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THE LEGAL SCOPES OF LIBERTY AND THE STATE IN LIGHT OF THE UTILITARIANISM OF JOHN STUART MILL

ZAKRESY PRAWNE WOLNOŚCI I PAŃSTWA W ŚWIETLE UTYLITARYZMU JOHNA STUARTA MILLA

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Abstract

In modern democracies the liberty of the individual is ensured and protected by the state or the government. But it is well-known that restrictions on liberty are institutionalized and the individual is responsible for obeying them. The liberty of the individual and its protection is provided through restrictions. On the other hand, the legal system and the government are the institutions that threaten the liberty of the individual. Mill's thesis on individual liberty implies the primacy of it and sets out the social conditions in which it will be possible to realize and protect individual liberty. The main theme of his treatise *On Liberty* is the nature and boundaries of individual liberty, the scope of legitimate interference with individual liberty. In other words, the principle establishes a sufficient basis for the legitimate protection of the individual liberty, i.e. what is a restriction of a right, on the one hand**,** is at the same time a protection of it. An individual must be free from all forms of violence, if his/her actions do not harm others [Riley 2001, 46]. The purpose of the paper *On Liberty* is to provide one very simple principle. Main point of it is that the method of societies' relations with the individual should not be coercion and control. No matter is it a case of physical violence as a form of punishment or as a form of moral coercion by society. Power over a member of a civilized community can only be exercised for the sole purpose of preventing harm to others. Thus, the liberty principle establishes a necessary condition for legitimate violence against any individual: his/her liberty of action must be restricted by law or opinion if there is a reasonable expectation that it will harm others.

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Abstrakt

We współczesnych demokracjach wolność jednostki jest zapewniana i chroniona przez państwo lub rząd. Jednak powszechnie wiadomo, że ograniczenia wolności są zinstytucjonalizowane i jednostka jest odpowiedzialna za ich przestrzeganie. Wolność jednostki i jej ochrona jest zapewniona poprzez ograniczenia. Z drugiej strony system prawny i rząd to instytucje zagrażające wolności jednostki. Teza Milla o wolności indywidualnej implikuje jej prymat i określa warunki społeczne, w których możliwa będzie realizacja i ochrona wolności indywidualnej. Głównym tematem jego traktatu *O wolności* jest natura i granice wolności jednostki oraz zakres uzasadnionej ingerencji w wolność jednostki. Innymi słowy, zasada ta stwarza wystarczającą podstawę dla uzasadnionej ochrony wolności jednostki, czyli to, co jest ograniczeniem prawa, jest jednocześnie jego ochroną. Jednostka musi być wolna od wszelkich form przemocy, jeśli jej działania nie szkodzą innym. Celem dzieła *O wolności* jest przedstawienie jednej bardzo prostej zasady. Najważniejsze jest to, że metodą relacji społeczeństw z jednostką nie powinien być przymus i kontrola. Nie ma znaczenia, czy jest to przemoc fizyczna jako forma kary czy forma przymusu moralnego ze strony społeczeństwa. Władza nad członkiem cywilizowanej społeczności może być sprawowana wyłącznie w celu zapobiegania krzywdzie innych. Zatem zasada wolności ustanawia warunek konieczny uzasadnionej przemocy wobec jakiejkolwiek osoby: jej wolność działania musi być ograniczona przez prawo lub opinię, jeśli istnieje uzasadnione oczekiwanie, że zaszkodzi to innym.

Słowa kluczowe: wolność, swoboda, wolność negatywna, wolność indywidualna, wolność słowa, zasada krzywdy

Introduction

The purpose of this article is to demonstrate the extent to which John Stuart Mill's views on liberty enable humans to understand the legal implications of liberty. Such an opportunity is well illustrated by the example of the right to free development of the individual. This involves both the content of this right and the relevant constitutional standards that are necessary to demonstrate the potential for the right to free development of the individual. This will only happen if the full realization of this right is ensured through constitutional judicial review.

