Rok Svetlič
DOI:10.33179/BSV.99.SVI.11.CMC.22.3.1

MONISTIČNA TEORIJA ČLOVEKOVIH PRAVIC IN OHROMLJENOST VARNOSTNIH SISTEMOV – PRIMER ILEGALNIH MIGRACIJ

MONISTIC THEORY OF HUMAN RIGHTS AND PARALYSIS OF SECURITY SYSTEMS – THE CASE OF ILLEGAL MIGRATION

Povzetek V prispevku analiziramo posebna tveganja, povezana s temeljnim delovanjem države, ki niso posledica neučinkovitosti oblasti, temveč njene ohromljenosti s pravnega vidika. Z razlago pravnih aktov v družbeno resničnost vstopi ideološki program, ki ni združljiv s temeljnimi postulati liberalne demokracije. Posledično so varnostni organi ohromljeni pri opravljanju svojih nalog, saj so obravnavani kot potencialni kršitelji človekovih pravic. Rešitve za to ni mogoče iskati na zakonodajni ravni, temveč na ravni kompleksne teorije, ki temelji na spoznanju, da je demokracija nezdružljiva s pasivnostjo in ohromljenostjo represivnih organov, pa tudi z njihovimi ekscesi.

Ključne besede ***Filozofija prava, človekove pravice, varnostni organi, ilegalne migracije.***

Abstract This article analyzes the specific risks that concern the basic functioning of the state which are not the result of the inefficiency of the authorities but of their legal paralysis. Through the interpretation of legal acts, an ideological agenda which is incompatible with the fundamental postulates of liberal democracy enters social reality. Consequently, security authorities are paralyzed in performing their tasks, as they are treated as potential violators of human rights. The solution cannot be sought at a legislative level, but at the level of a complex theory, based on the realization that democracy is incompatible with the passivity and paralysis of repressive authorities, as well as with their excesses.

Key words ***Philosophy of law, human rights, security authorities, illegal migration.***

Introduction

An indispensable aspect of modern liberal democracy is that it places the protection of the individual's rights at the very top of its values. It could be said that the *purpose* of the existence of liberal democracy is to prevent encroachments on human dignity, suffering and risks at all levels. However, at the same time, powers and institutions whose purpose is – at first glance – exactly the opposite, remain a necessary component of every state. These organs have the mandate to interfere with an individual's freedom, or even with their physical integrity, including their life; here we are talking about the penal system and its penitentiaries and, of course, the police and the army. Within a liberal democracy, the legal regulation of these institutions and entities is more difficult than ever. The eventual interference of repressive entities in human dignity is not just a violation of one of the many legal rules, it is a negation of the fundamental value agenda of a democratic state. As a result, a complex system of control over these entities and institutions has become a *sine qua non* of every democratic state.

However, democratic concern for the *possibility* of a conflict between human rights and the powers of the state risks slipping into a false comprehension that this conflict is *inevitable*. This is not merely an aberration of the layman's understanding of the state, often underpinned by imprudent reservation and distrust. Unfortunately, a big part of the theory (Marxist and anarchist provenance) also insists on an irreconcilable conflict between the individual and the state. Consequently, a modern pacifist attitude increasingly includes the naïve belief that the armed forces have become an obsolete institution, or even that their dissolution would automatically provide a world without violence. In this way deficient theories gradually lead to risks at the level of national security, as they paralyze the response of the state's institutions.

A recent example of such paralysis in Slovenia concerns the ideological blockade of the assistance of the armed forces in the control of illegal migration. It is about Article 37a of the Defence Act, which enables the military to assist the police in the task of guarding the border. Populist opposition against it was particularly dominant at the level of civil society; however, it was also widespread over a significant part of the political spectrum. Although the law defines the mandate of the military forces precisely (in terms of its tasks, timespan and territory of the activity etc.), an atmosphere has been created, as if Article 37a would implicate the militarization of society, including tanks and the army in our cities. Both the existence and influence of such ideas in Slovenia are all the more unusual because in countries with a long democratic tradition, military assistance to the police is an normal part of the security system (in Austria, for instance, the *sicherheitspolizeilicher Assistenzeinsatz* has been in use for decades).[1]

