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Does ECHR Prohibition of Abuse of Rights Lead to Contradiction of the Principle of Legality? Considerations upon Judicial Practice of ECtHR

Keywords: prohibition of abuse of rights, legality, Article 17 ECHR, rule of law, ECtHR

Słowa kluczowe: zakaz nadużycia praw, legalizm, art. 17 EKPC, zasada rule of law, ETPC

Abstract

The aim of this article is to resolve an issue whether the Article 17 of the European Convention on Human Rights (further referred to as ECHR) contradicts the principle of legality within the judicial practice of the European Court of Human Rights (referred to as ECtHR). The significance of the presented topic does not lie solely within the sphere of academic considerations, but remains of great value for ensuring an adequate level of protection within the Strasbourg system. Moreover, the establishment of the boundaries of implementation of Article 17 ECHR is crucial for providence of legal certainty for all its addressees: individuals, states and the groups of persons. The author of presented paper poses the hypothesis that the manner of practical usage of Article 17 ECHR leads to contradiction of the principle of legality which remains the core for the rule of law concept. The article relies on the legal dogmatic method as well as elements of historic and comparative analysis.

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Streszczenie

Czy zakaz nadużywania praw w EKPC prowadzi do sprzeczności z zasadą legalności? Uwagi dotyczące praktyki sądowej ETPC

Celem tego artykułu jest rozstrzygnięcie kwestii, czy art. 17 Europejskiej Konwencji Praw Człowieka (dalej zwanej: EKPC) zaprzecza zasadzie legalizmu w orzecznictwie Europejskiego Trybunału Praw Człowieka (dalej zwanego: ETPC). Znaczenie tego tematu nie leży jedynie w sferze akademickich rozważań, ale ma dużą wartość dla zapewnienia odpowiedniego poziomu ochrony w ramach systemu strasburskiego. Ponadto, wyznaczenie granic zastosowania art. 17 EKPC jest kluczowe dla osiągnięcia pewności prawa w stosunku do wszystkich jego adresatów: jednostek, państw oraz grup osób. Autorka artykułu wysuwa hipotezę, że współczesna praktyka orzecznicza ETPC prowadzi do podważenia zasady legalności, stanowiącej rdzeń koncepcji rule of law. Artykuł został przygotowany w oparciu o metodę dogmatyczno-prawną, z elementami analizy historycznej i porównawczej.

I. The Initial Remarks

The conducted analysis shall be commenced with recalling the literal resonance of the analyzed regulation. According to the Article 17 ECHR: nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. As it can be concluded expressis verbis from the cited provision, there are two different forms of its objective scope:

1. Performing any act aimed at the destruction of any of the rights and freedoms set within the ECHR,
2. Limitation of such rights to a greater extent than is provided within the ECHR.

However, as the addressees of the second of the aforementioned forms are only states and as its usage within the jurisprudence of the ECtHR is very
limited, it has not a direct impact for the principle of legality. Therefore, the further analysis focuses exclusively on the first from the indicated forms. As it has been reiterated within the judicial practice of the European Commission and further repeated by the ECtHR: “the task of the Article 17 ECHR is to safeguard the rights and freedoms set within the Convention through the protection of the free functioning of democratic institutions”. As the consequence, both Commission and the ECtHR have adopted the presumption that no one is entitled to recall the substantial provisions of the Convention with an intention to weaken or destroy the democratic ideals or values. It is therefore not probable for the organizations of totalitarian character to diminish democracy, after they will flourish within the fully democratic conditions, as it already has taken place within the history of Europe. The analogous notions have been repeated within the statements of the numerous doctrine representatives. For instance, Markos Karavias claims that this provision solely targets activities subversive of the treaties which according to him, can be interfered from the formulation that activities must be “aimed at the destruction of the rights protected”. The cited author states that such a narrow reading of the analyzed clause has been supported by its drafting history, especially taking into consideration the Article 30 Universal Declaration of Human Rights which has constituted a pattern for Article 17 ECHR. In particular, it has been mentioned that the travaux preparatoires of the Article 30 UDHR suggest that the prohibition of abuse of rights was geared toward the need to prevent the resurrection of Nazism and its equivalents. The presented opinions are of utmost importance for an accurate understanding of the collision between the literal resonance of the Article 17 ECHR establishing the relatively narrow scope of implementation of this provision and virtual boundaries of its implementation set in the judicial practice of the ECtHR. Such dissonance is subjected to in-depth analysis within the latter parts of

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5 M. Karavias, Corporate Responsibility Under International Law, Oxford 2013, p. 28.

the paper hereto. Here is only to mention that this dissonance puts the principle of legality in jeopardy.

