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MEASURING BIOPOLITICAL SECURITY

Introduction

We can observe a rapid expansion of medicine and biotechnology since 1970s. It causes a social phenomenon called medicalisation² which means that the incessantly increasing number of life issues are embedded into and described by the terms of medical practices. In general, such issues are birth, life, dying and death. Being more precise however we shall enumerate even such detailed matters as plastic surgeries, organ donations and transplantations, cognitive enhancements, abortion, surrogacy, euthanasia and so on. Taking into account that these issues concern our deep moral or even religious beliefs, they are contentious by nature thus cause disagreements, wrangles and eventually conflicts. Recent decades show us that there are cases in which these conflicts are very intense including court cases (e.g. the most famous abortion case *Roe v. Wade*³) or even social protests (e.g. pro-abortion protest in Poland in 2016) and the use of force (e.g. a Christian terrorist attacks against an abortion clinics in the United States including 42 bomb attacks, 100 acid attacks, 37 murders, etc. – according to the National Abortion Federation there were 7 214 severe and 234 308 minor incidents in 1977-2015 in total⁴). Being so contentious and trouble-causing the cases became the topic of interest of political entities including non-governmental organisations, the Church, individual politicians, political parties, national governments and eventually international organisations. Thus, the life issues became firstly ethical (birth of bioethics) and then, secondly, the bioethical cases became political (birth of biopolitics).

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² Ivan Illich, *Medical Nemesis* (New York: Pantheon Books Press, 1976).

³ See Ronald Dworkin, *Life's Dominion. An Argument about Abortion and Euthanasia* (London: HarperCollinsPublishers Press, 1993).

⁴ National Abortion Federation, "2015 Violence and Disruption Statistics. A Dramatic Escalation in Hate Speech, Threats, and Violence", retrieved 12.09.2016, <http://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf>.

In this article I examine the way an international organisation deals with biopolitical issues asking specifically is it able to assure safety for the citizens of its member countries. Hence my research subject is biopolitical security scrutinised on the example of regulations proposed by the Council of Europe. My aim here however is not to make a legal analysis of them but to propose a method of measuring the level of CoE's biopolitical security arrangement focusing solely on the character of the regulations. Thus this study is limited and requires further research, but it gives a basic idea on the use of proposed method. To present it I verify the following hypothesis: *The Council of Europe's regulations do not guarantee the biopolitical security for the citizens of its member countries which results not from the sound of the regulations but from the type of solutions proposed by this organisation.* To verify it I have analysed the CoE's *Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* and the chosen body literature of the subject on the discursive changes in the contemporary politics and law. For consistency purposes between the hypothesis, used theory and analysed sources I have taken the discursive approach, used the Weberian concept of ideal-types and mingled both content analysis and discursive analysis methods. The results prove that the hypothesis is false which opposes the postmodern claims that modern law and political regulations are merely a fiction⁵.

Rules, Principles and Political Requirements

The starting point of my theoretical considerations is a distinction proposed by Ronald Dworkin. The author proposed to divide legal provisions into rules, principles and political requirements⁶. The difference between them is in major part logical and considers the extent of their application⁷.

Rules are applied according to the "all or nothing" rule. In other words, they refer to the strictly defined set of possible events which cause, if they happen, that the corresponding rule (or rules) is (or are) applied. Hence rules cannot be exceeded or abandoned, and violating them results in sanctions. So if any political organisation wants to use rules as a basic type of legal provisions, its members have to foresee the possible scenarios and limit the unwanted course of actions. This is why rules are negative and restrictive.

Principles, on the contrary, may or may not be applied. They then do not serve to make restrictions (in a strict sense) but to point out an 'argumentative direction'. In other words, they are a 'theoretical basis' for conceiving rules. Therefore, principles are naturally more general and flexible than rules. Presuming that there is

⁵ See Michel Foucault, *Discipline and Punish. The Birth of the Prison* (London: Penguin Books Press, 1991); see also Michał Podniewski, *Prawda i władza. Myśl Michela Foucaulta w latach 1956-1977* (Cracov: Towarzystwo Autorów i Wydawców Prac Naukowych UNIVERSITAS, 2012).