As preventing illegal migration is becoming an important part of the confrontation with asymmetric threats, the dominance of such an atmosphere in society cannot be

[1] *More detailed in: Peter Fender: Militärisches Einsatzrecht – Inland, Verlag AV + Astoria Druckzentrum, Wien 2013, pp 52-55 and pp119-121.*

accepted with indifference. We will show that it has its origin in a long-term process which has established a distorted account of the relationship between the individual and the state, between their (human) rights and its (repressive) powers. It is about a theoretical error in the understanding of the value-foundation of democracy – i.e. of human rights – which leads to the *legal paralysis* of the armed forces, making them unable to perform their tasks.

1 LEGAL PARALYSIS

There is a widespread comprehension that the law strictly regulates processes in society, through statutes and other acts. The law is supposed to give almost mechanical assurance that social reality reflects the normativity that is written in it. Unfortunately, the law is much more helpless than we usually imagine. We will see that dominant social beliefs largely determine its content; precisely those beliefs that are actually supposed to be regulated by law. A good example is the so-called "democratization" of Iraq and Libya, where the enactment of the democratic institutions proved to be completely powerless. The situation is similar with regard to the regulation of migration, which often remains ineffective despite the existence of appropriate powers and a legal framework. Let us take a closer look at the mechanism of the legal paralysis of these powers.

Although the main ingredient of the law is legal *rules*, it also contains a set of *principles*. The legal rule has a solid structure which, in the event of the occurrence of a specific factual situation, demands certain legal consequences: "if x, then y." For example: "*A citizen who is assigned to a military or work duty is obliged to be trained to perform this duty in accordance with the regulations*" (Defence Act, Article 13). Legal principles, however, do not contain such a structure, and they cannot be respected in the *same* way as the rule. They have the character of "oughtness", of a normative tension, as they represent just the "*value goals of statutory system and of the legal system in general*" (Pavčnik, 2015, p 53). In this sense the principles *direct* to some decision, and do not, as in the case of rules, demand clear and determined legal consequences. To give an example of the legal principle: "*Slovenia is a state governed by the rule of law and a social state*" (Constitution, Article 2).

Principles play an important role in the interpretation of rules, determining their meaning and thus their regulatory scope. This enables the meaning of the law to stay open, allowing it to remain alive and to follow changes in society. At the same time, this openness represents a trap, as legal principles are *abstract* and can be interpreted in different ways – even in a way that is *contrary* to the purpose of a particular legal institute. In this way, specific legal institutes can become completely paralyzed.

The most illustrative example in Slovenia is to be found in the field of criminal law, where the majority of sentences are passed below the legal minimum; the percentage of conditional sentences, however, has already reached an excessive 80%. A situation was brought about where in the vast majority of criminal cases

the sanction – as envisaged in the description of the delict – has not been imposed. This is a consequence of the *interpretation* of Article 58 of the Criminal Code, which regulates a conditional sentence in the third paragraph: "*The court imposes a conditional sentence if, in view of the offender's personality, his previous life, his conduct after the offence, the degree of guilt and the other circumstances in which he committed the offence, it finds that he can be expected not to repeat the offence.*" If we interpret this article through the principles of Article 45a[2] of the Criminal Code, in which a radical abolitionist agenda has been imposed, the courts will apply a conditional sentence in an excessive number of cases. Despite the formal validity of the Criminal Code, *de facto* radical abolitionism will be implemented.

A similar anomaly could occur in the case of any other institute. If, for instance, in civil law, a theoretical disorientation arose based on the notion that an individual cannot form their true will at all – as they are, for example, constantly misled by the commercial messages of capitalist society – then the courts would probably begin to find errors of will excessively often. Consequently, the legal transactions could be gradually invalidated in such a proportion as in the case of conditional sentences within penal law. Despite the formally preserved validity of the Obligations Code, this would eliminate its actual effectiveness and replace it with the agenda of the anarchist notion of the liberation of the individual from the bourgeois-state and its institutions.

