

THE CONCEPT OF FREEDOM IN THE DRAFT POLISH CONSTITUTION 1996 FROM ABSOLUTIZATION OF FREEDOM TO DENIAL OF BASIC RIGHTS

While I am writing this paper the draft constitution is proofread in the Sejm Constitutional Committee. The core solutions, with which I deal here, have been already adopted.

In analysis of legal texts the term „freedom” occurs in various meanings. In respect of legal norms in force it is possible to distinguish¹: (a) freedom to act when there is no norm prohibiting a certain action; (b) freedom to refrain from an act when there is no norm ordering a certain action; (c) the so-called bilateral freedom (indifference) of an act when there is no norm prohibiting or ordering a certain action; (d) legally protected freedom, which is a legal situation of subject A arising in respect of a norm prohibiting every or only some subjects not-A from realizing actions which interfere with some type of behaviour of subject A; legally protected freedom is a combination of freedom as indifference of A's actions and prohibition of not-A's interference; (e) freedom as a type of subjective right which can be characterized as a functional unity of legally protected freedoms, claim-rights and competencies, a unity based on the protection of a certain good which is due to a subject; freedoms regarded as human rights are most often characterized in positive law as subjective rights.

These descriptions show that in positive law freedom is defined by criteria determining which actions are ordered or prohibited. I shall later call such criteria normative criteria. In the above described meanings, freedom can be discussed in reference to the system of positive law. In this regard

¹ Cf. A. Redelbach, S. Wronkowska, Z. Ziemiński, *Zarys teorii państwa i prawa*, Warszawa 1992, p. 144 ff.

freedoms are a reality existing by virtue of the existence of a system of law and the question of stating the existence of a specific freedom and determining its content is a question for lawyers and theoreticians of law.

When drafting a new constitution a question on what is decisive for recognition of certain actions as ordered or prohibited by law comes to the fore. I shall discuss this issue in the perspective of the philosophical conception of freedom of man presupposed in the new draft constitution. Recognizing that this conception consists of many elements, I shall concentrate on the relation of action to normative criteria which are independent of the existence of positive law, and which justify law-making decisions. In the Polish debate on the draft this issue is usually referred to under the heading of „axiological foundations of the constitution”. I shall not examine the concrete content of these criteria but I shall limit my analysis to the problem of their objective foundation. I shall aim at indicating the basic consequences of accepting or rejecting the existence of objective foundations of normative criteria of human actions, the consequences thereof for the basis of a legal order and especially for the place given to human rights in this order.

Article 24 of the draft is of fundamental importance for the addressed matter. This article is placed in the second chapter concerning protection of human rights and reads as follows:

1. Everyone may do that what is not forbidden by law. No one may be forced to that what is not prescribed by law.
2. Everyone who makes use of rights and freedoms shall respect freedoms and rights of others.
3. Restrictions in the exercise of rights and freedoms may be established only by law when they are necessary in a democratic state in the interests of security of the State or public order; for the protection of the environment, public health or morals, or rights and freedoms of other persons.

The first paragraph unambiguously states that the normative criteria of man's actions are determined by laws (statutes), including the constitution. The only point of reference is therefore positive law. No reasons are indicated in this article in respect of which statutory or constitutional provisions regarding liberty of action may be established. This paragraph is analogous to the second sentence of Art. 5 of „The French Declaration of the Rights of Man and Citizen” from 1789. However, the contexts of these articles are markedly different. In the Declaration from 1789 the first sentence of Art. 5 states: „The law has the right to forbid only actions which are *injurious* to society” and the preceding article points inter alia „Liberty consists of the power to do whatever is *not injurious* to others”². The point of reference is therefore the good of an individual and society, the good which is primary to the system of law. Such ideas are not to be found in the discussed article of the draft. Furthermore, the whole draft does not contain any provision

which would point to recognition of the existence of objectively grounded normative criteria to be accounted for by the law-maker. It should be also pointed out that Article 24 does not authorize the conclusion that the draft recognizes human rights which exist independently of positive law and which should be accounted for by the law-maker when introducing provisions limiting freedom of actions of an individual. Para. 2 and 3 of this Article refer only to rights and freedoms already formulated in the constitution or statutes, and so in Para. 3 no reasons are given which are to be accounted for by the law-maker (first of all a constitutional one) who limits the liberty of action when the relevant provisions of the constitution are formulated or modified.