This article also analyzes the limits of interference with individual liberty proposed by John Stuart Mill; it is trying to answer the question about relationship between the intervention and the individual. The article first discusses the key concepts used by Mill in his treatise. The three concepts of liberty that Mill offers are then analyzed. The environment and conditions in which the free individual acts are discussed. The principles of the individual liberty are analyzed in the light of the harm principle. The research is based on general scientific methodology which includes analysis and synthesis, induction and deduction.

The present paper highlights the difference between an individual's physical liberty and the general, metaphysical concept of freedom. It states that in John Stuart Mill's treatise these two aspects are intertwined. This article argues that right to liberty can be absolute and indefeasible when the consequences of exercising the right will surely vary with social circumstances.

This article also deals with the question whether the enforcement of traditional moral norms are *per se* constitutional. Some experts suggest that the answer to this question is negative. Courts and scholars have often confused humans' moral traditions with their traditions of liberty and equality. The central premise is that it is for the legislature to enact morality into law, and it is for the courts to determine whether moral norms infringe upon constitutionally guaranteed liberty and equality. The difficult problem is to develop a coherent theory of liberty and equality. General liberty of action or liberty of behavior is, according to the practice of the Constitutional Court of Georgia, the right to free development of a person. It, first of all, implies a general liberty of action of an individual. In the court's view Article 12 of the Constitution of Georgia protects the liberty of a person to lead his own life at his own discretion. It implies the human right to live as one wants, can, likes.[1]

[1] Decision No. 2/4/570 of the Constitutional Court of Georgia dated August 4, 2016 in the case of Georgian citizen Nugzar Jackeli against the Parliament of Georgia, II, 9 (in Georgian).

1. The nature of liberty – negative liberty

It can be said that general liberty of action is the individual liberty, individual's liberty before dividing actions into self-regarding and other-regarding types. It is the whole liberty or undivided liberty the existence of which will always be controversial. But on the other hand, as Isaiah Berlin argues [Berlin 1969, 5-7], the minimum level of personal liberty must be maintained. In addition, Berlin gives the definition of the liberty by emphasizing its negative nature.

Whatever these principles are, natural law or natural rights, utilitarianism or the categorical imperative, the social contract or any other concept on which humans have always sought to substantiate their beliefs, liberty always means liberty – from [ibid., 11].

Isaiah Berlin also poses another essential question concerning the amount of such a minimum. The only freedom that deserves this name is to pursue one's own goodness the way you understand it. But if this is so, then is coercion justified. Mill had no doubt about that. Since justice requires that all people have a minimum of liberty, it is necessary to restrict other individuals so that this minimum of freedom is not taken away from one another. The function of the law is always to prevent any conflicts among human beings. In this respect, the function of the state is reduced to the functions of a night watchman or a traffic policeman [ibid., 13].

Mill argues that if an individual does not have freedom in a field that only concerns him, civilization will not move forward. Protecting freedom is the 'negative' goal of protection from interference, from forcing a person to live a life where he/she has no choice of goals.

Three facts should be noted regarding this position. One is that Mill mixes two different concepts. Coercion suppresses human desires and is evil in itself, but it is used to prevent greater evil. Intervention as the opposite of coercion is good in itself. There is the concept of 'negative' liberty in the classical form. The second is that a person is inclined to try to discover the truth or to develop a non-conformist, critical character. But in order to form such a character, freedom is necessary; it is also necessary for the discovery of the truth. Both positions are liberal but not identical to each other. There is a connection between them, but this

connection is empirical. No one can e.g. argue that liberty of self-expression flourishes where dogma stifles thinking [Kotter 2002, 9-10].

In addition, Mill also confuses two distinct notions. The first notion is that of liberty from unwanted interference by others (negative liberty); and the second notion is that of a certain type of character-development (individuality). For Berlin, Mill's failure to distinguish these two different conceptions is compounded by his effort to employ the second in justification of the first. In Berlin's interpretation, Mill's argument rests on the claim that individuality "can be bred only in conditions of liberty" [Mill 1963, 209].