The problem is that the law cannot be written in a way that would make it immune to the abuses described, since it inevitably contains meaningfully open terms. Dworkin describes this cognition by distinguishing between *concepts* and *conceptions*. Concepts are notions written into law, and conceptions are moral theories that provide the meaning to these concepts, interpreting its background principles.[3] It is inevitable that a specific notion (concept) could be interpreted through different theories (conceptions), and that in this way the concept gets a different emphasis of its meaning. But this also opens up the possibility of interpreting a notion through a theory that is incompatible with the *basic idea* of a specific legal institute, thus achieving its paralysis – as demonstrated above in the case of penal law.

Protecting the law from such dissolution can only be a task of consistent legal theory and cannot be incorporated into the law itself. Every legal concept refers to principles that imply a moral dimension, and therefore cannot be defined more precisely. Dworkin stated: "*Indeed the very practice of calling these clauses 'vague' (…) can now be seen to involve a mistake. The clauses are vague only if we take them to be botched or an incomplete or schematic attempt to lay down a particular*

---

[2] "*By punishing according to the provisions of this Code, the state (…) while respecting the human dignity and personality of the offender allows to the offender, with an appropriate sanction, a dignified integration into the common social environment.*"

[3] *Bittner points out that "the reference to reading concepts as concepts [that is, when only semantically open concepts, not as already completed conceptions – Author's note] is fundamental to Dworkin's theory of interpretation and law*" (Bittner, 1988, p 31).

conception. If we take them as appeals to moral concepts they could not be made more precise by being more detailed" (Dworkin, 1999, p 136). For example, the concept of "fair compensation" could be defined, for instance, by reference to human dignity; but then we should also define the meaning of dignity and so on, which would lead to *progressus ad infinitum*.

Unfortunately, it is not possible to enshrine in law how to interpret the law itself; this would require a jump over one's own shadow. If a belief that is incompatible with the fundamental idea of a legal institute becomes dominant in society, this institute is at risk of gradually becoming ineffective. This is the structure of the problem discussed here. The response to an asymmetric threat linked to illegal migration, is determined by the dominant view on migration as such in a specific society. This view, however, was formed by a naïve and incorrect interpretation of human rights. The fundamental error of this interpretation is the fact that it is not capable of thinking of an *ambivalent relationship* between human rights and state institutions.

2 BETWEEN CONTROL AND PARALYSIS OF SECURITY POWERS

"*Quis custodiet ipsos custodes*" ("Who will supervise the supervisors themselves?") is the phrase that most succinctly describes the eternal problem of any kind of control. That social processes need to be controlled due to security risks is the cognition of the broadest consensus. However, in the case that the control-mechanism *itself* escapes control, not only is control lacking, but the door is wide open to serious violations of legally protected goods. This is confirmed by the experience of totalitarian regimes in the 20th century, which massively misused repressive powers for repugnant political aims. On the basis of this very realization, the Universal Declaration of Human Rights was adopted in 1948, where we read: "*Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind (...), the General Assembly proclaims this universal declaration of human rights*." (*Universal Declaration of Human Rights, Paragraph 2 of preamble*)

Human rights catalogues provide a clear and synoptic value-platform for the control of repressive powers. However, a clear insight into the value foundations of a society often creates the misleading impression that control of the power is an easy task. One-sided interpretation of human rights, which views them in an *a priori* opposition to the repressive powers is, referring to this mater, the most widespread mistake. As this interpretation comprehends the repressive powers as the main violators of human rights, the key task of their protection would be, consequently, to limit the mandate of those powers *as much as possible*. Although on the horizon of the historical experience of totalitarian regimes such a view is understandable, it is nevertheless theoretically quite naive. We must not overlook the circumstance that the only subject which is both permitted to and capable of effectively protecting human rights in practice is the state (with its powers). Individuals and civil society organizations have no means to do this, and above all, they have no mandate to use coercion.

