person. These laws were conceptualised to protect the fundamental value which is the human life and its liberty. After the Second World War, i.e. nearly 160 years after the French Revolution, the another declaration of human rights has been adopted. It was based on the fundamentals of its predecessor, but this time, protecting the rules of the Declaration became an international duty. Since then, all states that have adopted the Declaration had to proclaim its values and spread them amongst other nations and countries. It has become one of the main aims of international politics. In more general words, this aim was to settle peace between states, safety to people and to preserve continuity of these values.

Since the very beginning, the concept of human rights has been criticised for ignoring cultural pluralism, increasing the political influence of Northern countries on Southern countries and for increasing ‘the asymmetry of power relations between the rich and the poor nations’¹. These and similar aspects (dominant in the current discourse) of critique, however, are merely of accidental (commonsensical) nature. They focus

¹ S.P. Marks, *From the „Single Confused Page” to the „Decalogue for Six Billion Persons”*: *The Roots of the Universal Declaration of Human Rights in the French Revolution*, „Human Rights Quarterly”, 1998, Vol. 20, No 3, p. 462.

on the results of the adoption of the Declaration; in other words, they focus on the pragmatic perspective that covers the perception of the Declaration as a tool used in the international politics and negotiations. Therefore, the accidental critique is rather the optimistic approach which discerns drawbacks of the Declaration, even serious ones, but settles their status as „curable” by the use of right remedies (modifications).

In this article I present the stream of critique towards the concept of human rights that has appeared just recently, in the past 40 years. It contains the works of the authors that had the greatest impact on the nature of this stream of critique such as Hannah Arendt, Giorgio Agamben, Michel Foucault, Roberto Esposito and Alasdair MacIntyre. These authors usually make many references to the history of human rights and through which they try to discover basic assumptions behind the Declaration. Therefore, they base their critique not only on the history and the historical scrutiny, but also on the philosophical premises on which the concept of human rights was founded. This stream of critique differs from the accidental (commonsensical) one, because it covers the aspects of the Declaration that refer directly to the very assumptions and – philosophically speaking – to the essence of the human rights movement and concept. Concluding the introduction above, the aim of this article is to reconstruct the thoughts of the aforementioned authors on human rights. In order to do that, I propose the following structure of the article: in the first section I outline the historical frames of human rights conception; in the remainder, I put the thoughts of the authors in the following order: Esposito, Arendt, Agamben, MacIntyre, Foucault, i.e. from the least to the most radical character of the critique. The main thesis that follows this aim sounds: the described stream of critique of the human rights concept is more radical than the commonsensical one and has a substantive nature. The latter means that the substantive critique perceives the human rights concept as „incurable”, mistaken and evil in its essence, hence it should be completely rejected².

THE HISTORY OF THE DECLARATIONS OF HUMAN RIGHTS

The Declaration from the period of the French Revolution covers three ideologically evolving documents. The first was drafted on 26 August 1789 and focused on the establishment of democracy in hitherto

² J. Bartyzel, *Śmiertelny Bóg Demos*, Warsaw 2009.

monarchist France. This aim resonated in 1791 when the Declaration (with some modifications) became a part of the French Constitution. Another document was drafted and adopted on 24 June 1793. The new Declaration has covered new fields such as the common right to education, work and public assistance. The third and the most discussed Declaration, entitled the Declaration of Rights and Duties of Man and Citizen, was drafted and adopted in 1795. The last Declaration, historically separate, but ideologically similar to the French one, was drafted after the Second World War, in 1948, to rebuild faith in human rights and to restore legal guarantees – protecting human life – to every man. Both Declarations are short and concise. They include a short preamble and the set of general principles, but, as Antonio Cassese has observed, the Declaration from 1948 does not ‘use the hard-hitting words of the French Declaration [and] seems dull, almost grey, devoid as it is of the solemn rhetoric in which its ‘forebears’ are worded, and of the emotive impetus which animates them’³. Also, the basis of the Declaration from 1948 refers rather to the one from 1789 than to the draft from 1793. In result, the post-war Declaration does not include social guarantees such as concern with work, education and social protection⁴. Differences like the above are understandable in the context of historical change of the human rights meaning. While the French Declaration was focused on the internal politics in France and on the transition towards democracy within this country, the Declaration from 1948 embraced a more diverse set of concerns towards the international attitude in politics. In other words, one can say that the French Declaration was „local”, while the Universal Declaration of Human Rights from 1948 was „global”. However, the detailed list of similarities and differences between the Declarations⁵ is not the key point in understanding the philosophical fundamentals underlying the human rights concept.

The most general task of introducing the human rights concept was to establish the principles of such a government that is able to practically realise, i.e. to enact as functional and then to protect the human rights. Therefore, the principles of the Declaration had to 1) be articulated in a few abstract, philosophical premises that 2) can be interpreted and

³ A. Cassese, *Reflections on International Criminal Justice*, „The Modern Law Review”, 1998, Vol. 61, No 1, p. 45.

⁴ S.P. Marks, *op. cit.*, p. 489.

⁵ ...that is available e.g. here: S.P. Marks, *From the...*, pp. 486–493.

reformulated to the form of more precise, practical and applicable principles which 3) underline the need to provide the institutional protection of these principles. The just mentioned, fundamental abstract premises are liberty, equality and popular sovereignty, usually being dominant in politically liberal streams⁶. Another assumptions of human rights include the right to nationality, asylum, non-refoulement, freedom of movement and the right to privacy. In the further (after 1948) development of human rights we can observe that this concept has „abandoned” its liberal roots and moved towards so-called social protection. The latter ‘resembles the idea of security, defined as the protection granted by society to each of its members for the conservation of his person, his rights, and his properties’⁷. This allows somehow to explain why the concept of human rights fits better to socialist and social democratic countries than to the liberal ones⁸.