Moreover, Para. 2 of the quoted article stating that „Everyone who makes use of rights and freedoms shall respect freedoms and rights of others.” leads to denial of the idea of inherent rights and freedoms (birth-rights). A principle of reciprocity becomes primary to basic rights and freedoms.

In Para. 3 the emphasis put on the well-being of the state should also be noted. We find there such expressions like „necessary in a democratic state” or „in the interests of security of the State” while in the similar formulas used in international law of human rights we find respectively „necessary in a democratic society” and „in the interests of national security”³.

The provisions of Article 24 of the draft indicate two assumptions. First, it is recognized that beyond positive law man is not confronted with any firm normative criteria which would determine the manner of ordering social life. Beyond positive law all opinions referring to good and evil appear in fact on an equal footing. Secondly, it is recognized that positive law is the basis for determination of the limits of the liberty of action and basically there are no limits in narrowing the scope of this liberty, however with one reservation – the existence of the system of law is assumed and therefore the existence and functionality of the system provide unquestionable criteria for formulation of provisions.

The first assumption would not spur protests of the drafters. The conception which holds that evaluating utterances are neither true nor false (do not inform on reality) is widely accepted in Polish theory of law. Besides, it is argued that pointing to any foundations of legal order which are inde-

² Quoted after: *The Human Rights Reader*, eds. Walter Lanquer a. Barry Rubin, Temple Univ. Press: Philadelphia 1977, p. 119; emphasis added by the author.

³ Cf. *Universal Declaration of Human Rights* Art. 29, Para. 2; *International Covenant on Civil and Political Rights*, Art. 18 Para. 3, Art. 19 Para. 3, Art. 21, Art. 22 Para. 2; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 9 Para. 2, Art. 10 Para. 2, Art. 11 Para. 2.

pendent of positive law would constitute a declaration in favour of a certain world-view. Proponents of liberalism argue that preparation of a constitution requires identification of principles based on a consensus, without reflecting on the motives and reasons because of which particular individuals recognize these principles. Moreover, in the debate around the draft an argument surfaced that examination of justification of evaluations, which are to be the basis for law-making decisions, is not only expendable but even harmful as it interferes with the freedom of an individual since it questions the freedom of opinions and leads to giving legal sanction to a single world-view.

It is worth adding here that Art. 25 para. 2 of the draft confirms that all world-views meet, in respect of law making procedures, on an equal footing. It states: „No one may be discriminated in political, social or economic life on account of sex, race, national or ethnic origin, state of health, physical or psychological disability, social origin, birth, sexual orientation, language, religion or lack of a religion, opinions, property or any other reason.” This provision is similar to an anti-discrimination clause common in the international protection of human rights, nevertheless it is not such a clause. The classic anti-discrimination clause expresses a simple idea that no particular characteristic of an individual is a sufficient reason for depriving him of the rights contained in a given legal instrument – it should be stressed – it refers only to these rights⁴. Instead, the formula adopted in the draft refers not so much to the relation between individuals and basic rights, nor to the relation between individuals and law⁵, but to the position of an individual in all social relations regulated by positive law.

The second of the indicated assumptions, which refers to the lack of limits in narrowing the scope of freedom of an individual, would encounter opposition of the authors of the draft. After all, they argue, the draft offers an extensive Chapter containing human rights guarantees, there are democratic law-making procedures, the draft is founded on absolute respect for liberty of an individual.