2. The notion of an individual and the concepts of individual liberty in Mill

Mill argues that individual's liberty is absolute. But one should take into consideration that it is about a peculiar individual who has the ability to self-development or self-improvement. If an individual does not have this ability, then he/she is not entitled to liberty even if their actions do not harm others [Riley 2001, 51].

Mill's principle of liberty should be applied to a self-developing individual who has the ability to express his or her own thoughts. Mill believes that control and prohibition produce a greater evil than the evil that is prevented.

As to the question if there is any general principle or rule that determines what is the criterion for interfering in a law or protected area by law or public opinion, an answer is that there is no such a thing. The only exception according to Mill is a religious belief whose absolute basis is conscience. The believer is accountable in his faith only to his own conscience or to the Creator. Freedom of Conscience is a "natural and absolute right" [ibid., 45].

The reason for this is that from the theoretical perspective only an individual can be free. Naturally Mill's individual is not just a person taken separately, but he/she is a peculiar self-developing individual [Spitz 1962, 181, 212, 221].

An individual is one who has the ability to distinguish himself or herself from traditions, customs, or culture, and self-determine their desires. Both in general theoretical and legal terms, the nature and limits of the violence or power that society inflicts on the individual are of great interest.

Mill's essay contains a number of arguments that recommend a particular life a free person ought to lead. Here Mill appears to endorse a particular type of character or individuality and to denigrate a life led in accordance with custom. The puzzle for any interpreter of Mill's liberalism is to reconcile Mill's defense of negative freedom with his more specific advocacy of individuality. It is self-evident that concepts of individual, liberty, restriction, harm are of great importance, because the structure of the Mill's argument is based on them [Mill 1963, 49].

This is the central point of the Mill's theory because its thesis is an attempt to explore the limits that can be imposed by society on the freedom of the individual; the individual who wants to act according to his/her will. Interestingly, Mill refers to limitations of individual's freedom as restrictions imposed by a legal system.

3. Liberty of expression

Mill argues that liberty of expression and publication, is subjected to a different principle, since such behavior applies to other people [Riley 2001, 126].

Doing as one likes has its own limits: not disturb one's neighbors, not harm him/her even if they think such behavior is stupid or wrong. But on the other hand, here is a difference between liberty of thought and expression: opinion never harms others; it is always self-regarding. Social regulation of thought is unthinkable, while in special cases control of expression is justified. But liberty belongs to both and expression should always be considered as if it is self-regarding [ibid., 49].

It must be noted that this 'as if' is likely to be considered as confusing the two spheres – real and imaginative, that might give rise to some difficulties while applying to the juridical field. The following words of C.L. Ten confirm the correctness of this opinion: "Ever since On Liberty was published, the commonest line of criticism of his argument has been that it

presupposes what does not exist-a domain of purely self-regarding actions that affect only the agent and his agreeing partners and no one else" [Ten 2008, I, 213].

Mill argues that the individual is free to express his or her opinion, whether it is popular or unpopular. But as far as its embodiment is concerned, the individual is limited: he/she is free to express their own views insofar as they do not contain the danger of harming others [Merritt 1986, 237-39].

According to Mill, liberty of expression is the protection of the individual from the tyranny of the majority. The suppression of the discussion is based on the assumption of infallibility. But Mill thinks that it is illegitimate because humans are not infallible [Ten 2008, 99]. The liberty of thought is necessary to eliminate errors and to have a holistic understanding of the grounds which it is based on [Larvor 2006, 3].

Scholars point out how important John Stuart Mill's theory of liberty is e.g. for the regulation of hate speech and hate behavior. One of the main issues is to find out where the line goes between on the one hand free thought and expression as such, and on the other hand, between word and action; how does government regulate speech and what is the difference between speech and behavior; whether it is possible the regulation of speech. Mill discussed the issue of speech regulation in great detail, but said very little about speech-related conduct [Hylton 1996, 42].

