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NEGATIVE FREEDOM OR OBJECTIVE GOOD:
A RECURRING DILEMMA
IN THE FOUNDATIONS OF POLITICS

INTRODUCTORY REMARKS

In the article, I intend to analyse two competing models of metaaxiological justification of politics. Politics is understood here, broadly, as actions that aim at organising social life. I will be, first of all, interested in lawmaking activities. When I talk about metaaxiological justification, I think not so much about determinations of what is good or proper for axiology, but about determinations referring to the way in which the good is founded, in short: determinations which answer the question why something is good.

In the first model, which is described here as objectivistic, it is assumed that determining what is good is a matter of cognition. In the second model, which could be described here as voluntaristic or exceedingly liberal, it is assumed that determining good is not a matter of cognition but of will – something is good because it is wanted. In the latter model, the cognoscibility of good is rejected and therefore the objective criteria for evaluation of which “will” is better and which is worse are rejected. As a consequence, negative freedom becomes the fundamental value of social order and the basic requirement is that of maximizing the sphere of individual’s free actions, the sphere which is free from interference of other individuals or institutions.

I am going to discuss some arguments for and against adopting one of these models with the view of organising social life. I am going to argue that none of these models is acceptable because of at least

one reason. Each of them leads to a certain version of totalitarianism. It is assumed, for the sake of the present argument, that totalitarian solutions are unacceptable.

In the conclusion, I am going to present a mixed model, which, in my opinion, reflects well the practice of democratic states. Analysis of these three models allows, first of all, to identify more clearly some of the problems appearing in making law, including procedural questions. By pointing at the interdependence of the foundations of good and law making procedures the presented analysis argues for the thesis that the choice of the concept of good is primary to the choice of law making procedures.

OBJECTIVISTIC MODEL

In the first model, it is assumed that good is objectively founded. To learn what is good one has to get to know good. It is a cognitive approach. In consequence, it is assumed that there are objective standards of action which bind everybody. Discussions about organising social life, including shaping law, are then discussions about facts, about how things are. Statements about good inform evaluations about reality and they may be true or false; this is not a commonly shared conviction in contemporary philosophy.

Nevertheless, this model could become a good basis for the justification of human rights which are considered universal. Everyone is entitled to them; they are inherent and inalienable and are independent of others' actions (they may not be granted or taken away by any actions, positive law does not grant these rights but only protects them). According to this model, lawmaking procedures should aim at elimination of false convictions. Discussions aim at extensive and thorough discernment of what is good; in this sense, they are objective – they are disputes on reality.

Critics of this model have very strong arguments. The classic argument against accepting objective good as the basis for organising social life was formulated by Isaiah Berlin when he criticised the proposition of founding social life in positive freedom. What is the core of the argument? It is obvious that some are more talented in the field of cognition than others. If good is something objective and knowable then it is most rational to rely on the judgment of those who are the most competent in cognition. Good leads man to the fullness of

humanity and therefore to happiness. Consequently, leaving power and subjugation to those who discern the best is in the best interest of the ruled. Those exercising power do not have to ask the ruled of their opinion, they do not have to ask what they want and what they do not want, as good is objective and univocally determined¹. It is enough to know it and make people achieve the discerned good – in this way everybody will attain the greatest possible happiness. Happiness? The price for it is the depreciation of freedom and a certain version of totalitarianism. How can these consequences be avoided?

VOLUNTARISTIC MODEL

Since these consequences are unacceptable, then the point of departure has to be changed. Therefore, to avoid the consequences of totalitarianism, the thesis that good has objective foundations and its determination is a matter of cognition has to be discarded. A non-cognitive position should be assumed. From the wide array of possibilities let us choose, following Isaiah Berlin, the solution which is typical for extreme liberalism: good is a matter of will². Something is good because it is wanted. Because there are no objective standards of evaluation in general then there are no objective standards to determine which will is proper (right) and which is not (wrong). Therefore, no will is better than another and what is left is only an agreement on individual projects of life, achieved by employing, first of all, the principles of consensus and compromise. Let me quote Isaiah Berlin's words: "the borders between individuals or groups are laid [...] so as to avoid conflicts of human aims, each of which should be considered equally final and indisputable aim in itself"³. Social order should be directed at the maximisation of the sphere of free realisation of chosen aims, maximisation of negative freedom.

Statements about good do not have their object, they do not inform about reality. Consequently, they may be neither true nor false – this

¹ "Since moral and political problems are real [...] – then they basically have to be solvable; which means there must be one and only one proper solution of each problem", I. Berlin: *Dwie koncepcje wolności* [Two Concepts of Liberty], In: *Cztery eseje o wolności* [Four Essays on Liberty], Warszawa 1994, p. 206; quoted according to Polish translation.

² Other basic possibilities of a cognitive foundation of good and evaluations are: emotional reactions (emotivism) or changing culture (cultural relativism).

³ I. Berlin, *op. cit.*, p. 214.

view corresponds to the standard conviction, even in the field of logic and semiotics⁴. It is worth noting that, bearing in mind my analysis, logic and semiotics turn out not to be axiologically neutral, as it is commonly assumed.