However, argumentation which bases the guarantees of personal development of an individual on the presence in the constitution of an extensive catalogue of rights and freedoms has to be considered superficial even if this catalogue embraces basically all rights and freedoms included in the fundamental international instruments of human rights protection. The fact that

⁴ Eg. *Universal Declaration of Human Rights* Art. 2, *International Covenant on Civil and Political Rights*, Art. 2 and 26; *European Convention for the Protection of Human Rights and Fundamental Freedoms* Art. 14.

⁵ This issue is provided for in Para. 1 of this Article: „All people are equal before a law and have right to be equally treated by public authorities”.

the draft ignores the fundamental ideas which lie at the basis of the post-war protection of human rights is overlooked. The international protection of human rights is founded on the conviction that there are things that are good or evil because of who a human being is, irrespective of how they are evaluated by individuals or societies, and irrespective of the formally binding positive law. Furthermore, in the international law of human rights fundamental rights are recognized as a basis of a just legal order, and are inviolable in the sense that the interests of the community or the state do not justify actions aimed against the fundamental goods of an individual. These solutions referring to the sources of human rights and relations of these rights to law and to the state are absent from the draft.

The conception of human rights adopted in international law comprises a specific conception of freedom which is very different from the one which is present in the draft. Art. 1 of the *Universal Declaration of Human Rights* addressing the problem of freedom points simultaneously at dignity, reason and human conscience: „All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Freedom is, next to reason and conscience, one of the elements which have to be taken into account in formulation of the rules of protection of a human being, who realizes himself in his entirety only through action which is at the same time free and rational and which accounts for good of other people. A reference to reason and conscience underlines that man is not an unconstrained author of standards of his conduct but that he should take into account indications of reason and conscience. Such a formula presupposes the possibility of cognition of good by an individual and also the possibility of achieving an agreement in common realization of good. Recognition of inherent rights would have little or no practical consequence if justification of these rights were outside human cognitive abilities.

In the draft there are no provisions which would in any way point to recognition of the existence of objectively grounded normative criteria which would have to be taken into account by the law-maker. Additionally, the Chapter devoted to human rights is placed after a sizable Chapter concerning organization of the state. This arrangement supports the conclusion that the drafters perceive the state as primary to the fundamental rights.⁶

It is very significant that originally the drafters intended to introduce no article defining the aims of the state and legal order. Ultimately, following the motion of the opposition, Article 7 was accepted which reads: „The Re-

⁶ For a comprehensive analysis of the draft see: M. Piechowiak, *Projekt konstytucji RP i prawa człowieka*, „Człowiek w Kulturze” 6-7 (1995), s. 227-250.

public of Poland protects the independence and inviolability of its territory, guarantees human freedoms and rights, ensures safety of the citizens, protects national heritage and ensures protection of the environment following the principle of balanced development". The proposal made by the opposition placed protection of human rights and freedoms as the first aim of the state, in the adopted version it is just one of a few aims of the state⁷. Being aware of the history of this article it is not possible to identify protection of human rights as the primary aim of the state and it is not possible to identify fundamental rights as inviolable even if they were to be recognized as inherent. The idea of a non-instrumental treatment of a human being disappears.

I shall further argue for a general conclusion that recognition of the primacy of the state over an individual is consistent with the absolutization of freedom of an individual and that legal order based on a rejection of an objective grounding of normative criteria leads in consequence to destruction of freedom of an individual and subjection of an individual to interests of the state. Then, there is no space for inherent human rights; the constitutional guarantees of fundamental rights and freedoms are of „provisional” nature.

Defining the point of departure for the argument let us pay attention to a certain conception of the foundations of normative criteria which is commonly accepted in the contemporary Polish theory of law⁸. Namely that evaluations are regarded to be neither true nor false, that they do not tell anything about reality. From psychological point of view evaluation, in which evaluative utterances are grounded, is understood as „a mental process consisting in taking an emotional attitude towards some really existing or only imagined states of things or events, that is, approving or disapproving something”⁹. In this perspective, values are correlates of relatively constant dispositions to evaluate in a certain way; they are „intellectual, emotionally tinted pictures of certain states of things which are recognized as desirable or preferred, deserving attainment and/or protection”¹⁰. At the same time „certain states of things are not values as long as they are positively qualified by subjects performing evaluation”¹¹. Since evaluative utterances are

⁷ P. Winczorek, *Dyskusja nad podstawowymi zasadami ustroju RP*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 57 (1995), Vol. 2, p. 24.

