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WAIVER OF HUMAN RIGHTS: A RIGHT OR A CHALLENGE?

The author discusses the new tendencies of waiving human rights. In the article they are qualified as a new emerging institute of Human Rights Law. The definition of human rights waiver is discussed, as well as the necessity to give a legal regulation to it. The author presents the existing definitions of human rights waiver, but does not share any of them, particularly most of them define human rights waiver as not utilization of human rights, but the author calls this definition as a passive application of human rights, whilst waiver of human rights has its own content which is discussed in the article in details. Human rights waiver is discussed in the light of the co-relation of the right to autonomy and the principle of paternalism. The author presents some case law on waiver of human rights, which is very rare. Specifically, the author presents the case law of the Constitutional Court of the Republic of Armenia and the case law of the European Court of Human Rights. The legal positions of the mentioned bodies can serve as good criteria in dealing with human rights waiver. Particularly, the Constitutional Court of the Republic of Armenia held a decision dedicated to this issue and qualified waiver of human rights as an exception from the classical perception of human rights ideology. The author agrees with idea reflected in decision of the Constitutional Court concerning the correlation of human rights waiver and right to autonomy, according to which right to autonomy cannot be absolute and that absolute waiver of human rights can, in its turn, violate the human rights. In this context the author highlights the necessity of defining the limits of human rights waiver offering two important directions for discussion of this question; the scope of the rights which can and cannot be waived, the framework and criteria of a waiver of human rights.

Key words: human rights, new right, right to waive human rights, autonomy, paternalism.

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1. Introduction

The history of the development of human rights, the struggle for them, for their declaration, and moreover, for their real protection was difficult and impressive. The human race made so many efforts over thousands of years to achieve the idea of human dignity, equality, freedom, private life, and all the others. From the ancient oriental philosophy, antic philosophy, through middle ages, renaissance, new era, and presently so many concepts, ideas, so many lives, struggle for the declaration of a human being to be the highest value. From the idea of Protagoras – the measure of all things is a human being, to the contemporary perception of human rights and freedoms: the journey has been long and hard.

We did it! We have an enormous quantity of international treaties, courts, national legislation, and state bodies all to serve humanity, to protect their rights and freedoms. But what phenomenon do we meet? A new demand – for a human being to be able to waive their rights. What does this mean, how is it applied, how should a state respond?

The waiver of human rights is sometimes interpreted as non-realization of a right. I call this passive realization. From my point of view, a waiver of a human right is a demand addressed to a state to derogate from its obligations to protect a certain right concerning which the person demands a waiver, for example, not to ensure the right to advocate during criminal proceedings even if such participation is mandatory according to the legislation or not to protect life or mental or physical integrity and etc. Is this phenomenon possible? Is it in compliance with the idea of human rights and the obligations of the state, what are the limits of a claim to waive a right, should the state go in this direction or not, should it be regulated by law or not? All these questions need some research and some response as they have already become a part of the legal reality at both an international and domestic level.

2. Waiver of Human Rights

2.1. Definition

A definition of a human rights waiver has not been discussed a lot within the scientific literature and one unanimous approach does not exist. Originally, even the idea of waiving human rights was rejected. It was believed that one of the characteristics of human rights

is that they cannot be waived or taken away (Office of the United Nations High Commissioner for Human Rights, (United Nations), Frequently asked questions on a human rights-based approach to development cooperation, New York and Geneva, 2006, 1, December 27, 2019). The same idea can be met within judicial practice as well. In the Webber Academy Foundation v. Alberta (Human Rights Commission) (2015 AHRC 8 (CanLII)) case considered by the Alberta Human Rights Tribunal justice Poelman held that waiver is not a possible defense in any case, as human rights are a matter of public policy and protect the inherent dignity of every individual; thus they "cannot be waived or contracted out of" (H. Shireen, Human Rights Cannot Be Renounced or Waived, University of Calgary Faculty of Law BLOG September 1, 2016, 1). Mart Susi – Professor of the Human Rights Law at the Tallinn University, discussing the issue of a waiver of human rights in the context of the European Convention on Human Rights and the case law of the European Court of Human Rights considers that "The possibility of the waiver of a convention right also seems to contradict the obligations taken up by Member states of the Council of Europe under Article 1 of the convention – to guarantee to everyone under their jurisdiction the rights and freedoms specified in article 1 of the convention" (M. Susi, Recent Judgments and Decisions of the European Court of Human Rights towards Estonia, Juridica International XI/2006, 97).