As we could see in the previous paragraph, the human rights concept was conceived to protect civil and political rights of people. But the most important right has not been mentioned yet in this article. Probably the most innovative and important thing that has appeared in the Declaration from 1948 is the right to life. It is a moral principle which holds a belief that any human being should not be unjustly killed or deprived life in any other way. The importance of this right is threefold. 1) Since the right to life has been recognised, the thing that has found itself under protection was life in the literal meaning of this word. In the opposition to the so-called social protection that covers issues that surround life (these are, for instance, living conditions, equality of rights, common right to education, medical healthcare and so on), the right to life provides protection of life against being unjustly killed by other human being or by the state. 2) Philosophically speaking, life has gained a central position in political thinking. Of course, one can say that the protection of life or providing a good life were the aims of every political system since the Antiquity. That is obviously true. But, up to this moment, the political power was exercised over immaterial things like territory, social goods, means of

⁶ This is however an ambiguous matter: whether the human rights concept corresponds mainly with liberalism or not.

⁷ Ibidem, p. 506.

⁸ Even greater understanding of this match comes with the deletion of the right to property in post-1948 human rights declarations. Some claim, however, that it ‘has not been banished (...) as it has been reaffirmed in numerous international and regional human rights treaties’ (See S.P. Marks, *op. cit.*, p. 509).

production, etc. The adoption of the human rights concept is one of those historical moments since when the central object of political interest has changed to the life itself; since that moment the political power is exercised directly over life, over the life itself⁹. 3) With the recognition of the right to life and under pressure of emancipation movements the terms such as „man”, „citizen” or „brother”, which have been present in the French Declarations, were replaced by the concept of person. Although there is a huge philosophical tradition behind this term, its introduction is important because of other reason. In fact, the introduction of the term „person” to the post-war Declaration was crucial because it has opened a wide window of critique towards the human rights concept; the critique that stroke to the very heart of this concept, the substantive critique. In other words, the addressing of the substantive critique towards the human rights concept is possible almost only through the reference to the terms like „person” or „human” that are protected by some laws, rights or any other kind of legal principles.

ROBERTO ESPOSITO’S HISTORICAL SCRUTINY ON PERSONHOOD

The first example of the substantive critique towards the concept of human rights is the critique addressed by the Italian historicist and political philosopher, Roberto Esposito. In fact, the reconstruction of his thought allow us to look at the history of the Declaration one more time, but from another perspective. Esposito’s historical scrutiny on the human rights concerns mainly the Declaration from 1948 and starts in the moment ‘when the Allied victory became apparent and along with it the possibility of bringing Nazi leaders to justice, the most urgent task to be performed, even before attempting any legal definition, was the conceptual development of a notion of „crimes against humanity”’¹⁰. In these times, such a development was a hard task to be done, because the concept of humanity was not known to the legal language. Another difficulty resulted from the scale of the committed crime. For the first time in history, the entire country could be

⁹ Such a political action took place in history much earlier than in 1948. A comprehensive insight into this matter was written by Michel Foucault and published in his most famous book entitled *Discipline and Punish*. In this article I point at the Declaration from 1948 only as a contemporary example of the long lasting process of incorporating life to political legislation.

¹⁰ R. Esposito, *op. cit.*, p. 64.

charged for crimes against its own citizens. The problem was: how to judge such a crime? It cannot be done within the borders (national sovereignty) of the country that is accused. In such case a judge is not a single person, but another state which gain almost an unlimited right of interference. And ‘this would allow a war to be waged against any nation in the name of unwritten laws considered implicit to humankind simply by nature and by custom’¹¹. According to Esposito, to avoid such a severe problem, the tribunals which were judging Nazis appealed to the Universal Declaration of Human Rights. Through such decision, national sovereignty was opposed by a higher value, i.e. the right to life. ‘And yet it was this specific reference that ended up creating the most glaring contradiction in the new doctrine’¹². Esposito claims, that this happens because ‘what holds true for the individual is not true for humankind, and vice versa. No matter how they are conceptualised, the three terms ‘individual’, ‘law’ and ‘humanity’ fail to line up along a single path’¹³. In other words, any legal rules which have been settled for individual human beings are not applicable to any audience wider than this individual, because of differences in ethnicity, nationality, religion, morality, motives, interests and share in guilt. Up to this point, Esposito’s critique bears the stigma of the accidental critique, because 1) he claims that the reason behind the creation of human rights was a development of a method to punish Nazis for their crimes; that the human rights concept is merely a tool used to find, for any cost, justice for the Second World War crimes – also, this observation seems to be sufficient to explain why the Declaration from 1948 did not include a guarantee to a fair trial for criminal offences¹⁴; 2) he claims that the concept of human rights as the judiciary tool is inherently contradict to itself. However, in Esposito’s philosophy, these arguments are only a historical introduction to the core of the problem.

In the accidental part of his critique, Esposito outlines the legal gap between the invention and the practical implementation of the human rights concept. This allows him to get closer to the deeper field of the issue. As he notices: ‘the concept of ‘person’ was intended to fill in the chasm opened up between the poles of human being and citizen that had existed since the Declaration of 1789’¹⁵. The concept of person, ‘the

¹¹ Ibidem, p. 66.

¹² Ibidem.

¹³ Ibidem, p. 67.

¹⁴ S.P. Marks, *op. cit.*, p. 502.