This realization requires a far more complex account of both the control of repressive authorities and the mistakes they can make in performing their tasks. We must be aware that there is not one, but two mistakes that can lead to the most serious human rights violations: the first is *exceeding* the mandate of the repressive authorities, and the second is *not implementing* this mandate. This implicates a *binary* and not just a monistic conceptualization of the relationship between repressive authorities and human rights. When it comes to a discussion on this relationship, the lay public – and unfortunately also some of the scholars – recognize only the first mistake, even though the two errors are flipsides of the same coin. Democratic culture is incompatible both with the excesses of repressive authorities, and with their passivity and inefficiency.

The main theoretical challenge is the circumstance that these two errors are not unrelated. On the contrary, one refers to the other: the excessive proactivity of repressive authorities easily slips into inadmissible encroachments on the human rights of individuals; and excessive concern for the limitation of their mandate easily slips into ineffectiveness of their protection. One excess can instantly pass into the other. For this reason, the main task of the binary approach is to define the conceptual *balance* between these two sides. Failure to accept this theoretical constellation makes it impossible to control the repressive powers and hinders their efficiency in advance.

For this reason, concern for the protection of human rights must begin with the formation of a sound interpretation of the principles enshrined in the highest legal acts. As indicated above, the provisions – if they are read in isolation – tend to point to one or the other excess. For instance, the *Universal Declaration of Human Rights* stipulates that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*" (Article 5), which suggests the strong limitation of repressive powers. But the *Declaration* also stipulates that "*Everyone has the right to life, liberty and security of person*" (Article 3), which, on the other hand, demands the efficiency of those same repressive powers. Similarly, the Constitution of the Republic of Slovenia includes a number of interpretive tensions.

Only proper understanding of the tensions between these provisions, and demonstration of their immanent dialectic and their mutual co-dependence can enable both the effectiveness of security systems and their proper control. Unfortunately, in Slovenia we have a serious problem at this level, as the monistic doctrine of the relationship between human rights and state (security) powers is firmly entrenched. We do not recognize in them institutions that are *sine qua non* for the protection of human rights; instead we see them primarily as violators of human rights. As in the case of criminal law described above, security powers are not formally abolished, but in reality their existence is delegitimized, and their effectiveness is paralyzed.

In this way, ideological teachings that are completely incompatible with liberal democracy become realized within it. First and foremost, it is about versions of secular eschatologies that place human emancipation in the "beyond", in a world

without law and state. The traditions of anarchism and Marxism are most illustrative here. Kropotkin, for example, describes police officers as "*the impurest race upon the face of the earth*" (Kropotkin, 1976, p 43). Similarly, for Marx "*security is the highest social concept of civil society*" (Marx, 1975, p 163), as it summarizes and fixes all defects of bourgeois society. So "*the concept of security does not raise civil society above its egoism. On the contrary, security is the insurance of egoism.*" (*Ibid.*)

3 EXAMPLE OF THE CONSTITUTIONAL COURT DECISION OF U-I-59/17-27

In 2015, Europe faced an escalation of the migration and refugee crisis, which took place particularly through the Balkan route. Almost half a million people passed through the territory of the Republic of Slovenia within a few weeks, which posed an enormous logistical burden and a severe security challenge. Despite the commendable work of all the institutions engaged with it, we can say that the crisis ended without incident also with some luck. If the numbers had been just a little higher, the system would have broken down and hundreds of thousands of unidentified people would have been straying around the country.

On that occasion, parliament adopted an amendment to the Foreigners Act, where in Articles 10a and 10b a special border regime was foreseen for the case that "*the circumstance could or has already arisen when public order or internal security would be or already is endangered due to the changed migration situation*" (Foreigners Act, Article 10a). This regime provides the possibility of rejecting requests for asylum when "*there are no systemic deficiencies in the neighbouring Member State of the European Union (...) which could lead to danger of torture, inhuman or degrading treatment*" (Foreigners Act, Article 10b). The legislator also provided for exceptions, such as the health condition of foreigners or their relatives, for minors, and so on.