In the judgment of the Supreme Court of Canada concerning the case Dickason v. University of Alberta it is stated that the Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of an enactment which may not be waived or altered by private contract (Dickason v. University of Alberta, Supreme Court of Canada, September 24, 1992, 22700, 213-14). The same idea has been emphasized in another judgment held by the Supreme Court of Canada in Insurance Corp. of British Columbia v. Heerspink. In the judgment it was stated that "Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection" (Insurance Corp. of British Columbia v. Heerspink, Supreme Court of Canada, August 9,1982, 16525, 158).

At the same time some tendencies in the opposite direction are coming up. For example, David Miller in his article "Are human rights conditional?" discussing the inalienable nature of the rights stated that "Human rights are also often said to be inalienable: they are not things that a person can lose by virtue of the way she acts" (D. Miller, Are Human Rights Conditional?, CSSJ Working Papers Series, SJ020, Centre for the Study of Social Justice Department of Politics and International Relations University of Oxford Manor Road, Oxford OX1 3UQ United Kingdom, September 2012, 2012, 2). D. Miller noting this statement with some exception, especially stated that "I leave aside here the question of voluntary waivers of human rights, such as occur, in the short term, when a person agrees to have invasive

surgery" (Ibid). Here as we can see the idea of waiving human rights is mentioned as an existing one. Another source stated that "Some human rights can be waived, but only in limited circumstances; and certain rights can never be waived, such as the right to liberty and protection from torture. Other human rights may be waived but that waiver must be established in an unequivocal manner. For example, it can be lawful to waive your rights in the employment context" (A Training Manual on International Human Rights Law, Building Human Rights into Practice, The Bingham Centre for the Rule of Law, London, UK, 2012). The idea of waiving human rights and its practical application can be met also within the recent case law of the European Court of Human Rights and some domestic jurisdictions.

However, the existing ideas and case law is vague. "It is not theoretically clear whether an individual may waive his or her rights under the convention at all, nor to what extent or exactly which convention rights may be waived" (M. Susi, Recent Judgments and Decisions of the European Court of Human Rights towards Estonia, Juridica International XI/2006, 97).

The examination of the rare research shows that waiving human rights is discussed in the following manner; the legitimate decision of the person not to use his/her right in a specific situation (A. Ghambaryan, Waiver of subjective human rights and the conditions of legitimacy, Journal "Legality", Yerevan, 2016, 24, to use the right in violation of the deadlines stipulated by the law (A. Gambaryan, Отказ от субективных прав молчанием (Tacit waiver) (Waiver of subjective right by silence (Tacit Waiver)) Теория и практика общественного развития N4 (2018)). Some specialists argue fairly that not realization of the rights does not amount to a waiver of human rights (Отказ от субъективных гражданских прав: диссертация кандидата юридических наук: 12.00.03 / Суханова Юлия Владимировна).

In my opinion a waiver of human rights implies the demand of the person addressed to the state to stop realization of its obligations, especially positive ones for the protection of a special right of a special person. The parties of the relations deriving from human rights are the human being and the state. Even in the case of horizontal relations it is the state who carries a responsibility towards the person to ensure the realization of their rights in relations with another human being. The responsibility carrier in human rights relations is the state. The human rights stipulated in the international treaties and the domestic basic laws/Constitutions are addressed to the state who is obliged to perform some obligations directed to the protection of these rights.