⁸ P. Winczorek, *Aksjologiczne podstawy nowej konstytucji*, „Państwo i Prawo” 43 (1988), Vol. 12, p. 4.

⁹ M. Zieliński, Z. Ziemiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie*, Warszawa 1988, p. 40 f.

¹⁰ Winczorek, *Aksjologiczne podstawy*, p. 4.

¹¹ *Ibid.*

neither true nor false, then also expressions stating that something is a value (good) are neither true nor false and they do not inform on reality. To be consistent, within this conception one should accept that acts of genocide are in themselves neither good nor evil, they are evil only in respect of certain acts of evaluation which, however, do not inform about reality but are grounded in subjective emotional reactions. It is manifestly inconsistent with the foundations of the international protection of human rights. Nevertheless such conception allows for advocating absolute freedom of an individual in making individual choices and equality of all opinions and world-views.

Let us now look at further consequences of presupposing such a position in constructing legal order. It should be pointed out that – in the name of respect for an individual and his freedom – constitution cannot impose unshakable solutions in the respect of what is good or bad for an individual. The aim of the constitution and law is to create conditions which would allow individuals to establish common principles of co-existence. There are no reasons to favour certain aims in the constitution. Basically, all opinions on good and evil appear on an equal footing. Therefore compromise and consensus are the fundamental principles of making law. However, the system of law itself is an unquestionable good, it is a condition of the possibility of establishing principles of existence and realization of aims of individuals. Man is entirely free in actions and creation of standards of his conduct but only within positive law and only as long as he does not encounter in his way any project of action of another individual. Rights and freedoms formulated in the constitution are not excluded from the sphere of conflicts. When there is no consent between individuals, legal procedures provide solution. The result of their application depends on current configuration of interests. At the same time every dispute solved by law takes its subject outside the sphere of privacy. Moreover, an individual is free and can enjoy the afforded rights only as long as, according to the law-making procedures, he is recognized to be a subject of law or a man; since the dispute on who man is, is not a dispute on reality, but a confrontation of evaluations and subjective beliefs. The outcome of such a confrontation, with application of the procedures based on consensus and compromise, is quite uncertain.

In such a perspective if any inviolable limits of the interference of the state in the freedom of an individual appear, then the reason to recognize these limits would be not any determined good of an individual but the good (existence or functionality) of a legal system¹². At the starting point

¹² See M. Piechowiak, *W sprawie funkcjonalności i dysfunkcjonalności konstytucji. Zagadnienia filozoficzno-prawne* [On Functionality and Disfunctionality of a Constitution], „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 57 (1995), Vol. 2, p. 129-138.

the primary aim of a constitution and law is construction of a system which would allow individuals to determine the rules of co-existence in the perspective of individual choices of all possible aims. However, the aims determined by individuals may change, but the aim consisting in the existence of the system of law and the state is constant and superior. Therefore, eventually it is the state which becomes the source of the fundamental freedoms and rights, and potentially there is no sphere of private life which would not be endangered by the interference of the state and law. Adam Łopatka, one of the leading Polish specialists in the field of human rights, known in the world as one of the authors of the Convention on the Rights of the Child (1989), wrote in his article on the freedom of religion: „Freedom of conscience and religion is not given by supernatural forces, but as every human right it is recognized by the state and of the state's own will has a status of a fundamental freedom”¹³.