One of the first threats for legality arises from the fact that the nature of the Article 17 ECHR has not been defined with sufficient degree of precision. It has been not even established whether an analyzed provision has its autonomous character. The development of such opinion is visible within the observations of Hannes Cannie and Dirk Voorhoof\(^7\). Both aforementioned authors present the view that such regulation merely constitutes a symbolic declaration, in the light of which the substantial terms of the ECHR shall be read and interpreted. However, for many other scholars, such interpretation seems too far-reaching. From such a perspective, Pieter van Dijk and Godefridus J.H. van Hoof describe this provision as one of the primary interpretative doctrines of the ECHR. In practice, it simply means that even if the Article 17 ECHR has not been recalled by the applicant in the specific case, it can serve as an additional interpretative tool, which allows for assessment whether a specific limitation of the substantial right or freedom imposed by the state authorities shall be deemed legitimate through the prism of the values stated in the Preamble to the Convention\(^8\). According to the author, the practical difficulty to reconstruct the function of the Article 17 ECHR results from the existence of two practical forms of its application: direct and indirect. While the direct form means the substantial incompatibility of the complaint through the guillotine effect and without examination of its merits, for the indirect, the Article 17 ECHR serves as the tool for interpretation of the limitation clauses of the Articles 8–11 of the Convention. In result, it ought to be stipulated that in any case, an analyzed provision does not play the role of the symbolic declaration. Moreover, the hypothesis regarding its function as the interpretative doctrine can be true only in the situations of its indirect application. Oppositely, for the direct situation, such a provision may constitute sole legal basis for the inadmissibility of the certain complaint. The consideration gets more compli-


cated as there are not any criteria to distinguish the circumstances of direct and indirect application of the Article 17 ECHR⁹ and consequently, to precisely define its role within the factual situation of the concrete case. This situation opens a potential field for collision between implementing prohibition of abuse of rights as a mechanism of democracy protection and the principle of legality which is deemed to constitute foundation of both: rule of law and democracy.

II. The Notion of Legality

To purport this thesis, first it is essential to establish definition of the legality concept. Initially, it shall be underlined that an analyzed principle shall be considered as a derivative of the rule of law concept. Therefore, the analyze shall be commenced with the prior reconstruction of the broader term of rule of law. According to John Finnis, the rule of law exists when the certain legal system is legally in good shape¹⁰. However, such notion does not mean that there is certain uniform perception of the rule of law principle. Such an observation has been confirmed by Brian Tamanaha, who divides the ways of perceiving rule of law for two basic groups: formal and substantial views¹¹. The formal approach often can be described as minimalistic as it encompasses only certain procedural conditions regarding the process of enactment and application of legal norms, without consideration regarding their content. In consequence, such conditions are necessary to be fulfilled in order to recognize such norms as legally binding. Compliance with such criteria shall be therefore deemed as both the essential and sufficient condition of legally binding character of the norm. Oppositely, the substantial views of the rule of law clearly discern the content of the concrete norms, mainly their moral dimension as well as values they protect. Simultaneously, all substantial views of democracy also require fulfillment of the proce-


¹⁰ J. Finnis, Natural Law and Natural Rights, OUP 2011, p. 270.

dural aspects granted by the formal approach. Within each of these concepts, one can distinguish the triple gradation from “the weakest” to “the strongest” definition. At the same time, all the stronger views encompass views of the “weaker” concepts.

As the notion of legality constitutes the component of the formal views of the rule of law, this paper will mostly focus on its formal aspect. The reason for such an approach is to demonstrate that the practical application of the Article 17 ECHR diminishes the very foundation of the rule of law – merely its formal aspect, which is both more fundamental and minimalistic than the substantial ones.