A human right is a freedom of the person to choose the possible legally formulated version of his/her behavior concerning a special situation. The idea that a waiver of a human right is just a non-realization of a right cannot be justified as non-realization of a right is also a form of its realization, of its enjoyment, just in a passive way. Besides, in case of non-realization of a right, the obligation holding party of human rights relations – the state, does not participate in any manner, which is not possible as to waive a right implies some consequences which cannot leave the state

without any role. So, if the relation based on human rights is a relationship between a state (here I consider the classical understanding of human rights relation – vertical relations. Though in case of horizontal relations the state in any case holds active role as it is the state's obligation to protect the person in those horizontal relations) and a human being, and if the state carries obligations to ensure those rights, it means that waiving a human right is a demand of the person addressed to the state to stop performance of its obligations, especially positive obligations concerning the waived right. In this situation another question arises – whether the state has an obligation to stop performance of its obligations based on such a demand of the human being or it comes to the margin of appreciation of the state to decide this issue. In the context of this issue such ideas should be discussed as autonomy and paternalism which refers to another question – limits of a human rights waiver.

2.2. Limits of a Waiver of Human Rights

The idea of a waiver of human rights arises from the right to autonomy. Autonomy is a familiar concept within legal, moral, and political philosophy (J. Coggon and J. Miola, Autonomy, Liberty, And Medical Decision-Making, Camb Law J. 2011 Nov; 70(3): 523–547). For example, such issues as assisted suicide, euthanasia, voluntary interference with mental and physical integrity, and etc., which are the types of waiver of such rights as life, physical and mental integrity, are the expressions of the right to autonomy. The European Court of Human Rights discusses these issues within the right to self-development which is also an element of right to autonomy. The right to autonomy implies the possibility of a human being to make decisions about their life. It denotes self-government. The specialists also stress the free will of a human being and possibility to act without the interference of third parties. Human rights in turn exist to protect some sides of human life and life itself too. Correspondingly, human rights demand the existence of a state's obligations to take care for these rights. As a result, when it comes to the correlation of human rights and the right to autonomy the issue of a waiver comes out when the person demands not to protect their rights, when the person demands from the state to take away its care. In this context, another famous question comes out – whether the state has an obligation to stop its care, i.e., protection of human rights in any case the person demands it. In my opinion the proper balance between the right to autonomy and paternalism should be kept. The aforementioned is especially true when it comes to such spheres as end of life, physical and mental integrity. In these cases, people can be especially vulnerable and letting them make decisions which can harm themselves will go too far in the sense of the protection of life as a value. In ECtHR judgment on the case of Pretty v. the United Kingdom the Court expressed an approach on this issue that went too far, particularly it stated that "...in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity". Such position is marginal in my opinion. It contradicts the Court itself; its

position in accordance with which Article 2 and 3 of the European Convention on Human Rights are the core values of the Convention. In this case the Court undermines the life of the person, by passive actions; in other words, by not giving the treatment the state, in fact, does not fulfill its positive obligations for the protection of the right to life. It shall be stressed that there is no right to die. Thus, countries shall take positive means to protect life, even in case the person refuses medical treatment which can safe their life. However, if the state acts conversely, the state becomes a supporter of suicide. One should keep in mind that the whole legal system and the state in general exist for only one main aim – to protect human life, to make it prospective and secure. This is the main idea of the theory of the emergence of a state on the basis of the social contract and natural law which are the basis for democratic societies. It also shall be taken into account that in difficult situations which require medical treatment with fatal consequences people are under emotional and psychological pressure and are not able to understand what they are doing. In such cases, in my opinion, where the treatment is fatal and the adult refuses it, the opinions of relatives and those who have a close relationship shall be taken into account. The person should also be given some psychological help if he/she refuses the treatment which could allow recovery. In such cases, the person can be under immense stress.