In this approach, any discussion referring to the shape of law becomes, in fact, an exchange of views. In the field of lawmaking, the procedures should serve to identify the sphere of consensus and assist in achieving compromise – proportional resignation from conflicting interests. There is also a need for procedures that would lead to solutions in individual cases when general arrangements are not sufficient to solve a given dispute⁵.

This model, at the first sight, serves well to protect freedom, however, it is also afflicted by a certain type of totalitarianism which consists in giving institutions the remit to interfere in, potentially, all fields of life. This danger has its source in conflicts of interests or conflicts of individual projects that always occur in a certain social context. If individuals themselves cannot reach a compromise, then an independent body has to be appealed to. A natural point of reference will be legislature and judiciary. The conflicts may concern almost all the spheres of activity of an individual. In consequence, it is difficult to point to the limits of the state's activities in deciding on things referring to individuals' lives.

Additionally, in the framework of this model, there is nothing which would make the achieved consensus or compromise final, thus the achieved consensus or compromise cannot define permanent limitations for the state's interference in individual's life⁶. Similarly as in the first model, consistent adherence to the voluntaristic foundations of good leads to totalitarian consequences.

Furthermore, to secure or even shape the sphere of his activity, the individual should take part in the public debate. On the one hand, it

⁴ Cf. e.g. Z. Ziemiński: *Logika praktyczna*, 17th edition, Warszawa 1994, p. 102 et seq. (in 2002, the 25th edition of this handbook appeared).

⁵ Cf. M. Piechowiak, *W sprawie funkcjonalności i dysfunkcjonalności konstytucji. Zagadnienia filozoficzno-prawne* [On the Functionality and Dysfunctionality of Constitution: Philosophical and Legal Issues], "Ruch Prawniczy, Ekonomiczny i Socjologiczny", 1995, No 57, vol. 2, pp. 129–138; *Czy konstytucja może być neutralna światopoglądowo?* [Can a Constitution be Neutral to any World-View?], In: *Transformacja i wartości. Aksjologiczne aspekty transformacji ustrojowej w Polsce*, ed. W. Kaczochoa, Wydawnictwo WSP TK, Zielona Góra 1997, pp. 81–90.

⁶ Inflation of law, which we witness, or – in some societies – frequent recourse to courts in solving everyday problems are the confirmation of actuality of this danger. These are issues which require further, also empirical, study.

is an advantage but on the other hand there is a problem of interests of those who cannot or are unable to articulate their opinions. In extreme situations, in the resulting compromise or consensus some individuals may be excluded from society.

Finally, a further intuitive argument against rejecting objectively founded good and the possibility of determining whether an evaluation is true or false is worth mentioning here. I think that it is very difficult to claim that the evaluation "torturing small children is wrong" is neither true nor false and that it does not say anything about reality but is, first of all, a consequence of choice, consensus or compromise⁷.

THE MIXED MODEL

Both presented models are therefore unacceptable. However, it may be noticed that there is a possibility of constructing a mixed model, a moderate one, which links both perspectives in a consistent way. In short, it may be assumed, that there are goods which are founded objectively and goods which are founded or at least co-founded by free choice and decisions.

This solution may seem trivial but I think that it is important to realise basic options and consequences they entail. Sometimes the determination with which one of the above extreme metaaxiological solutions is defended is amazing. It can be exemplified by the resolve to reject even a theoretical possibility of determining whether something is good or not in case of at least some evaluations. Or, on the other hand, maintaining that will does not create good, and the whole perfecting function of will is exhausted in the choice of discerned good.

It has to be underlined that in the mixed model the perfecting function of will appears not only when an individual rejects what is bad and turns to good (to simplify: when he chooses between right and wrong) but also when he chooses among various possibilities of which none is wrong (to simplify: when he chooses among different goods). In this approach, which assumes the self-perfection of a person, securing negative freedom, ensuring a sphere of action which is free from intervention is important for, on the one hand, freedom in rejecting bad (choice between right and wrong) and, on the other, for the free determination of one's "own" good (choice among different goods).

⁷ In other acognitivist approaches, it would have to be assumed that this evaluation is the result of an emotional reaction, development of culture, etc.

Realisation of the fact that goods which are objectively founded and goods (co)constituted by free choices coexist, allows us to classify in a consistent theoretical perspective various law making or judicial procedures.

Objectively founded goods can serve goods that are protected by international or constitutional human rights law. This sphere should be determined by neither voting, even if it shows a consensus by a major part of society, nor compromise. The practice in democratic states confirms recognition of the existence of this sphere of goods in legal systems. The provisions that are fundamental for protection of human rights, which are usually placed in constitutions, are – in comparison with other parts of law – exceptionally well protected against the possibility of change. The arising problems are usually left for tribunals which comprise distinguished specialists (in Poland, this role is attributed to, among others, the Constitutional Tribunal). The decisions of such tribunals are not verified by voting in parliaments, and actually professionals make law in a non-democratic way also in continental legal culture.