⁶ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) 14-80.

⁷ Maciej Dybowski, „Ronalda Dworkina koncepcja zasad prawa”, *Ruch prawniczy, ekonomiczny i socjologiczny* 3 (2011): 99-115.

a situation which was not predicted thus not regulated and rule-framed, settling the case is possible only through the reference to principles. A dilly of such a situation is an abortion case described by Dworkin as follows: “If, as I have elsewhere argued, an early foetus can have no interests of its own, then the argument that abortion is wrong because it is against someone’s interests is indefensible. But it nevertheless makes sense to believe, as a great many people do, that abortion is always morally problematic, and at least in some cases morally wrong, because it offends an intrinsic or detached value – the “sanctity” of human life in any form”⁸. As we can conclude from the given example, basing on principles does not guarantee an immediate or even reasonably fast settlement of a case because, firstly, a case may require a reference to more than one principle and they may be contradictory, and secondly, one and the very same principle may be variously interpreted hence leading to qualitatively different solutions. Logically however principles, similarly to rules, have a negative nature, meaning that they eventually limit the number of possible course of actions.

The third type of legal provisions are **political requirements**. Dworkin wrote that this is a kind of norms which point out aims to achieve⁹. It is usually a progress to make in the scope of some political, economic or social issue. Therefore the political requirements are positive, they aim to stimulate actions though on the other hand they are some way illusive or deceptive because there are no sanctions for their partial fulfilment or even abandoning them. There is no surprise though because while rules and principles have more or less specifically defined an extent of their application, the political requirements have these extents so broad that it is impossible to measure exactly what part of them have been completed, or even whether they have been fulfilled at all.

Rules, Principles and Political Requirements in Biopolitics

Neil MacCormick argued that a thorough formalisation of Dworkin’s distinction to rules, principles and political requirements is the biggest weakness of his theory because by doing such, Dworkin fell into a trap of reductionism, meaning of he reduced the entire category of politics to the political requirements (aims)¹⁰. According to MacCormick such a simplification is unjustified because in his opinion politics, and biopolitics specifically, is not just a set of pragmatic solutions. It actually needs moral theories – or at least methods of rational moral reasoning – which could be used to assess which actions are right or wrong¹¹. We can agree with MacCormick but we have to be aware of few things. Firstly, there is a following problem: which moral theory shall we choose as the official one and why? Secondly, using a moral theory for political reasons brings ideological bias. Thirdly, the

⁸ Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000), 428.

⁹ Dworkin, *Taking*, 14-80.

¹⁰ Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 2003), 261.

¹¹ MacCormick, *Legal*, 261.

author's idea is normative, meaning of it is a course of action desired by him. The most useful part of MacCormick's concept is an observation that despite some difficulties political actions justified by the moral theories guarantee us more safety than actions justified by the political requirements proposed by an institution including state or international organisation. That is because morally justified actions are not aimed to regulate or optimise indicators on the population level. Thus they are not quantitative but qualitative, done to achieve freely understood individual or common good. A dilly here is once again an abortion case. Let us assume that the ruling institution conceived (1) a political requirement to maintain the population size therefore it funded and advised abortion as a common practice or (2) a political requirement to increase the population size thus banned abortion and oppose it to another hypothetical situation in which the ruling institution (3) allowed abortion in liberal society justifying the decision by a principle of autonomy or (4) banned abortion in conservative country using a principle of life sanctity as a moral background. In each of these cases abortion will surely remain a highly contentious issue but the point is that in cases (1) and (2) the settlement serves the ruling while in cases (3) and (4) it serves the ruled. Therefore, if biopolitical security means assuring safety for the ruled, a natural conclusion is that morally justified solutions are more efficient because they generate lower probability to violate an individual's autonomy. Such a conclusion can be strengthened by theoretical considerations of Michel Foucault whose research on the history of methods of ruling stresses exactly the same thing as Dworkin's phenomenon of the political requirements which is creating positive instead of negative legal provisions. Although Foucault focused mainly on the political economy of the phenomenon, his research clearly indicates that the political requirements are sheer *simulations* of the desirable state of affairs¹². Therefore they are ideologised and inefficient in assuring any kind of safety including the biopolitical one.