The mentioned position of the court is also in direct conflict with the Hippocratic oath, which requires "all measures [that] are required"…"I will apply, for the benefit of the sick". Generally, no enforcement can be made and no treatment can be performed against the will of the person, however, some mechanisms to try to save the life should be introduced, as the life is the highest value.

In 2002 in the case of Pretty v. the United Kingdom the ECtHR held that the very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that "…it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity. […] The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 §1 of the Convention".

I would like to stress three elements in this judgment specifically, which can be challenging from the point of view of dignity and autonomy as well. Firstly, the Court mentioned "what she considers". This means that the Court did not state any criteria for a situation in which the person can choose death. In such a case even a little disadvantage in life could be defined by a person in this way. Secondly, the Court mentioned "mental decrepitude" as a ground which can make life undignified. But here a question arises, whether the person may enjoy personal

autonomy and decide on life or death issues while being mentally ill? The answer seems to be obvious. Finally, the third one is when the Court mentioned as a ground for making life undignified "being in old age". In my opinion such statement undermines the value of the elderly. Such a statement from the Court reminds some form of eugenics. In Haas v. Switzerland the Court developed the idea adding that "... an individual's right to decide the way in which and at which point his or her life should end, provided that he or she was in a position to freely form his or her own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention".

The ideas expressed in Gross v. Switzerland seem to be ideological support for death even in cases of absence of any illness. Here the Court cited the mentioned ideas and added that "... having regard to the above considerations, and, in particular, the principle of subsidiarity, the Court considers that it is primarily up to the domestic authorities to issue comprehensive and clear guidelines on whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted the ability to acquire a lethal dose of medication allowing them to end their life. Accordingly, the Court decides to limit itself to the conclusion that the absence of clear and comprehensive legal guidelines violated the applicant's right to respect for her private life under Article 8 of the Convention, without in any way taking up a stance on the substantive content of such guidelines".

Thus, the Court considers it possible for states to help people die in cases where they are only elderly or do not wish to become elderly or in any other case instead of calling on the states to take care of such people and showing them social and moral aid.

Positions like these undermine the idea of life as a value in general. In this regard, some authors have already expressed the idea that "the basic argument for assisted suicide is that life has its value only as long as it has a meaning for the person whose life it is…" (E. Drogoń, 'The Right to Die with Dignity', in: T. Gries and R. Alleweldt, Human Rights within the European Union, Berlin: Berliner Wissenschafts-Verlag 2004, 100). Such approaches to human life are risky as ideologically they are full of nihilism to human life and human beings in general, like "do what you want, nobody cares for you". So, in all the aforementioned cases, paternalism can be justified, and the waiver rejected.

There is another important justification against an absolute waiver. In several cases the state shall not stop its protection as the opposite will result in violation of human rights as the highest value. It is important to understand that the protection of human rights does not imply merely the protection of the interest of a concrete person who has entered into relations with the state concerning a special right. By protection of human rights, the state protects the special human right as a value, as a general value. For example, when the state starts an investigation of a murder it is directed not merely to that special case, not only to resolve that special case but also to show its concern about human life in general, that it cares about human

life as a value, as a general value. Investigation in this case is directed also to prevent crime in the future and to educate people. The object of the protection of a human right includes not only the interest of the specific person but also the general interest of the whole society. So, the protection provided by the state does not refer merely to the will of that person and therefore it cannot be waived by a wish of the person because the waiver can be attractive for a specific person but be in contradiction with the will of the society. In this case the waiver can violate the idea and value of the special right.

In the context of the aforementioned the issue of the limits of human rights waiver arises. I would like to discuss these limits in two directions;

→ the scope of the rights which can and cannot be waived,

→ the framework and criteria of a waiver of human rights.

In regard to the first issue I would like to differentiate human rights into two groups by applying the criterion of humiliation of the nature of a human being. I can suppose that a human rights waiver can never be used in regard to those human rights the waiver of which will result in humiliation of a human life and human nature. For example, right to life, right to physical and mental integrity.