The gradation of formal views of the rule of law can be presented as follows:

– Legality – rule by law concept, according to which legal norms constitute the instrument of the government policy;
– Formal legality, when the legal norms have to comply with certain procedural requirements;
– Democracy + formal legality – when the consent within a particular society determines the content of the legal norms.

As it is visible in the presented gradation, the legality in the sense of this article (understood as rule by law, which is narrower than the formal legality concept) is the most primary among the formal rule of law concepts. As a result, it shall be stated that the violations of the legality principle put in jeopardy the most fundamental rule of law concept. In other words, if certain judicial practice infringes the rule by law concept, it simultaneously violates the very heart of the rule of law concept.

After such remarks, it is essential to establish a definition of legality understood as the rule by law. Simultaneously, due to limited volume of that paper, the presented definition will only focus on the primary notions of the analyzed concept and has not exhaustive nature. Analogously, the indicated sources have an exemplary character. Moreover, it exposes such notions of legality which are associated to the position of the judges and courts as bodies applying the legal provisions.

According to Christian Starck, legality limits the governmental power by demanding that the government keeps to the law and governs through

\[\text{Ibidem, p. 92.}\]
Analogously, it has been stated by Geranne Lautenbach, the subjection of the government to the law is given shape and the substance to the legality principle. Moreover, legality has only function in relation to the existence of central law-making authority. As a result, if everyone was able to fulfill their own special legal system, the legality principle would have never existed. In consequence, it may be stipulated that the legality principle presupposes the governmental power can only be exercised and controlled through law. On the national level, legality principle is indicated as the supremacy of law, denoting that state bodies must follow and apply existing legislation and obey legal rules within the framework of the constitutional order. For the highest political bodies, it also means that they are bound by the constitutional order. Analogously, the legality principle in relation to ECHR shall mean that it is bound by the order governed by the ECHR. In this context, it is vital to say that legality principle implies not only valid legislation has to be obeyed and applied faithfully by the state administration and the courts, but also that the use of the coercion on the part of the state in relation to citizens must be based on general legal norms in accordance to standards known in advance. As it appears in the further parts of the article, it will become one of the problems of application for Article 17 ECHR.

Simultaneously, the direct consequence of the legality principle is the mentality of legalism – respect and obedience for legal norms. Its special form is the legalism among the judges, which simply means not reaching just solutions, but achieving justice according to certain standards known in advance – which is associated with legal certainty. Through such a prism one can observe that the legality is not only an autonomous concept of the rule of law

\[^{14}\text{G. Lautenbach, The Concept of the Rule of Law and the European Court of Human Rights, Oxford 2013, p. 20.}\]
\[^{15}\text{P.W. Brouwen, Beginselen van Legaliteit, 2003, Themis 2, p. 75.}\]
\[^{16}\text{G. Lautenbach, op.cit.}\]
principle, but also a part of other principles directly derived from the rule of law. Therefore, the formal requirements of law (formal legality) densify the statute required by the legality principle¹⁹.

Nevertheless, despite the fact that the notion of legality (or widely speaking the rule of law) is described as the cornerstone of the Strasbourg system, the judicial practice of the ECtHR regarding application of the Article 17 ECHR significantly violates the analyzed principle.

III. The Jeopardy of the Legality within the Article 17 ECHR Judicial Practice

As it has been already stated, the principle of legality requires that the activities of public authorities are conducted only upon the basis and within the boundaries of law. In particular, such a principle shall be applicable to the legal instruments of an exceptional character. Undoubtedly, the prohibition of abuse of rights constitutes such instrument as it disturbs the relationship between protecting certain right or freedom – as a general rule and all limitations accepted by the virtue of the Convention – as exceptions which cannot be subjected to an extensive interpretation. This relationship relies at the very heart of each human rights system, therefore infringement of the notion of legality is particularly dangerous in such a case.

In this context, it is essential to refer back to the literal resonance of the Article 17 ECHR. In conformity with its wording, this provision aims at activity or any act aimed at the destruction of any of the rights and freedoms set forth in the ECHR. Such notion clearly corresponds to the notion that the prohibition of abuse of rights shall be used only on the exceptional basis for extreme cases²⁰. While applying Article 17 ECHR expressis verbis, its implementation is limited to the situations of destruction of – firstly – individuals’ rights and freedoms and secondly- only such rights and freedoms which have been safeguarded within the substantial provisions of the ECHR. How-

²⁰ See for instance: Perincek v. Switzerland from 15.10.2015. It has been also emphasized by the doctrine representatives: S. Smet, E. Brems, When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony, Oxford 2017, p. 149.
ever, such a scope of its application has been significantly broadened through the judicial practice of the ECHR.