The Office of the Ombudsman submitted a request to the Constitutional Court to review the constitutionality of these amendments for several reasons. The main concern was focused on violation of Article 18 of the Constitution (prohibition of torture). The Court ruled that although refoulement is possible only to a country where are no systemic shortcomings in the asylum procedure, the amendment violates the prohibition of torture and inhuman treatment. The Constitutional Court relied on the judicial practice of the European Court of Human Rights (ECHR), which interprets the prohibition of torture in the case of refoulement in a way that an *objective* assessment of asylum procedures is not sufficient. According to the interpretation of this right, it is also necessary to take into account the *subjective* circumstances related to each person individually.

The set of arguments of the Office of the Ombudsman, which was drawn from case law of European and domestic courts, is of even more interest for the purposes of this article than the repeal of the provisions of the amendment itself. In these arguments we

can spot precisely the anomalies thematized in the previous section, concerning the relationship of human rights to the state (and its powers). Despite the Government's argumentation (the Government initiated the adoption of these amendments) that the state "*should not allow uncontrolled and unrestricted immigration, as this would deny the foundations of the state and the entire state system*", (U-I-59/17-27, 9) and that "*international law cannot impose obligations that are impracticable*" (U-I-59/17-27, 54), in its reply, the Ombudsman's Office insisted on the *absolute* right of foreigners to non-refoulement. It referred to the judgments of the highest court of the EU and maintained that according to "*the ECHR, the right from Article 3 of the ECHR is an absolute right that cannot be limited even in cases where the existence of the nation would be endangered. Balancing the weight of the encroachment on that right against the interests of the community as a whole should not be permissible*." (U-I-59/17-27, 18)

According to this interpretation, respect for human rights implicates the commitment to sacrifice the very existence of the state and, thus, the (human) rights of its citizens. Just a consideration about securing the vital functions of a specific state which it provides for its citizens, i.e. an attempt to "balance the weight" of the rights of a foreigner as an individual against the rights provided by state's organs to the citizens "should not be permissible." The Constitutional Court does not take a direct stand on this account of the relationship between human rights and the state, but it indirectly confirms it when it states: "*The ECHR has already taken the position that the increased arrival of migrants or applicants for international protection does not release the state from fulfilling its obligations arising from the principle of non-refoulement. Difficulty in ensuring formulated standards in the field of positive obligations as a result of the increased arrival of migrants, in itself, cannot justify reducing them*"(U-I-59/17-27, 50).

This stance resembles moral fanaticism, which Hegel (2001) sums up in the following principle: *fiat iustitiae, et pereat mundus* (Let justice be done, even if the world perishes). It stems from an archaically understood Christian ethos, which sees the "world" in irreconcilable opposition to "justice." The core of Christian eschatology is, however, the comprehension that the precondition for the realization of (ideal) justice is the destruction of the (defective) world. Thus, the world has no intrinsic value in any relation whatsoever. This ethical attitude requires from an individual a constant willingness to sacrifice everything they have and treasure in the name of a "higher" value. The extreme limit of this demand is martyrdom, the readiness to perish for something more valuable than our worldly existence.

When this notion of the relationship between justice and the world settles into the interpretation of the right to asylum, in the event of an enormous number of asylum seekers it requires from the state – even if it is clear in advance that the state's capacities are drastically too low – its exhaustion including its dissolution. This is one of the interpretations of the "absoluteness" of the right from Article 18 of the Constitution that is becoming, evidently, progressively relevant. At the same time,

this is a synoptic illustration of the consequences of the monistic approach, which cannot recognize the ambivalence of the relationship between human rights and the state.

In this way, the anarchist motto, "Open the borders!" (i.e. "Dissolve the state!"), became part of legal discourse and is getting (to some extent) realized. One might think that the dissolution of the state could still be avoided if a state of emergency according to Article 92 of the Constitution would be declared. It is questionable whether this is correct, as Article 16 of the Constitution does not allow the "prohibition of torture" to be abolished in this case either. If that were so, however, it would bring a significant realization that, according to the current interpretation of human rights, the state can ensure its existence solely in the context of a state of emergency.