What about the rights which can be waived? Such as the right to fair trial, right to freedom of movement, right to freedom of speech etc.? Can these human rights be waived in an unlimited manner? In my opinion some criteria should be applicable to a waiver of these rights too. In my opinion the most reasonable criterion in this regard can serve the criterion of violation of the very essence of the given right. This is a very significant criterion/principle recognized by the case law of the European Court of Human Rights. This principle is also enshrined in the Constitution of the Republic of Armenia. Particularly Article 80 of the Constitution stipulates that the essence of the provisions on basic rights and freedoms enshrined in this Chapter shall be inviolable (The amendments to the Constitution of the Republic of Armenia were introduced through a referendum on 6 December 2015, Article 80).

As for the procedural rights, the waiver here cannot be unlimited either. The main limit here can be the interests of justice, for example in cases where the state appoints an attorney it could act against the wish of the accused to defend himself *pro se*.

3. Practical Realization of a Waiver of Human Rights

3.1. Legal Regulation of a Waiver of Human Rights

No international legal act regulates the relations concerning the waiver of human rights. Some domestic legal acts regulate this phenomenon but mainly in regard to the procedural human rights. The same is true for the case law of the European Court of Human Rights (Poitrimol v. France, Håkansson and Sturesson v. Sweden). In these cases, the European Court of Human Rights developed some principles for the application in regard to the waiver of procedural human rights. Especially in the case of Poitrimol v. France the European Court of Human Rights stated that, 'however, such a waiver must, if it is to be effective for the Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with

its importance. In case of Håkansson and Sturesson v. Sweden the European Court of Human Rights added that "waiver must be made in an unequivocal manner and must not run counter to any important public interest". Therefore, as we can see, the waiver concerning even the procedural rights is not absolute.

The Constitutional Court of the Republic of Armenia also discussed the principles of the human rights waiver in its decision DCC-1403 adopted on February 13, 2018. It stated that "the application of the institution of refusal without reservations may lead to violation of rights". The European Court of Human Rights also developed the legality test for the waiver of human rights. The failure to comply with the test amounts to a violation of a right. The mentioned comes to prove that absolute waiver of human rights is not possible, which is justified as the legal system and the state exist to protect the inviolability of the rights, dignity, and substance of the human being.

In my opinion waiver of human rights is a new emerging legal institution which requires definite legal regulation. All the issues concerning human rights should comply with the principle of legal certainty. To resolve this problem, I would offer to stipulate some legal norms in the domestic legislation. The practical realization of waiver of human rights can be performed via a separate legal act or legal norms stipulated in the basic laws of the states. In the Constitutions the states separately and definitely enshrine the human rights and their limitations. In the same logic, the waiver should be regulated taking into account the tendency of application of this institution by the domestic courts as well as by the European Court of Human Rights.

3.2. The Armenian Case Law on a Waiver of Human Rights

In the Republic of Armenia only one case exists concerning the waiver of human rights (Decision of the Constitutional Court of the Republic of Armenia – DCC-1403, 13.02.2018) The Human Rights Defender of the Republic of Armenia brought a case to the Constitutional Court. The Applicant considers that the challenged provisions regulated by the Criminal Procedural Code contradict Part 2 of Article 67 and Article 79 of the Constitution of the Republic of Armenia insofar as the application of the institution of compulsory participation of a defender contradicts the full exercise of the defendant's right to be defended personally or through his chosen counsel. In the Applicant's opinion, existing legal regulations create a situation in which, on the one hand, the fundamental right of a suspect or accused for the defense, in person or through a lawyer chosen by him, is opposed, and on the other hand, the obligation of the body conducting the criminal proceedings (as part of the right to a fair judicial trial) to ensure effective legal representation, within which the body conducting the proceedings has the right not to accept (and in the case of applying the sanctions as the removal of the defendant from the courtroom, the court does not accept) the refusal of the suspect, accused or defendant from the defender. The Applicant notes that, as a general condition, the defense counsel assumes their authority with the consent of the person accused of a criminal offense (Part 2 of Article 68 of the RA Criminal Procedure Code), whereas in the case of applying sanctions against the defendant without their consent, applying the institution