Projective and Legalistic Types of Legal Solutions

Analysing the features of legal provisions we can observe that their kinds are logically opposite¹³. Thus we obtain a basis for creating two ideal-types¹⁴ of solutions aimed at assuring biopolitical security. On the one hand we have a legalistic type, based on negative law, i.e. limiting rules and principles justified by moral theories; on the other we have its falsification – a projective type, based on positive (simulative) law, i.e. norms justified by the political requirements. One can observe that the ideological bias can occur in both types but the difference is that in the case of the legalistic type it serves the ruled while in the case of the projective type it serves the interests of ruling. The catalogue of ideal-types' significance features can

¹² Podniesiński, *Prawda*, 253-267.

¹³ They are opposite solely logically because in reality both rules and political requirements can function at the same time.

¹⁴ In Max Weber's understanding. See Tore Lindbekk, "The Weberian Ideal-type: Development and Continuities", *Acta Sociologica* 35 (1992): 285-297.

be broadened – we can also distinguish the antinomic comprehension of secured object, categories of justice and citizenship but in this paper I put emphasis solely on the distinction between rules, principles and political requirements showing the way of measuring them in the context of biopolitical security. It is impossible though without prior establishment of analytical criteria of assignment a legal provision to either of the given types. For example: is a provision ‘State’s security should be protected while maintaining a preference for individual rights’ rule, principle or a projective norm? MacCormick would argue that according to Dworkin’s distinction the provision is a flagship example of political requirement though not because of the occurrence of word ‘should’ but due to its non-distributive character¹⁵. I argue however that much more convincing criterion is a subject concerned by a provision. Whenever this subject is a political entity (like a state in the given example) we can boldly assume that the provision is a projective norm.

Empirical Analysis

In the empirical part of the study I analyse the main Council of Europe’s *Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* whose bases are also adapted by the European Union. The convention has been enacted in 1997 and has two parts: a preamble and fourteen chapters which contain legal provisions: chapter 1 – general provisions, chapters 2-3 – patient autonomy and informed consent, chapters 4-5 – genetic and human embryo research, chapters 6-7 – organ donation and commerce, chapter 8 – sanctions, chapter 9 – relations of the convention with other documents, chapter 10-14 – legal framework. For the purpose of this study I have analysed chapters 1-7 because only these regard biopolitical issues while the remainder refers to the legal context of convention’s functioning.

After the analysis of the document we can observe that the Council of Europe puts an emphasis on protecting values of identity, individual’s integrity, equal redistribution and access to healthcare services, respect for autonomy and dignity, and fundamental freedoms – all of them justified by a moral principle of primacy of the human being’s good over the social or scientific interests. The convention covers six biopolitical issues such as patient autonomy, informed consent, genetic and human embryo research, and organ commerce and donation. During the analysis I was able to distinguish 20 rules, 14 principles and 1 projective norm. Taking into account the fundamental values protected by the convention (such as dignity or integrity of the human body) we can presume that the rules (e.g. “The creation of human embryos for research purposes is prohibited”¹⁶) were justified by Christian

¹⁵ MacCormick, *Legal*, 261.

¹⁶ The Council of Europe, “Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine”, retrieved 14.09.2016, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cf98>.

theory of morality. Such an assumption is consistent with works of other authors¹⁷ (on other European organisations) and also it seems to be valid because none of the rules was not inconsistent with Christian teachings. Considering that Christian values are the only common values to all European countries, this moral theory seems to best fit the territory. Also, the rules in the convention are subjective rights, i.e. they can be a legal basis for claiming individual's right in court. Henceforth I argue that they belong to the legalistic type of biopolitical solutions. The similar thing can be said about principles present in the convention. For instance, a provision "Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo"¹⁸ protects the integral existence of embryo which is characteristic to Christian morality – non-Christian liberals and libertarians perceive an embryo as a property¹⁹. Interestingly and oppositely to postmodern claims that the entire law transformed into the projective type, there is only one projective norm in the convention's part on biopolitical issues. It sounds "Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention"²⁰. One can say that this is a provision that can change the whole situation because due to it the convention does not strictly oblige its parties to mandatory introducing its rules and principles. It only advises their introduction. However if a member country ratified the convention, an individual can claim its rights in the European Court of Human Rights on the basis of the convention's provisions and expect a positive result due to the sound of the rules and principles.