¹⁵ R. Esposito, *The Third Person*, Cambridge 2012, p. 70.

new semantic epicenter, shifting away from the revolutionary emphasis on citizenship, is the unconditional demand for the dignity and worth of the human person¹⁶. Since Nazis were the ones who had reversed the philosophical tradition that was constructing the thought on personhood, that process has had to be cured by restoring a person his/her dignity, rights, respect and rational will. We can observe this accurately on the example of Jacques Maritain, a French, Catholic philosopher who had a significant role in the development the Declaration from 1948, who wrote: ‘the human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, and possesses rights¹⁷. Although the concept of person (who has the unalienable rights, including the right to life, for instance) was needed to punish Nazis for what they did during the Second World War, Esposito claims that its introduction has „destroyed” the human rights ideal from the inside, that the concept of person has split rights and life even more than they were in the past instead of connecting them¹⁸. The Italian philosopher constructs this argument by referring to the history of Roman law. In the ancient Rome there was a principle *summa divisio de iure personarum*¹⁹ which was legally dividing persons into *ingenui*²⁰ and *liberti*²¹. The term *persona* was therefore connected to the legal, but, first of all, abstract categories such as possession of rights, social status, etc. That leads to the natural conclusion that ‘no human being was a person by nature (...). Certainly not the slave, but not the free man either: before he became *pater*, that is, a legal subject, he still had to pass through the status of *filius in potestate*, which reflected the fact that, in the changeable dispositif of the person, since human being arrived into life from the world of things, they could always be thrust back into it²². In other words, Esposito presents a complex dialectic object,

¹⁶ Ibidem.

¹⁷ J. Maritain, *The Rights of Man and Natural Law*, New York 1971, p. 65.

¹⁸ R. Esposito, *op. cit.*, p. 74.

¹⁹ *Ang.* „The most important division in the law of persons”.

²⁰ *Ang.* Born free.

²¹ *Ang.* Those who have been freed.

²² Ibidem, p. 78.

a historical perspective according to which a person and a human being are separate though mutually connected (but not always) terms that base on the inclusive-exclusive relation. The natural-artificial opposition was well-presented by Hugues Doneau, who wrote: ‘man is a term of nature, person is a term of civil law’²³.

In modern times, especially during the French Revolution, the concept of person has been broadened, i.e. granted to all human beings as bearers of a rational will and brothers in equality. That was also the historical moment, when the introduction of the (moderate) concept of human rights became possible. However, as time progressed, the concept of person was not only imposed, but ‘superimposed onto the human being’²⁴. In the most complete or radical form, such an enforcement of law to a human being 1) creates a ‘personified unity of the legal norms’²⁵; 2) diminishes the significance of a human being (as a concept); 3) makes the term human being inferior to this of a person; 4) causes that the concept of person starts to precede a human being and eventually 5) ‘separates human beings from their rights’ and causes ‘that something like ‘human rights’ is impossible’²⁶. One can oppose that the above reasoning is invalid because there are many discontinuities between the ancient and the modern legal tradition. Although it is true, it does not apply to the Esposito’s argument because its underlying logic is practically the same today as was in the past; also, it is astonishingly accurate. Simply, if the status of person belongs only to the legal tradition, along with growing legislation, which concerns the issues connected with personhood, the fact of being a „mere” human is marginalised in the legal context. That results not only with the impossibility of the existence of something such as human rights, but also with that that the definition of human rights is conceptually empty.

HANNAH ARENDT AND STATELESS PEOPLE

Hannah Arendt’s objections to the concept of human rights were developed by her on many different levels, however, they are all based on the two following statements: 1) the human rights are impossible to be followed and executed because in the current political order, which

²³ Cited in R. Esposito, *op. cit.*, Cambridge 2012.

²⁴ *Ibidem*, p. 83.

²⁵ H. Kelsen, *Pure Theory of Law*, London 1978, p. 174.

²⁶ R. Esposito, *op. cit.*, Cambridge 2012, p. 83.

is based on the national states, being the subject of law is dependent on being a member of the state, not a mere human; also, because there is a lack of a transnational legal subjectivity for some people; 2) imposing law on a human being endangers humanity because a human being is, in some way, „out-of-political” and is deprived of freedom and dignity through such enforcement. As we can see, the Arendt’s critique is the substantive one from the very beginning as the author properly, according to Esposito²⁷, identifies the problem which traverses the human rights concept, i.e. that through the enforcement of the human rights to a human being, the latter is excluded from the benefits of the law and deprived of rights just because it is a human. Therefore, in Arendt’s philosophy, the human rights concept is not only a meaningless term, as in Esposito, but also the danger one that decreases the safety of people instead of increasing it.

Arendt’s considerations on the human rights concept have their roots in her work entitled *On Revolution*, in which she notices that the aim of the French Declaration from 1789 was to build the national unity amongst Frenchmen²⁸. In the language of political philosophy, it was the inclusion of people to the range of political power. For Arendt, who advocates for the belief that factors that come from the nature should be separated from politics, such an inclusion resulted with the author’s observation that 1) the political means, especially violence, were connected to the natural (biological) domain, i.e. liberty; 2) politics designates the membership to humanity²⁹, i.e. the belief that politics decides whether someone is human or not; that is because politics creates the legal framework in which someone can be recognised as a human being or as a person. It can also be said that a human gains the rational will in that particular moment in which he becomes a member of political community. Without being an element of any political order, a human being is no one. The best example on such an individual is a stateless man, i.e. a man who is not recognised as a member of any nation, hence is deprived of any rights. This creates a paradox that a stateless man needs to commit a crime in the first place to become subject to law. There is however no bigger paradox than that that the most glaring example of entity which fully represents the ideal of

²⁷ Ibidem, p. 69.

²⁸ See H. Arendt, *On Revolution*, London 1990.

²⁹ Ibidem.

human rights are stateless people, because they reflect the ideal of „natural” human beings. Moreover, ‘the conception of human rights (...) broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man’³⁰.

It should not be overlooked that by criticising the human rights concept, Arendt also criticises the current political order, which stands in the heart of the problem of excluding certain groups of people from belonging to a state or nation, hence depriving them of the legal status. Within the state some people can be recognised as unnecessary, redundant and eventually danger; then it is the state, which can make certain people outlaws and try to get rid of them; finally, it is the state, which puts people to danger³¹. Another Arendt’s ambiguity towards the concept of human rights concerns the connection between a state and a nation. The entire mechanism of the international law was based on such a connection, i.e. on the connection between being the legal subjectivity and being a member of a nation. Therefore, the human rights concept, because of its generality and assumptions, fails not only to distinguish itself from, for instance, the rights of citizen, but also proliferates the problem of stateless people by increasing their number³². The only way to overcome the problem, i.e. to grant all people the legal subjectivity seems to be the emergence of humanity as the global political community under the rule of the global government. However, this does not guarantee a complete safety to e.g. some groups and minorities whose rights still can be discriminated and violated against in the name of „higher cause” such as maintaining order or security.