A kind of irony is that right now we are entangled in a theoretical disorientation that philosophy already recognized and understood two centuries ago. In §209 of the *Philosophy of Right*, published exactly two hundred years ago, Hegel writes about the recognition of human equality: "*It is the essence of education and of thought, which is the consciousness of the individual in universal form, that the I should be apprehended as a universal person, in whom all are identical. Man must be accounted a universal being, not because he is a Jew, Catholic, Protestant, German or Italian, but because he is a man. This thinking or reflective consciousness is of infinite importance. It is defective only when it plumes itself upon being cosmopolitan, in opposition to the concrete life of the citizen*" (Hegel, 2001, §209). The last sentence is crucial: the universalism of (human) rights as an indisputable civilizational acquisition is only harmful in the case that it degenerates into a rigid extreme that opposes the state. It is clear to Hegel that (human) rights can only be secured within the state, not *beside* or even *against* it.

This would be both 1) *ineffective* – as the disintegration of the basic institutions of the state would benefit neither citizens, nor foreigners who already have been granted asylum, nor foreigners who are striving for it – as well as 2) *immoral*. Due to the religious remnants in our culture, self-sacrifice or at least self-negation is often misinterpreted as a laudable virtue: "*Love your enemies, and be good to everyone who hates you. Ask God to bless anyone who curses you, and pray for everyone who is cruel to you. If someone slaps you on one cheek, do not stop that person from slapping you on the other cheek. If someone wants to take your coat, do not try to keep back your shirt. Give to everyone who asks and do not ask people to return what they have taken from you*" (Lk 6, pp 27-31).

But enlightenment originates from a totally different anthropology than the Christian world. It builds on an autonomous subject that finds a moral law within themselves. They now have intrinsic value and, consequently, not only a duty towards others, but also towards themselves. This is explicitly stated in this version of Kant's categorical imperative: "*Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the*

same time as an end" (Kant, 1993, p 30). We have duties also towards ourselves,[4] to "humanity in our person". The demand for a willingness to destroy oneself – on an individual or collective level – is on the secular existential horizon immoral.

4 HUMAN RIGHTS AND POSITIVE DUTIES OF THE STATE

In no other area can state powers intervene more deeply in the private sphere of the individual and affect their fundamental rights more than in the exercise of a repressive mandate. The activity of repressive authorities is a field where terrible violations of dignity can occur. This is evidenced by the Western tradition of abuses of law and the state, first described by Sophocles' Antigone, and also confirmed by all the totalitarian regimes of the 20th century. The realization has matured that the state needs to be strictly controlled when using coercion. The key instrument of this control today is precisely the concept of human rights, which have played an indispensable role in preventing inhumane treatment of the individual.

However, we have seen that this is only one side of the relationship between state authorities and human rights. If human rights are to be implemented into a social reality, they must be effectively and consistently enforced by state authorities. Therefore, the protection of the individual on the one hand and the activity of the state's powers on the other, do not stand *a priori* in opposition. Theory, for example Hobbes in his Leviathan, teaches us that the absence of law and the state does not implicate the realm of freedom, as the void begins to be replaced by the contingent initiative of individuals. In this manner, the right is sooner or later replaced by brute power, and authority (*postetas*) by force (*violentia*). Hobbes describes the concept of the natural state as a "war of all against all" in these words: "*In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short.*" (Hobbes, 1985, p 186)

Unfortunately, history confirms the theory perfectly. Genealogically, human rights have indeed evolved as the protection of the individual from the bearer of power. This is also evidenced by the order of the first three articles of the *Universal Declaration*, where "*life, liberty and security of person*" are mentioned only in the third article. But insofar as human rights are to represent a coherent value foundation of the legal system and society as such, they must provide protection of the individual in all possible situations – including protection against other individuals. This interpretation

[4] *Not only is indifference to one's own existence inadmissible, even moral servitude, kneeling (Kriecherei, animo servili) that often accompanies the self-image of the West in relation to the Third World is, according to Kant, reprehensible.*

of human rights was developed through the concept of their "horizontal effect". Probably the most famous example is "Lüth-Urteil", where the German Federal Constitutional Court used the phrase "the effect of radiation" (Ausstrahlungswirkung der Grundrechte) of fundamental rights into the private sphere.