Commencing with the case of *Refah Partisi v. Turkey*, the ECHR has used the formula of “weakening or destroying of ideals and values of the democratic society”. The presented formula shall be considered threatening for two basic grounds: (1) it is not only the additional condition justifying the application of such provision (2) but also adding the new object of such “destroying” or “weakening” which are the ideals and values of the democratic society.\(^{21}\) Moreover, according to Steve Peers, the jurisprudence of the ECHR does not specify the degree of weakening to trigger Article 17 ECHR\(^{22}\). Also, other cases prove that the Strasbourg Court is moving away even from this level of negative impact on Convention values. For example, in *Witzsch v. Germany*, the test for Article 17 ECHR has been expressed as being the promotion of ideas contrary to the ECHR\(^{23}\), while in *Gunduz v. Turkey* – disseminating the intolerant speeches\(^{24}\). Especially the lastly mentioned notion poses a question regarding the threat for effectiveness of the Strasbourg mechanism of protecting freedom of expression by the instrument of an exceptional character which is the Article 17 ECHR. It is sufficing to recall the Handyside judgment, according to which freedom of expression constitutes the cornerstone in any free democratic society\(^{25}\). Moreover, the notion of protecting freedom of expression encompasses not only the “information” or “ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society\(^{26}\). Such conclusion is the derivative of the notion that, according to the ECHR, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes\(^{27}\).

\(^{24}\) *Gunduz v. Turkey* from 14.06.2004.
\(^{26}\) Ibidem.
Moreover, one shall not forget that even shocking or offensive speeches constitute an important part of the public debate and may be important in the process of searching the truth. The borderline between shocking speeches and intolerant expressions justifying the usage of Article 10 (2) or Article 17 ECHR is practically very thin and, in consequence, an illegitimate extension of the subjective scope of Article 17 ECHR can shake the relation between protection of such right and its limitation, which would be contrary to the intentions of Convention authors as well as judicial practice of the ECHR itself. Therefore, independently from the other circumstances, exceeding the range of situations justifying the application of the Article 17 ECHR by the decisions of the ECHR beyond its literal resonance causes jeopardy of the notion of legality not only through contradiction with the very wording of the Article 17 ECHR, but also due to incompliance with Article 10 ECHR.

From such a perspective, it is essential to underline another vital factor, which is the fact of domination by the current jurisprudence of the prohibition of abuse of rights by the conduct which had been excluded from its original scope of application – the Holocaust denial. In that context it is worth presenting an opinion of Paolo Lobba who stated that: “despite the solemn declarations regarding protection of the freedom of expression, the Strasbourg organs are progressively developing the exceptional legal instrument – based on the prohibition of abuse of rights, safeguarded within the Article 17 ECHR. However, the scope of application of the analyzed clause has been developed in such a manner that it encompasses increasing category of expressions, including the denial of certain historic facts, such as atrocities committed by Nazis” 28. The cited author represents the view that the original purpose of the presented regulation had been to create additional safeguard against the threat arising from activity of the groups and individuals which realized the aims of totalitarian character 29. Considering different phases of the Strasbourg approach toward Holocaust (and Nazi crimes) denial, three primary periods can be distinguished 30:

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29 P. Lobba, Holocaust Denial, …, p. 244.
30 P. Lobba, Testing the “Uniqueness”: Denial of the Holocaust vs Denial of Other Crimes before the European Court of Human Rights, [in:] Law and Memory. Addressing Historical Injustice
– Application of the general principles of the freedom of expression to cases of such denial. The characteristic feature of this stage is that the Article 17 had never come into play\(^{31}\).

– Application of the Article 17 ECHR as the principle of interpretation\(^{32}\). During this phase the prohibition of abuse of rights has not been applied as a provision generating a guillotine effect, but as an interpretative aid, affording guidance within the necessity test under Article 10 ECHR. However, in all cases falling under this second stage, the Commission shows an unusual deference to the assessments undertaken at the domestic level, which are ratified quite uncritically\(^{33}\).