Therefore, the substantiveness of Arendt’s critique manifests itself in discerning in the concept of human rights the widening gap for

³⁰ H. Arendt, *The Origins of Totalitarianism*, New York 1966, pp. 299–300.

³¹ *Ibidem*, p. 300–301.

³² *Ibidem*, p. 299–302.

insecurity, or the danger that is caused by any further implementation and spreading of this concept. Arendt's critique is also more radical than the one presented by Esposito and that is not only because Arendt identifies the harmful logic of the human rights concept to itself (eventually, Esposito does the same thing), but because she notices how this logic undermines the state's capability to provide legal protection to its citizens. Although she proposes the solution to that problem, Arendt admits that, the most probably, it is not sufficient to have the effect. In other words, the proposed solution is unable to deal with the complexity of the problem and this is it which makes the impression, that Arendt's critique can be of the accidental nature, transient and illusionary.

GIORGIO AGAMBEN'S PARADIGM ON SOVEREIGN POWER

Although Giorgio Agamben's critique resembles the one that was developed by Arendt, he goes a step further in his considerations and describes the process of change in the nature of politics, instead of measuring political phenomenons by classical political terms as did Arendt. For Agamben, the human rights concept is something more than the conceptually empty term or the danger to some people, groups or minorities. In the implementation of this concept he sees a threat for the entire population because of the change of the political nature which became possible e.g. through the development of the human rights. To understand Agamben's position, first we need to comprehend the underlying logic of his argument, which is tightly connected to Agamben's understanding of sovereign power.

In his one of the most famous works, entitled *Homo Sacer. Sovereign Power and Bare Life*, Agamben notices that in the 17th Century law has appeared the category of *corpus* (body), the dominant one since then. 'The fact that, of the all the various jurisdictional regulations concerned with the protection of individual freedom, it was *habeas corpus* that assumed the form of law and thus became inseparable from the history of Western democracy is surely due to mere circumstance. It is just as certain, however, that nascent European democracy thereby placed at the center of its battle against absolutism not *bios*, the qualified life of the citizen, but *zoe* – the bare, anonymous life that is as such taken into the sovereign

ban³³. According to Agamben, since that particular moment, the political power could spread its reigns over individual bodies. A theoretical backdoor with which Agamben develops his paradigm of sovereign power is the term sovereign ban. In the Roman times, the „sovereignly banned” individual was a man, who could be (even unjustly) killed in any moment of his life by literally anyone and the killer remained unpunished. This observation allowed Agamben to outline the figure of homo sacer (bare or naked life) – an individual which can be excluded from any legal relations by the state, hence from any legal protection, and put to the risk of being killed by anyone³⁴. In other words, homo sacer is the figure that defines sovereignty as an ability to introduce the state of emergency; in Agamben, sovereignty is based on the right to exception. The place, or territory, on which the state deprives people of their rights, is called a camp. Eventually, Agamben makes the camp the central figure of his considerations and claims that it is the paradigm of modern politics which functions as the political order’s inherent though hidden potentiality³⁵.

At the beginning, Agamben’s critique towards the human rights seems to be very similar to the one of Arendt’s, especially when he writes: ‘Human rights, in fact, represent first of all the originary figure for the inscription of natural naked life in the political-judicial order of the nation-state’³⁶. In this statement Agamben does nothing other than the description of the inclusion of human being to the range of politics. Therefore, he remains consistent with Arendt, by claiming that 1) through the introduction of the human rights concept life is subjected to the valuation by the state between the authentic (connected with being a member of a nation) and naked life; and that 2) introducing the concept of human rights was a try to create a mechanism of protection for the naked life that would be independent from the state. Agamben obviously notices that the human rights were conceived as a response to the cruelty of political power and that the human rights supposed to oppose political violence. He also notices, however, that the nature of the concept of human rights is reactive, hence it emphasises exactly that what is the

³³ G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford 1998, p. 124.

³⁴ In other words, this is exactly the same figure which was ‘a human being’ in Esposito, i.e. a human, but perceived as a thing, an entity without rights and without legal protection.

³⁵ Ibidem, p. 120–130.

³⁶ G. Agamben, *Beyond Human Rights*, „Social Engineering”, 2008, No 15, pp. 92–93.

central subject of sovereign power, i.e. the naked life. Therefore, the human rights rather creates the field of exclusion and stigmatises people within its borders than provides them the legal protection. Particularly in this part of the Agamben's argument one can recognise a very strong objection against the human rights – their powerlessness does not result from the accidental or adventitious factors, but from their very assumptions and their underlying logic³⁷.

The main part of the Agamben's critique differs from the Arendt's one, it goes even further and beyond the horizon of her philosophy. According to Agamben, the concept of human rights supports, against the will of its creators, and leads to the further development of the camp paradigm. The introduction of the human rights concept does not only mean the fall of classical politics, but also the complete change of the main subject of new politics (biopolitics). From now on, as claims Agamben, the line between people with rights and people without rights becomes even more and more apparent and dangerously close to the level that has occurred during the Second World War in the Third Reich. Paradoxically, the additional exemplifications of that process are humanitarian organisations which usually present people as individuals deprived of almost everything except their biology. Therefore, humanitarianism, also oppositely to its intentions, supports the process of the exclusion of the naked life because it introduces it as a problem to the public space, leading in this way to the further separation of the naked life from the political rights and the legal protection. Agamben claims that the very same situation has occurred in history, when the organisations such as 'the League of Nations or the United Nations have tried to face the refugee problem, from the Nansen Bureau for the Russian and American refugees (1921) to the High Commission for Refugees from Germany (1936) to the Intergovernmental Committee for Refugees (1938) to the UN's International Refugee Organization (1946) to the present Office of the High Commissioner for Refugees (1951)'³⁸. The scale of this phenomenon have increased nowadays even more. The industrialised countries of the European Union face the growing problem of illegal immigration, especially after the Arab Spring, and with the estimated twenty million immigrants from Central European countries³⁹.