Mill believes this is crucial because humans do not know what the truth is, they are working with hypotheses about what the truth might be. Humans consider the hypothesis to be true only because they do not have proof of its falsity [Riley 2001, 172, 202].

4. Liberty of carrying out one's own plan of life and liberty of association

The second concept of liberty is "freedom of taste and aspiration": to make one's own plan of life and to act according to it. This liberty is closely related to freedom of thought and expression. Mill seeks to delineate the boundaries within which the individual is free to legitimately

exercise his or her views, without restrictions on the part of state or stigmatization on the part of society [Mavrokonstantis 2008-2009, 94].

The third concept is liberty of association. On the basis of the concept of liberty of actions, Mill argues that individuals should enjoy the "liberty to unite, for any purpose not involving harm to others [ibid., 96].

Therefore according to Mill, individuals should enjoy the liberty to freely form or join different interest groups. However, the purpose of such groups should not involve harm to others. Within the realm of legitimacy government legislation against lawful groups should be limited [ibid., 98].

5. The harm principle

The harm principle as a practical framework for the application of the principle of liberty. The individual is free within the framework drawn on the principle of harm**.** The harm principle limits the powers of authority for the purpose of preserving individual liberty, based upon the premise that an individual is allowed to pursue his or her own course of action in order to be a happier person [Altman 2003].

To avoid harming others individual's action must maintain its self-regarding status. The idea here is that when actions harm others, it ceases to be evaluatively self-regarding even while it remains descriptively self-regarding. Mill recognizes cases where actions lose their self – regarding status [Morgan 2022, 149].

Some authors argue that, Mill's harm principle undergoes a significant qualification in the scope of its application in the last chapter because of the dual argumentative strategy [Dworkin 1982, 149-51].

This has been overlooked by Mill's American interpreters who use the harm principle to justify the judicial activism of the American Supreme Court [Donohue 2007, 196].

Mill discusses the harm principle, not in the legal sense, but in the moral one. According to him harm must be eliminated through education. Mill's views on reprobate and predator are noteworthy in this regard [ibid., 204].

It is about a new situation different from John Stuart Mill: "The reasoned apprehension of harm." A Canadian court e.g. denied the argument

that the principle of harm is an absolute principle of law, but acknowledged that "it is an important state interest [Huhn 1989, 133].

Thus the liberty principle tells us that it can never be right to limit liberty when "harm to others" cannot thereby be prevented; but this formulation is ambiguous. It can be said that ambiguity is main characteristic of Mill's thought because the subject itself of his thinking is ambiguous [Binkley, 1938, 564-65].

6. Liberty principle in the practice of the Georgian Constitutional Court

It is of particular interest the relationship between the right to personal development and the right to privacy. This issue comes to the fore during the systematic discussion of the right to free development of the individual. A standard for the protection of these rights has been established in Georgian law. The right to liberty of personal development is protected by the Article 12 of the Constitution of Georgia, and the liberty of personal life is guaranteed by the Article 15 [Lomtatidze, Khantadze, and Zedelashvili 2018, 15].

Thus, according to the Constitution of Georgia, personal development is not an aspect of personal life as it is in Article 8 of the European Convention on Human Rights.[2] General liberty of action under this article is excluded from the scope of protection. According to the Constitution of Georgia, general liberty of action is included in the field of protection.

But the problem becomes more complicated when jurists are faced with difficulties such as the interference with the right, testing the interference with the right, and setting the standard for interference with the right [Eremadze 2020, 134].

The Constitutional Court of Georgia uses the uniformly strict standard of testing of proportionality of interference with the law. The German Federal Constitutional Court uses tests of different strictness of interference with the right to personal development: if the problem belongs to the realm

[2] Constitution of Georgia, Parliament of the Republic of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995 [hereinafter: Constitution of Georgia], Article 8.

of personal life, a strict test is applied and interference with the absolutely protected core of the right to development is not allowed.