– The categorical exclusion of the Holocaust denial from the protection granted by the Article 10 ECHR. The milestone in this regard, has been the landmark case of Lehideux and Isorni, in which the ECHR reiterated that: “the negation of clearly established historical facts – such as the Holocaust – would be removed from the protection of Article 10 by Article 17 ECHR\(^{34}\). Such a notion has been subsequently confirmed within the decision of Garaudy, when the ECHR stated that Holocaust denial underestimate the values on which the fight against racism and anti-Semitism are based and, as such, is incompatible with democracy and human rights\(^{35}\).

The demonstrated evolution has been also confirmed within the opinion of Dean Spielmann, who indicates the year 2001 as the boundary date in this regard. He has also expressed his regret caused by long lasting insufficient usage of the jurisprudence\(^{36}\).

As it has been already indicated, the increasing amount of factual states for which the Article 17 ECHR is used, may lead to further serious violations of effectiveness of human rights protection. In particular, according to the opin-


\(^{33}\) See e.g. EcommHR, Walendy v. Germany from 11.01.1995.

\(^{34}\) Lehideux and Isorni v. France from 23.09.1998, paragraph 47.

\(^{35}\) Garaudy v. France from 24.06.2003.

ion of Albert Van Dicey, the individuals shall not have the penal sanctions imposed upon them, unless they infringed a concrete legal norm in the express manner in the moment of commitment of the concrete conduct. It has been an opposite principle to this which is in force toward the State authorities, which are obliged to act only upon the basis and within the boundaries of binding legal norms. It corresponds with the judicial practice of the ECHR that the limitation for the enjoyment of the freedom of expression shall not have the form of penal law sanctions (especially the imprisonment) as well as inordinate compensation. Simultaneously, in the cases of Holocaust denial, the ECHR accepts the imprisonment sanctions imposed by the State authorities as compliant with the ECHR standards. The most vivid example is the Austrian case of Schimanek, in which the ECtHR ruled that the penalty of eight years imprisonment is proportionate to the applicant’s guilt. In this context, Antoine Buyse points out that the reference to the necessity test within the presented case consisted only of the considerations of Article 17 ECHR. In such situation the violation of the legality principle results from omission of the three-stage test arising from limitation clause of Article 10 (2) ECHR and its entire replacement with the analyzed provision.

The aforesaid situations confirm the serious violations of the principle of legality. It is also visible that the current practice of the ECHR leads to infringement of other formal conditions of law, however the purpose of this article was to purport that it leads to eclipse the principle of legality which constitutes the cornerstone of each (formal or substantial) rule of law concept. Such notion has been confirmed within the opinions of various scholars. Suffice to cite the remarks of Paulien de Morree that “the ECtHR keeps it options open when it comes to the application of Article 17 ECHR”.

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39 *Schimanek v. Austria* from 1.02.2000.
40 A. Buyse, op.cit.
forms in comparable cases, it is almost impossible to distinguish clear criteria for its application. This inconsistent and obscure approach makes it highly unpredictable whether a case will be examined under Article 17 ECHR or under the limitation clauses in Article 10(2) or other substantial provisions of the ECHR\textsuperscript{42}.

**IV. Conclusions**

The conducted analysis has confirmed the hypothesis regarding the infringement of the legality principle within the ECHR current judicial practice regarding application of the Article 17 ECHR. The jurisprudence of the ECtHR has led to illegitimate extension of its objective scope of application beyond the literal resonance of the analyzed provision. Within such extended application scope, the ECHR has never elaborated the criteria which would allow for distinction between usage of this regulation and the substantial provisions of the ECHR.

The infringement of legality through the presented approach causes not only a major threat for the rule of law and its foreseeability, but jeopardizes the Conventional relation between the protection of certain right and its legitimate exceptions which may shake the foundations of the Strasbourg system. Therefore, the only accessible remedy seems to come to the narrow understanding of the notions of “acts destroying Conventional rights and freedoms” according to the literal wording of the prohibition of abuse of rights.

**Literature**


\textsuperscript{42} Ibidem.