³⁷ See G. Agamben, *Homo Sacer...*

³⁸ *Ibidem*, p. 91.

³⁹ *Ibidem*, p. 94.

Not surprisingly, the European Union response for the post-Arab-Spring immigrants, for instance, was the introduction of neo-colonial politics and the human rights programme in the North African countries⁴⁰. This second Agamben's charge against the concept of human rights concerns the paradigmatic change in the modern politics. Comparing to the previously mentioned authors, the Agamben's critique covers not only the theoretical mistake of the human rights concept and the evil that can be done to certain people by the human rights implementation. This author discerns the evil that can be done to all people by such implementation, because it starts and supports the paradigmatic change of the modern politics' essential subject and its attitude towards that subject.

BEYOND 'WITCHES AND UNICORNS'. ALASDAIR MACINTYRE'S CRITIQUE

Alasdair MacIntyre, a Scottish philosopher, is widely known as the author of the following phrase about the human rights: 'there are no such rights⁴¹, and belief in them is one with belief in witches and unicorns'⁴². MacIntyre's fully-developed critique against the human rights, however, is much deeper and more complex than the quoted, rather publicistic, phrase. In his works, MacIntyre advocates for the following arguments: 1) the existence of (any) rights cannot be proven or at least no evidence for their existence has been discovered yet⁴³; 2) human rights are a response to the social crisis which emerges when natural theology is abandoned; 3) human rights are not universal⁴⁴. How does he defend them? The author asks: 'Do individuals have a right in certain circumstances – for example, extreme and unrelievable pain or

⁴⁰ A. Dandashly, *The EU Response to Regime Change in the Wake of the Arab Revolt: Differential Implementation*, „Journal of European Integration”, 2015, Vol. 37, No 1, pp. 37–56.

⁴¹ ...human rights... – B.P.

⁴² A. MacIntyre, *After Virtue*, London 1985, p. 69.

⁴³ However, in the essay entitled *The Right to Die Garrulously* MacIntyre claims that rights can exist, but only as social practices (See A. MacIntyre, *The Right to Die Garrulously*, (in:) E. McMullin (ed.), *Death and Decision*, Boulder 1978, pp. 75–84). 'The game of chess is an example of such a practice: in chess, for instance, white has the 'right' to move first' (See T. D'Andrea, *Tradition, Rationality and Virtue: The Thought of Alasdair MacIntyre*, London 2006, p. 79).

⁴⁴ C.R. Stibora, *Jacques Maritain and Alasdair MacIntyre on Human Rights*, Washington 2013, p. 223.

the occurrence of such brain damage that there can be no possibility of recovery except as an idiot – to be deprived of further life-support or to have their life taken, provided that at the relevant time they do consent or have consented to this?’⁴⁵ In other words, MacIntyre asks whether there are any natural (human) rights that these individuals possess? The answer is no, ‘because there are no such rights’ and ‘nobody has ever given us the slightest reason for believing that there are’⁴⁶. The MacIntyre’s argument that rights do not exist seems to be a closed logical circle that explains itself by itself, hence it is insufficient to undermine the human rights concept as a whole. However, it does possess the stigma of the substantive critique.

Another MacIntyre’s argument concerns the collapse of traditional values in society such as community, family, neighbourhood, and so on. In a traditional society any person who suffers from any reason obtains help and care just because he is a member of a given community. After the collapse of these values, the only option left is ‘to show respect and care for the suffering or dying stranger because he is a human being. But if his claim to consideration arises only from his being a man, then it must be because some set of rights attaches to being a human being. And in this case everybody must have rights’⁴⁷. This is the way how MacIntyre sees the arising of the human rights in the modernity. Since all the traditional bonds are gone, the human rights concept seems to be the only one left to appeal to get a reason to help or care for another person. MacIntyre, however, sees the above differently: ‘rights claims derived from a consideration of abstract humanity tend largely to involve the identification of negative rights to non-interference; they far more rarely have anything to do with motivating us to positive care and concern for persons in need’⁴⁸. In other words, he criticises the human rights for supporting the egoistic and individualistic (and later also liberal) approach instead of taking a try to reactivate the traditional and fundamental values of community. For this author, the human rights are nothing more than moral fictions that try to

⁴⁵ A. MacIntyre, *The Right to Die Garrulously*, [in:] E. McMullin (ed.), *Death and Decision*, Boulder 1978, p. 75.

⁴⁶ *Ibidem*, pp. 75–76.

⁴⁷ *Ibidem*, p. 83.

⁴⁸ T. D’Andrea, *Tradition, Rationality and Virtue: The Thought of Alasdair MacIntyre*, London 2006, pp. 78–79.

replace the older traditions' function which was being the self-evident source of justice⁴⁹.

When it comes to the universality of rights, MacIntyre refers to Marx and claims that rights are a moral fiction because there are no such things as objective and impersonal criteria, but only these that arise from a given cultural context. 'One reason why claims about goods necessary for rational agency are so different from claims to the possession of rights is that the latter in fact presuppose, as the former do not, the existence of a socially established set of rules. Such sets of rules only come into existence at particular historical periods under particular social circumstances. They are in no way universal features of the human condition'⁵⁰. This argument seems to be consistent with recent events such as the emergence of the Asian Human Rights Commission which tries to adjust (reformulate) the human rights concept to the Asian environment and culture. As we can see in the MacIntyre's reasoning, the author uses the elements of the accidental critique of the human rights concept, such as the critique of the universality of rights or the critique of the human rights' ideological fundaments, to conclude from them the argument which stands for the substantive critique, i.e. the argument that something like the human rights cannot exist at all.