Assuming that normative criteria do not have an objective grounding the postulate to separate evaluations (values), which are to be a basis of law-making decisions, from their justification is understandable. It is assumed that what is normative may not be justified with the objectively existing reality. However, a rational justification may be conducted in the perspective of other normative content. Legal norm may be axiologically justified by evaluations (evaluative utterances). A question about justification of the evaluations (evaluative utterances). A question about justification of the evaluations which axiologically justify law-making decision is a question about other normative standards. Full justification will therefore consists in an indication of a possibly consistent set of evaluations referring to ordering of life, that is to indication of a world-view. If in a given case there are conflicting opinions, then, taking into account their justification, the problem has to be identified as a conflict of world-views, and therefore it cannot be solved on the basis of objective criteria. In such a perspective taking into account justification of evaluations which are the basis for decisions in the process of making law „makes almost certain that in this activity only one – predominant among law-makers – system of values will become a basis for law-making decisions”¹⁴. To avoid this consequence one has to resign from taking into account justification of values and account only for these values (read: society's evaluating inclinations) which are significant for determining

¹³ A. Łopatka, *Wolność sumienia i wyznania*, in: *Prawa człowieka. Model prawny*, ed. R. Wieruszewski, Wrocław 1991, p. 421.

¹⁴ P. Winczorek, *Uwagi o aksjologicznych aspektach działalności legislacyjnej w dziedzinie prawa publicznego (konstytucyjnego) w Polsce*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 56 (1994), Vol. 4, p. 56.

a given constitutional or legal matter. Disputes about values are not substantial since the debate refers not to an objective reality, which may be better understood through it, but to subjective emotional reactions. The question whether these reactions are right and just independent of the binding positive law is banned. Acknowledgment of relevance of this question would presuppose recognition of certain world-views as providing standards of justice and would mean unjustified favouring of those who follow these beliefs. Moreover, to take part in a public debate one would have to reveal his beliefs. A public debate on rightness of beliefs which are to be the basis for law-making decisions, would constitute an unjustified interference in individual's freedom; public argumentation in favour of the rightness of certain beliefs would have to be perceived as an attempt at indoctrination. Consistently, Art. 40 para. 4 of the draft constitution states: „No one may be compelled by public authorities to reveal his beliefs, religious convictions or religion”.

Let us compare the consequences of rejection of the objective foundations of the normative criteria of human action with the consequences which follow from the acceptance of the existence of such criteria. If evaluations are based on an objective, cognizable reality, for example on the fact that certain actions (states of things) are destructive for a human being and others objectively contribute to his personal development, then an individual takes a different position towards the state, and different postulates referring to law-making procedures are formulated. The discussion over justification for evaluations is an essential element of the process of creation of law. Moreover, rightness of certain convictions may be a subject of discussions and controversies. Independently of the functionality of the system of positive law, not all ideas referring to realization of man appear on the same footing and not all deserve such appreciation which should incline others towards a compromise and concession in favour of these positions. It is possible to justify adoption of, other than these dictated by the requirements of the system of law, limitations of consensus or compromise as law-making procedures. The state and law are not the source of fundamental rights but a means for their protection and realization. It is possible and justified to point out in the constitution the extralegal basis of the constitutional protection of human rights („inherent rights”, „rights derived from dignity” etc.) as well as the basis for modification of the constitutional catalogue of rights and freedoms. The reason for the existence of a legal order and its primary aim is the personal development of each member of society; the other tasks of the state are subordinated to it. Being aware of the historical experiences of the so-called „legal lawlessness”, it is also justified to introduce in the constitution limitations of the possibility to change some of the principles defining the foundations of legal order. The basic question which should be

answered when drafting a constitution is what the fundamental goods of a human being are and – secondly – what role law and the state play in their protection. At the same time, consensus and compromise perform a fundamental role in the sphere of what is not unjust.

To conclude it has to be said that it is not a coincidence that rejection of objectively grounded normative criteria is accompanied by recognition of the precedence of the state over an individual. Absolutization of freedom leads in consequence to rejection of the existence of limits of interference of positive law in the life of an individual. The presented analyses show as well that depending on whether existence or non-existence of objective foundations of good and evil is assumed, different requirements in respect of law-making procedures are postulated, and that these requirements contradict one another.

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