This is the basis of the doctrine of the positive duties of the state, which obliges the state to protect human rights also in horizontal relations, in relations between private entities. Constitutionally protected legal goods may be jeopardized not only by the state, they may also be endangered (or, from the perspective of mass illegal migration, even more so) by individuals and their unregulated activities. It is irrelevant to the victim who exactly is violating their safety and human dignity. The recent geostrategic situation which also includes the possibility that Turkey will release millions of refugees and migrants to the EU poses an enormous threat to the national security of all states on the Balkan route. It would be irresponsible to ignore this danger simply because it does not fit the established monist doctrine, envisioning the state as the exclusive source of threats to human rights.

Conclusion

If we want to "take (human) rights seriously" (Dworkin), then we must protect them in every situation, no matter who is the violator is. Therefore, human rights not only have a negative status (which prohibits the state from interfering with these constitutionally protected goods), but equally importantly a positive status, which imposes on the state the obligation to protect citizens' rights. The passivity of the state's powers in this field is no less unconstitutional than abuse and going beyond its mandate.

Anomalies causing the paralysis of state organs have existed in our society for a long time, as we demonstrated in the case of penal law. But rapid changes in the field of asymmetric threats, associated with the possibility of mass illegal migration, are drastically exacerbating this constellation. The recent blockade of the armed forces' assistance concerning the protection of the border, which was based on prejudice and populism, has dismantled a dangerous disorientation with regard to national security. As we have demonstrated, the only way to face these challenges is through expert discussion. Unfortunately, external intervention, for example in the form of a change in legislation, is in this case not possible. The first necessary step, therefore, is to understand and analyze the current situation. We hope that this article has provided a small contribution in this direction.

Bibliography

1. *Bittner, C., 1988. Recht als interpretative Praxis. Berlin: Duncker & Humblot.*
2. *Dworkin, R., 1999. Taking Rights Seriously. Massachusetts Cambridge: Harvard University Press.*
3. *Fender, P., 2013. Militärisches Einsatzrecht – Inland. Wien: Verlag AV + Astoria Druckzentrum.*
4. *Hegel, G. W. F., 2001. Philosophy of Right. Ontario: Batoche Books Limited.*
5. *Hobbes, T., 1985. Leviathan. London: Penguin Books.*
6. *The Holy Bible. https://www.biblija.net/biblija.cgi?l=en, 5. 8. 2020.*
7. *Kant, I., 1993. Grounding for the Metaphysics of Morals. Indianapolis: Hackett.*
8. *Kropotkin, P., 1976. Law and Authority. In: Keitha, Tompkins (Eds.). The Essential Kropotkin. London: The MacMillan Press.*
9. *Marx, K., 1975. On the Jewish Question. In: K. Marx/F. Engels, Collected Works, Vol. 3, London: Lawrence & Wishart, pp 146–74.*
10. *Pavčnik, M., 2015. Interpretative importance of legal principles for the understanding of legal texts. ARSP 2015, vol. 101. N° 1, 2015, pp 52–59.*

Sources of law

1. *Defence Act/Zakon o obrambi (Uradni list RS, št. 103/04 – uradno prečiščeno besedilo, in 95/15).*
2. *Foreigners Act/Zakon o tujcih (Uradni list RS, št. 1/18 – uradno prečiščeno besedilo, 9/18 – popr. in 62/19 – odl. US).*
3. *Penal Code/Kazenski zakonik (Uradni list RS, št. 50/12 – uradno prečiščeno besedilo, 6/16 – popr., 54/15, 38/16, 27/17, 23/20 in 91/20).*
4. *Universal Declaration of Human Rights. https://www.un.org/en/universal-declaration-human-rights/, 5. 8. 2020.*
5. *Constitution of the Republic of Slovenia/Ustava Republike Slovenije (Uradni list RS, št. 33/91-I, 42/97– UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 in 75/16 – UZ70a).*
6. *Constitutional Court Decision U-I-59/17-27.*