The Constitutional Court of Georgia simultaneously uses the widely protected area of law and the standard of strict scrutiny. Scholars believe that the practice of the Constitutional Court of Georgia has continued to develop in such a way that it may face the problem of self-restraint [ibid.]. Article 12 of the Constitution of Georgia, the right to free development of the person. Everyone has the right to develop their own personality. This article of the Constitution of Georgia stipulates the liberty of a person to lead his/her own life at his/her own discretion.

It is known that this is the shortest article in the Constitution of Georgia, which does not provide a guidance on the content of the right or the values that are implied in the concept of "free development of the person." In order to determine this content, the relevant practice of the Constitutional Court of Georgia and the theory created by its practice or the theory formed by this practice should be studied.[3]

According to a record in a decision of the Constitutional Court of Georgia liberty there exist in both the private and public spheres. This record significantly expands the range of rights protected and unequivocally indicates the equal protection of human activity; it does not matter whether the field of activity is public or private, if such activity affects the individual, it contributes to his free development.[4]

From the above excerpt, the words: "Freedom of will and action of a person in both private and public spheres" are noteworthy. If we put these words in Mill's terms we get the following statement: Liberty of will and action of a person both in the self-regarding and other-regarding spheres. From a Mill's point of view, liberty of action would be a problem here: In the public sphere, because free action may cause harm to others,

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[3] Decision N2/1/536 of the Constitutional Court of Georgia dated February 4, 2014 in the case of Georgian citizens – Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze against the Minister of Labor, Health and Social Protection of Georgia, II, 57 (In Georgian).

[4] Decision No. 2/4/570 of the Constitutional Court of Georgia dated August 4, 2016 in the case of Georgian citizen Nugzar Jackeli against the Parliament of Georgia, II, 9 (In Georgian).

not only liberty of action, but even freedom of expression poses a risk of harm to others.

One should remember that Mill's scheme e.g. regarding liberty of expression is as follows: liberty of thought-liberty of expression-public sphere. Even the expression for Mill contains the danger of harming action.

The position of the Constitutional Court of Georgia, expressed in the above decision, seems to be dictated by the need to expand the area protected by the right to personal development. This situation can also be considered as a continuation of the tendency of the Constitutional Court of Georgia to act as a positive legislator [Gegenava 2017, 88, 93].

This decision of the court also can be read as the definition and application of the concept of positive liberty by this court.

Conclusion

The division of action into self-regarding and other-regarding types is very vague. The main problem here is the separation of the personal sphere, setting its exact boundaries, as self-directed actions are carried out in this sphere.

Liberty principle, the harm principle and the concept of legitimacy are purely subjective phenomena, rendering impossible any attempt to formulate an explicit framework which would enable society to practically implement the harm principle. This principle is a context-dependent standard and far from being universal. Thus Mill's thesis fails to provide a useful guide to policy regarding legitimate interference with the individual, as it is inherently inconsistent. The content of the concept of harm varies with different moral outlooks. The central premise is that it is for the legislature to enact morality into law, and it is for the courts to determine whether moral norms infringe upon constitutionally guaranteed liberty and equality.

Thus moral principles are not per se constitutional i.e. cannot be enforced by law. This is especially clear through analysis the right to free personal development of the person and the right to personal life as well provided in light of the theory of practice of the Constitutional Court of Georgia.

There is provided no guidance in Constitution of Georgia on the content of the right or the values that are implied in the concept of "free development of the person." In order to determine this content, the relevant practice of the Constitutional Court of Georgia and the theory created by its practice or the theory formed by this practice should be studied.

The position of the Constitutional Court of Georgia, expressed in some decisions, seems to be conditioned by the tendency to expand the area protected by the right to personal development. This situation can also be considered as a continuation of the tendency of the Constitutional Court of Georgia to act as a positive legislator. Some decisions of the court can also be read as the definition and application of the concept of positive liberty by this court.

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