In MacIntyre's works there is also one more interesting, often omitted thread. In *Community, Law and Idiom*, the author claims that the reversed hierarchy of rights over law and the lack of the universality of the human rights have caused the wrong understanding of justice⁵¹; that 'rights have become a last resort to societies that no longer share a sense of the common good or a belief in an ultimate human good'⁵². Without a common understanding of that what is an ultimate good or what are the ultimate values, members of society who face moral and ethical problems have no a common standard of judgement, hence they are not able to reach a consensus in such cases. This is why MacIntyre observes: 'What justice requires depends (...) upon prior rational agreement as to the nature of justice, and rational enquiry into the nature of justice

⁴⁹ C.R. Stibora, *Jacques Maritain and Alasdair MacIntyre on Human Rights*, Washington 2013, p. 229.

⁵⁰ A. MacIntyre, *op. cit.*, London 1985, p. 67.

⁵¹ A. MacIntyre, *Community, Law and the Idiom and Rhetoric of Rights*, 1991, pp. 97–104.

⁵² C.R. Stibora, *op. cit.*, p. 247.

depends in turn upon prior agreement on the nature of the good, and more fundamentally, still upon those background beliefs in terms of which good is defined and understood⁵³. Therefore, appealing to the human rights is a sheer refuse of the path that seeks for a common consent and of any goods that a community has to offer. Eventually, if the adoption of the human rights concept in fact leads to the misunderstanding what is justice and to appealing to one's preferences, desires and will when the one thinks that it appeals to rights, if all MacIntyre's listed charges against the human rights are true, then the author's critique touches a very deep philosophical level. By reaching it, he uncovers even greater threat to modern politics than Arendt or Agamben, i.e. a deceit that has been made to the most fundamental political term: justice⁵⁴. If the concept of human rights is the one responsible for this, it has to be entirely rejected.

MICHEL FOUCAULT ON HUMANISM

Michel Foucault was a French political philosopher, probably the most influential one in postmodernism. Although the presence of the elements of his philosophy is obvious in, for instance, Esposito and Agamben⁵⁵, none of these authors has noticed the deepest level of Foucault's philosophical background. The superficial papers on Foucault notice only the sociological changes; more complex analysis concern Foucault's perspective on ethics, morality, philosophy and the obvious implications of his political thought (here we can place e.g. Esposito and Agamben); the most advanced and diligent research into Foucault's works shows that this author had always put emphasis on the significance of a given problem for the relations of power, that his primary concern was always political philosophy. The possibility of interpreting Foucault on the different levels of advance is the reason why some authors, such as Dosse, Paras or Dews, claim that Foucault

⁵³ A. MacIntyre, *op. cit.*, p. 100.

⁵⁴ C. R. Stibora, *op. cit.*, pp. 248–249.

⁵⁵ Esposito makes the most significant references to Foucault in the book *Bíos: Biopolitics and Philosophy*, in which he considers paradoxes of biopower and develops his most famous theoretical concept: the paradigm of immunisation. Foucault 'serves' Esposito as a theoretical background. On the other hand, Agamben draws from Foucault the fundamental definitions for his philosophy, such as biopower, biopolitics, population.

was embracing the human rights principles⁵⁶. Ben Golder notices: ‘Enter the triumphant subject of human rights; exit, somewhat confusingly, the genealogy of power/knowledge’⁵⁷. Why the putative Foucault’s support for the human rights causes so much confusion? There are two answers for this question: 1) because Foucault was the author who criticised the political power and its institutions by unmasking their historical roots; 2) because the interpretation of Foucault as the author who advocated for the human rights is mistaken. In this section I argue that Foucault’s critique towards the human rights is not the direct one that concerns the human rights per se. Claiming that such a critique exist would be an obvious nonsense because there are fragments like the following one – ‘Through these different practices – psychological, medical, penitential, educational – a certain ideal or model of humanity was developed, and now this idea of man has become normative, self-evident, and is supposed to be universal. This does not mean that we have to get rid of what we call human rights or freedom, but that we can’t say that freedom or human rights has to be limited at certain frontiers ... I think that there are more secrets, more possible freedoms, and more inventions in our future that we can imagine in humanism’⁵⁸ – in which Foucault clearly supports the human rights. However, as Golder writes: ‘this interpretation helps us to read Foucault’s late engagement with human rights discourse otherwise – not as an unqualified acceptance of its orthodox liberal humanist assumptions but precisely as a critique of them, in the name of another human rights’⁵⁹. My argument goes deeper than the Golder’s one – I argue that Foucault’s critique is focused on the relation between power and knowledge, with a special emphasis on the latter. In other words, I claim that Foucault has criticised a theoretical field on which the human rights was founded, i.e. the branch of knowledge that is called humanism.

⁵⁶ See F. Dosse, *History of Structuralism*, Minneapolis 1997, p. 336. See also E. Paras, *Foucault 2.0: Beyond Power and Knowledge*, New York 2006, p. 12.

⁵⁷ B. Golder, *Foucault, Anti-humanism and Human Rights*, <http://www.unisa.edu.au/Documents/EASS/HRI/foucault-conference/golder.pdf> (access online – 1.06.2015), p. 1.

⁵⁸ Cited in R. Martin, *Truth, Power, Self: an Interview*, [in:] L. H. Martin (ed.), *Technologies of the Self: a Seminar with Michel Foucault*, Amherst 1988, p. 15.

⁵⁹ For more see B. Golder, *op. cit.*, p. 1.