of mandatory legal representation, a public defender is involved, which indicates a contradiction between these legal regulations and legal uncertainty. The Applicant asserts that the RA Criminal Procedure Code does not specifically and clearly regulate in which case the duty of the state represented by the implementing body to ensure compulsory legal representation prevails over the fundamental right of the accused to defend themselves or through their chosen counsel. Referring to some precedents of the European Court of Human Rights, the Applicant argues that the right of an accused person to have a defender of their choice is not absolute. This right can be ignored or considered secondary by the court if there are relevant and sufficient grounds for this due to the priority interest of the justice. According to the Applicant, the RA Criminal Procedure Code should clearly indicate the boundaries, as well as the criteria and standards by which the body conducting proceedings can determine whether there are actually "relevant" and "sufficient" grounds to consider the existence of a priority interest of justice.

As a result of the consideration of the case the Constitutional Court of the Republic of Armenia held that in the context of realization of the institutions of the protection of human rights and waiver of human rights proportionality should be ensured. The Constitutional Court also stressed that the absolute waiver would result in violation of human rights. The Constitutional Court held that "waiver of human rights shall not become a demand addressed to a state to abandon its positive obligations directed to the protection of human rights. In this case the state should give priority to human rights not only as a possibility of people to choose their behavior but as an absolute value".

3.3. Regulation of a Waiver of Human Rights Within the Jurisdiction of International Bodies

The case law of the European Court of Human Rights refers to the procedural rights. It is worth noting from the very beginning that the European Court of Human Rights does not defend the waiver of human rights in all cases. Some fundamental ideas were expressed by the Court in cases such as Croissant v. Germany, Lagerblom v. Sweden, Correia de Matos v. Portugal, Sakhnovskiy v. Russia, Pishchalnikov v. Russia, Håkansson and Sturesson v. Sweden, Sejdovic v. Italy, Simeonovi V. Bulgaria, Jones v. the United Kingdom, Talat Tunç v. Turkey and others.

In the case of Sakhnovskiy v. Russia the European Court of Human Rights stated that "neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial". As mentioned above in the case of Håkansson and Sturesson v. Sweden the European Court of Human Rights also stressed that "such a waiver must be established unequivocally and must not run counter to any important public interest".

In the case of Sejdovic v. Italy the European Court of Human Rights has also stated that "before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be".

Notwithstanding the fact that the European Court of Human Rights considers it possible to waive the procedural rights under Article 6 of the European Convention on Human Rights, the case law of the Court proves that the opposite, i.e. the absence of waiver under the domestic legislations is not considered to be in breach with the European Convention on Human Rights. Particularly the case of Correia de Matos v. Portugal is worth noting in this sense, as the Court here adopted fundamental legal positions in the context of waiver of procedural rights. In this case the applicant alleged that the decisions of the domestic courts refusing him to conduct his own defense in the criminal proceedings against him and requiring that he be represented by a lawyer had violated Article 6 § 3 (c) of the Convention. The European Court of Human Rights did not find a violation of human rights here. Although judge Pinto De Albuquerque and judge Sajó adopted dissenting opinion concerning this. They were against the statement of absence of the violation.