The above remarks on the models of founding politics can also serve, at least partially, to formulate in a more precise manner the problem of whether it is allowed to determine by voting what is morally good (right) and what is bad (wrong). Taking into account the context in which this problem is formulated, it may be assumed that what is morally good is characterized, among other things, by the fact that it aims to contribute to the development of a person, which is, in principle, independent from statutory law. In this case, both types of goods – goods which are founded objectively and goods (co)constituted by free choice are morally good. In this perspective, the controversies on which procedures are to determine disputes of a given kind are not directly linked with controversies on what is a moral dispute and what is not; it is of primary importance if and to what degree decisions (co)constitute the good in question.

Even though the moderate model does not directly solve some of the problems, it allows for greater precision in their formulation. For example, the problem of the boundary between the sphere of what is objectively founded and the sphere of what is founded in decisions is more apparent. Although this boundary may be, and actually is, a matter of dispute, from the perspective of the mixed model it may be said that it is a dispute of a cognitive type and therefore to solve it, it is necessary to use procedures appropriate for cognitive disputes and not for disputes on goods which are (co)constituted by choice.

It is important to note here that both types of disputes have to be distinguished from disputes on how far positive law and the judiciary are to be engaged in protection of goods of a given type. In other words, how far they are to be engaged in the protection of moral goods? This was not a subject of my analysis.

FINAL REMARKS

The models of founding good presented above serve to highlight the interdependence between metaaxiological solutions and procedures for solving disputes, including lawmaking procedures. In the case of an objectivistic founding, the disputes are of a cognitive character; in the case of a voluntaristic founding, they do not have this character. The procedures for dealing with disputes of cognitive character cannot be based primarily on the principles of consensus and compromise while, on the contrary, in disputes about goods which are (co)founded by choices (decisions) these principles are essential. Consequently, it has to be accepted that metaaxiological solutions are primary in relation to the procedural matters. Although the presented analyses show only a small portion of the problems of foundation of law, they allow us to formulate a suggestion to conduct research not only on axiological foundations of law but also on metaaxiological assumptions – fundamental for procedural issues.

Streszczenie

Negatywna wolność czy obiektywne dobro: powracający dylemat w podstawach polityki

Autor podejmuje problem metaaksjologicznego uzasadnienia polityki rozumianej jako działania zmierzające ku porządkowaniu życia społecznego; akcent położony jest na problematykę fundamentów prawa. Podstawowe rozstrzygnięcia metaaksjologiczne stanowią odpowiedź na pytanie, dlaczego coś jest dobre, dlaczego coś jest cenne; pod-

czas gdy rozstrzygnięcia aksjologiczne odpowiadają na pytanie, co jest dobre, co jest cenne.

Prezentowane są trzy modele. W pierwszym, obiektywistycznym, uznaje się, że określenie tego, co dobre, jest rzeczą poznania; w drugim, wolnościowym – że dobro nie jest rzeczą poznania, ale woli, coś jest dobre dlatego, że jest chciane; odrzuca się przy tym tezę o poznawalności dobra i tym samym obiektywne kryterium oceny tego, które „chcienie” jest lepsze, a które gorsze. W konsekwencji, fundamentalną wartością porządku społecznego staje się wolność negatywna. Modelem trzecim jest proponowany przez autora model mieszany.

Przeprowadzona analiza wskazuje, że każdy z tych modeli prowadzi do uznania pewnego typu totalitaryzmu. Wobec modelu pierwszego trafna jest krytyka sformułowana przez Isaiaha Berlina: skoro dobro jest rzeczą poznania, a jedni ludzie są sprawniejsi poznawczo od innych, należy w pełni podporządkować się tym, którzy poznają najlepiej i którzy nie muszą pytać poddanych o ich wolę.

Przyjęcie modelu woluntarystycznego każe uznać, że nie ma obiektywnych kryteriów oceny celów wybieranych przez poszczególne jednostki i stąd wszystkie cele powinny być w równym stopniu uważane za cenne; zasadniczymi zasadami porządkowania życia społecznego jest wówczas zasada konsensu i kompromisu. Konflikty indywidualnych interesów, których rozwiązanie wymaga interwencji władzy publicznej, mogą dotyczyć wszystkich niemal przejawów życia. W konsekwencji trudno wskazać granice, poza które nie powinna sięgać aktywność państwa w rozstrzyganiu spraw dotyczących życia jednostek.

Zaproponowany zostaje model mieszany, w którym uznaje się istnienie obok siebie zarówno dóbr ugruntowanych obiektywnie, jak i dóbr (współ)konstituowanych decyzjami jednostek. Określeniu tych dóbr i rozstrzygnięciu sporów ich dotyczących służyć powinny adekwatne do nich procedury. W pierwszym wypadku procedury zmiernają do lepszego poznania tego, co dobre, w drugim dążą do ustalenia obszarów zgodności interesów i ustalenia kompromisowych rozwiązań tam, gdzie zachodzi konflikt.

Analiza ujęć modelowych pokazuje, że rozstrzygnięcia metaaksjologiczne dotyczące problemu, dlaczego coś jest dobre, mają fundamentalne znaczenie dla procedur prawotwórczych.

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