Obviously, humanism in Foucault has nothing to do with the humanitarian movements. He rather refers to the modern sciences which place a human being at the central place of their interests. These sciences are: psychology, medicine, sexology, history or criminology. The most advanced critique of humanism (and therefore the human rights concept), Foucault develops in the book entitled *Discipline and Punish. The Birth of the Prison*. When and how humanism started to play such a significant role in politics? Foucault responds: ‘ever since the new penal system – that defined by the great codes of the eighteenth and nineteenth centuries – has been in operation, a general process had led judges to judge something other than crimes; (...) the power of judging has been transferred, in part, to other authorities than judges of the offence. (...) criminal justice functions and justifies itself only by this perpetual reference to something other than itself (...). Its fate is to be redefined by knowledge’⁶⁰. In other words, Foucault describes how the new epistemologico-juridical system builds the „new kingdom of truth”. This process is nothing other than unmasking the another method of inclusion of a human being to the political sphere though even more dangerous than in Arendt or Agamben. Through such inclusion a human becomes politically useful as a working force, but simultaneously it becomes an effect of the political production, where human needs, for instance, are a calculated and organised political instrument⁶¹. Foucault uncovers the apparatus of so-called power-knowledge as the mechanism of (political) power which uses different fields of knowledge to subjugate (if we were using Foucault’s terminology we should say: assujettisse) people, to put them under complete control, and even to create their selves. The author explains this in the following, long though remarkable, fragment: ‘We should admit rather that power produces knowledge (...); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. These ‘power-knowledge relations’ are to be analysed, therefore, not on the basis of a subject of knowledge who is or is not free in relation to the power system, but, on the contrary, the subject who knows, the objects

⁶⁰ M. Foucault, *Discipline and Punish. The Birth of the Prison*, London 1991, p. 22.

⁶¹ *Ibidem*, p. 26.

to be known and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power-knowledge and their historical transformations. In short, it is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power-knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge⁶². Therefore, any increase of the existent body of knowledge (i.e. humanism) leads to the widening of the range of political power over people, i.e. to the further subjugation of people.

How is the above connected to the concept of human rights? To explain this we can use the so-called Foucault's triangle (Fig. 1.).

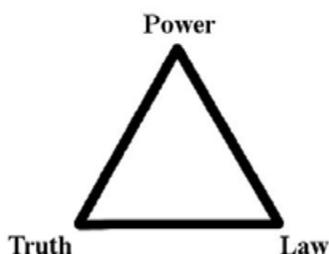


Figure 1. Foucault's triangle

Source: own study

The task of traditional political philosophy, when it was facing the three terms from the above schematic, was to discover how philosophy can establish the limits of power and law. Foucault somehow reverses that problem and asks: 'What are the rules of right [law – B.P.] that power implements to produce discourses of truth?'⁶³ He notices that there is no society that would be able to function without the discourses of truth. There always is the necessity of existence for truth (knowledge, humanism) if the existence of power is considered, and vice versa. But what is the role of the law in that relation? Not surprisingly, law in the above Foucault's theoretical construction has exactly the same meaning and rationale behind it as power and knowledge. It serves as a tool to strengthen power and knowledge, and is the effect of their functioning at the same time. Foucault writes: 'Power constantly asks questions and questions us; it constantly investigates and records; it institutionalizes

⁶² Ibidem, pp. 27–28.

⁶³ M. Foucault, *Society Must Be Defended*, New York 2003, p. 24.

the search for the truth, professionalizes it, and rewards it. (...) we are also subject to the truth in the sense that truth lays down the law: it is the discourse of truth that decides, at least in part; it conveys and propels truth-effects. After all, we are judged, condemned, forced to perform tasks, and destined to live and die in certain ways by discourses that are true, and which bring with them specific power-effects⁶⁴. Therefore, Foucault distinguishes the logical circle based on 1) legal principles, 2) mechanisms of power, and 3) discourses of truth or 1) principles of power, and 2) power of true discourses. In this theoretical model, humanism, and the human rights that are founded on its grounds, is nothing else than the tool in the hands of political power to increase its range. If one would try to maximally simplify Foucault's theory, one would have to say that 1) knowledge, truth, or humanism is a theoretical background for 2) the introduction, adoption and functioning of the law or the human rights which are, using Foucault's terminology, the strategy of power to increase its extent and the number of the fields of influence, therefore 3) a human or a person is only a product of political power. One can then say that a human in the theories of Arendt or even Agamben, for instance, resembled a human much more than it does at this stage of Foucault's theory. This is why the true main aim of his most famous book (*Discipline and Punish*) and also his entire philosophy was to criticise the humanistic sciences which make a human being a thing, the thing developed accordingly to the wish of political power.

Therefore, this that Foucault does not make direct references to the human rights concept is understandable. His critique is the widest from all critiques presented in this paper and touches the most vague trend of the present times. This trend is the constantly increasing development of humanism and the body of scientific and legal knowledge about human which ultimately does not serve the humanitarian goals, but the biopolitical power that is aimed to be extended to the possibly maximal level. The human rights concept is therefore nothing else than just another node in the history of the political power's economy. All of these elements make the Foucault's critique the most radical one from all which were presented in this paper. Also, the substantiveness of his critique is undeniable because it leads not only to the rejection of the human rights concept, but to the rejection of the current political order as a whole.

⁶⁴ Ibidem, p. 25.