Concerning the waiver of human rights in the abovementioned context some ideas were expressed by the United Nations Human Rights Committee (HRC) in the Communication No 1123/2002. In this decision the HRC expressed ideas concerning the wish of the person and cases when the state may act against that wish. Particularly the HRC stated that the "right to defend oneself without a lawyer was not absolute. The interests of justice could require the assignment of a lawyer against the wishes of the accused, particularly in cases of a person substantially and persistently obstructing the proper conduct of the trial, or facing a grave charge but being unable to act in his own interests, or where it was necessary to protect vulnerable witnesses from further distress caused if the accused were to question them himself. However, any restriction on the accused's wish to defend himself had to have an objective and sufficiently serious purpose and could not go beyond what was necessary to uphold the interests of justice" (U.N, Doc., CCPR/C/86/D/1123/2002, Communication No 1123/2002, 28 March 2006, para 7.4). "The assessment of whether in a specific case the assignment of a lawyer was necessary in the interests of justice had to be made by the competent courts" (U.N, Doc., CCPR/C/86/D/1123/2002, Communication No 1123/2002, 28 March 2006, para 7.5).

4. Conclusions

Human rights waiver is a new emerging phenomenon. It is an exception from the general rule to protect the human rights. Human rights waiver is a person's demand addressed to the state to not protect his/her rights, to stop performance of its obligations for the protection of human rights. Human rights waiver is not regulated by any international legal act, nor does any domestic law exist specially for the waiver. Some rare case law exists but mainly regarding the procedural human rights.

The aforementioned research showed the necessity to regulate human rights waiver in more detail as it can lead to such consequences as end of life, or interference with mental and physical integrity. Waiver and right to autonomy are strongly linked. But even wish and autonomy cannot be unlimited. The criteria which limit the possibility to waive the human rights should be defined by the domestic legal acts

at the minimum. Vague and not regulated realization of waiver of human rights can lead to violation of human rights.

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ОТКАЗ ОТ ПРАВ ЧЕЛОВЕКА: ПРАВО ИЛИ ВЫЗОВ?

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Автор обсуждает новые тенденции отказа от прав человека. В статье они квалифицируются как новый формирующийся институт права прав человека. Обсуждается определение отказа от прав человека, а также необходимость его законодательного регулирования. Автор представляет существующие определения отказа от прав человека, но не разделяет ни одно из них, в частности, большинство из них определяют отказ от прав человека как неиспользование прав человека, но автор называет это определение пассивным применением прав человека, в то время как отказ от прав человека имеет свое содержание, о котором подробно рассказывается в статье. Отказ от прав человека обсуждается в свете взаимосвязи права на автономию и принципа патернализма. Автор представляет некоторые прецедентное право об отказе от прав человека, которое является очень редким. В частности, автор представляет прецедентное право Конституционного Суда Республики Армения и прецедентное право Европейского суда по правам человека. Правовые позиции упомянутых органов могут служить хорошим критерием при рассмотрении и применении отказа от прав человека. В частности, Конституционный Суд Республики Армения принял решение, посвященное этому вопросу, и квалифицировал отказ от

прав человека как исключение из классического восприятия идеологии прав человека. Автор согласен с идеей, отраженной в решении Конституционного суда относительно соотношения отказа от прав человека и права на автономию, согласно которому право на автономию не может быть абсолютным, и что абсолютный отказ от прав человека может, в свою очередь, привести к нарушению прав человека. В этом контексте автор подчеркивает необходимость определения границ отказа от прав человека, предлагая два важных направления для обсуждения этого вопроса; объем прав, от которых можно и нельзя отказаться, рамки и критерии отказа от прав человека. Автор предлагает также принципы определения границ отказа от прав человека, в частности автор разделяет две группы прав человека в зависимости от того, нарушает ли отказ от этих прав сущность человеческой натуры. Следовательно, отказ от прав, нарушающий сущность человеческой натуры, невозможен. Второй принцип касается тех прав, на которые первый критерий не распространяется. В этом случае может применяться принцип нерушимости самой сущности права, то есть если объем отказа от данного права человека нарушает сущность данного права, то отказ невозможен.

Ключевые слова: права человека, новое право, право отказа от прав человека, автономия, патернализм, новый институт прав человека.