CONCLUSIONS

Instead of making a sheer summary, I would like to underline a fit of the described theories to the theoretical assumptions of postmodernism (significantly present in the theories of the aforementioned authors) and changing tendency of reasoning towards the human rights. Many representatives of postmodern jurisprudence have replaced the objective theories of law by pluralistic and contextual political models of law implementation, characteristic to developed, modern and multicultural societies. Postmodern streams and theories usually are the critiques of previous, classical theories and propose new solutions and programs to the old theoretical problems. One can then say that postmodernism in fact is an epistemological change – this is followed, for instance, by the postmodern rejection of Cartesianism or the ideal of a subject which is capable to objectively cognise the world. Moreover, postmodernism emphasises that all new methodologies and theories that are created today are transient and adventitious, therefore they cannot serve as a certain ground for universal theories and truths. The same thing touches the human rights concept – if postmodernism is hostile to the concepts of the autonomous subject and universality, it is hostile to the liberal, Enlightenment’s ideal of human rights as well. Noticeably, there are streams in postmodernism that are not hostile to the human rights concept as such, but they are looking for explanations other than ‘fundamental’ ones. These neo-pragmatic critiques of the human rights does not always mean the necessity to reject the human rights, hence they usually are accidental. Such critiques does not question that every man should possess the human rights. They question however the universality of these rights. Therefore, the aim of the accidental critiques is to find a way how to maximise benefits from the human rights possession.

Postmodernism also changes the anthropological view on a man being the object of the human rights concept. Oppositely to classic liberalism, that man is no more endowed the free will, rationality and responsibility. He is rather a member of a discriminated minority. Paradoxically, the existence of such a man, that requires the legal protection and receives it in the form of the human rights, opens the field for another stream of critique, the substantive one. In this paper I have presented a few, well-justified theories that are the best examples present in this stream. After reading them, there are few more questions that have to be answered:

is it possible to reactivate the dynamic of human rights? is it possible to make human beings the natural subjects of law? and finally, should the human rights be rejected and abandoned as a theoretical mistake? Esposito comes with an easy answer: '(...) no. If we look at the 60 years that separate us from the Declaration of 1948, we certainly cannot argue that fundamental rights have been extended to all human beings, or even that there has been a significant reduction in the number of people who remain uncertain that their vital needs will be satisfied. Despite the rising rhetoric of humanitarian commitment, human life remains largely outside the protection of the law; so much so that one could easily argue that, even in the context of an increasing juridification of society, no right is more disregarded than the right to life for millions of human beings who are condemned to certain death from starvation, disease, and war' (Esposito 2012). Therefore, Esposito (or Arendt, Agamben and MacIntyre) would give the following answers, respectively: no, no, yes. The hard answer to these questions provides Foucault, according to whom, humanism leads to the „enslavement” of society and its members; humanism is the double-edged sword that serves first as a tool to cognise people and later uses the obtained knowledge to produce truths and subjectivities, i.e. needs, views, beliefs, mind-sets, and, finally, norms that regulate (indicate) which of these needs, views, and beliefs are correct or wrong, good or bad. Then, when his responses to the first two of three aforementioned asked questions would be: yes, yes, the response to the most important, third, question would be: absolutely yes. The reality however is much more complex than theory. Nowadays, all international organisations such as European Union or United Nations do everything to preserve and provide the widest support possible for the human rights. Are they in fact doing it with the tacit consent to Foucault's theory, one not knows. Therefore, at the end, I would like to paraphrase the famous Polish political philosopher, Jacek Bartyzel, who wrote: „As long as the human rights feel steady and without real alternatives, they can disregard Socrates trying to sting them in the neck. Only in the case of a sudden change of conjuncture the argument of hemlock has to be used”⁶⁵.

⁶⁵ The original phrase sounds: 'As long as democracy feels steady and *without real alternatives*, it can disregard Socrates trying to sting it in the neck. Only in the case of a sudden change of conjuncture the argument of hemlock has to be used' (Bartyzel 2009).

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STRESZCZENIE

Bartosz PŁOTKA

SUBSTANCJALNE KRYTYKI KONCEPCJI PRAW CZŁOWIEKA

Słowa kluczowe: prawa człowieka, deklaracja praw człowieka, krytyka praw człowieka, krytyka substancjalna, historia, polityka, Arendt, Esposito, MacIntyre, Agamben, Foucault

Pierwsza deklaracja praw człowieka została przyjęta w trakcie Rewolucji Francuskiej, a jej założeniem było ustanowienie powszechnych praw przysługujących każdej osobie. Prawa te miały chronić podstawową wartość, jaką jest ludzkie życie i wolność człowieka. Jednakże już od samego początku istnienia koncepcji praw człowieka była ona krytykowana, m.in. za ignorowanie pluralizmu kulturowego i stwarzanie politycznych nierówności. Te aspekty krytyki miały jednak charakter akcydentalny, będący raczej optymistycznym podejściem do dostrzegania wad Deklaracji, acz zakładającym, że są one możliwe do naprawienia. W tym artykule zostały zaprezentowane krytyki substancjalne, których autorzy postrzegają koncepcję praw człowieka jako niemożliwą do naprawienia pomyłką i złą w samej swojej istocie, a więc konieczną do odrzucenia.

SUMMARY

Bartosz PŁOTKA

SUBSTANTIVE CRITIQUES OF THE HUMAN RIGHTS CONCEPT

Keywords: human rights, human rights declaration, human rights critique, substantive critique, history, politics, Arendt, Esposito, MacIntyre, Agamben, Foucault

The first declaration of human rights was adopted during the French Revolution and was aimed to settle universal laws for every human person. These rights should protect the fundamental value that is a human life and its liberty. Since the very beginning, the concept of human rights has been criticised e.g. for ignoring cultural pluralism or creating political asymmetries. These aspects of critique are of accidental nature, which is rather an optimistic approach which discerns drawbacks of the Declaration, but settles them as „curable” by the use of right remedies. This article presents the substantive which perceives the human rights concept as „incurable”, mistaken and evil in its essence, therefore necessary to be rejected.

NOTA O AUTORZE

Mgr Bartosz Płotka jest uczestnikiem studiów doktoranckich z zakresu nauk o polityce na Wydziale Politologii i Studiów Międzynarodowych Uniwersytetu Mikołaja Kopernika w Toruniu. W kręgu jego głównych zainteresowań naukowych znajdują się teoria oraz filozofia polityki, ze szczególnym uwzględnieniem biopolityki i bioetyki.