On the basis of conducted analysis we can recognise a conclusion that the Council of Europe does assure biopolitical security for the citizens of its member countries since 1996. Thus the research hypothesis is false.

Conclusions

Concluding the study I would like to point out several things. First, the obtained results bring the postmodern claim that there is a qualitative change of the form of political and legal proposals up for a further discussion. As we can see not every international organisation uses the projective type of solutions. Second, due to the initial stage of this research only one document was analysed. Therefore the generalisations may be not entirely valid though they indicate to keep scepticism

¹⁷ Emmanuel Agius, "The Institutionalisation of Bioethics in the European Union", retrieved 14.09.2016, <http://www.centessimusannus.org/media/2zahv1353926899.pdf>.

¹⁸ The Council of Europe, "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine", retrieved 14.09.2016, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cf98>.

¹⁹ James Hughes, *Citizen Cyborg. Why Democratic Societies Must Respond to the Redesigned Human of the Future* (Cambridge: Westview Press, 2004), 224.

²⁰ The Council of Europe, "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine", retrieved 14.09.2016, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cf98>.

towards theoretical mainstream. Also, more research is needed to confirm this study's results and assumptions. Third, this research considered only the type of proposed biopolitical solutions, not their daily functioning. I resigned from the latter due to methodological difficulties of measuring something's exact efficiency. Therefore, because of the mentioned flaws of the study, further research is required, especially such which would involve more perspectives and sources, more advanced and expanded methodology and would take into consideration the other aforementioned variables such as the category of citizenship, the category of justice and the antinomic comprehension of secured object.

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Abstract

In this study I examine the way an international organisation deals with biopolitical issues asking specifically is it able to assure safety for the citizens of its member countries. The research subject is biopolitical security scrutinised on the example of regulations proposed by the Council of Europe. The aim of the study however is not to make a legal analysis of them but to propose a method of measuring the level of CoE's biopolitical security arrangement focusing solely on the character of the regulations. Thus the research hypothesis is: *The Council of Europe's regulations do not guarantee the biopolitical security for the citizens of its member countries which results not from the sound of the regulations but from the type of solutions proposed by this organisation.* To verify it I have analysed the CoE's *Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* and chosen body literature of the subject on the discursive changes in the contemporary politics and law. For consistency purposes between the hypothesis, used theory and analysed sources I have taken the discursive approach, used the Weberian concept of ideal-types and connected both content analysis and discursive analysis methods. The results prove that the hypothesis is false which opposes the postmodern claims that contemporary law and political regulations are simulative.

Mierzenie bezpieczeństwa biopolitycznego

W poniższym studium badam jak organizacja międzynarodowa ustosunkowuje się do kwestii biopolitycznych, zwracając szczególną uwagę na kwestię zapewniania bezpieczeństwa obywatelom państw członkowskich. Tym samym, przedmiotem badania jest bezpieczeństwo biopolityczne analizowane w oparciu o przykład regulacji proponowanych przez Radę Europy. Celem badawczym nie jest jednak przeprowadzenie analizy prawnej tych regulacji, a zaproponowanie sposobu pomiaru poziomu bezpieczeństwa biopolitycznego zapewnianego przez tę instytucję, skupiając się wyłącznie na typie analizowanych zapisów. W związku z tym hipoteza badawcza brzmi następująco: *Regulacje proponowane przez Radę Europy nie gwarantują bezpieczeństwa biopolitycznego obywatelom państw członkowskich co wynika nie tyle z samej ich treści, co z typu rozwiązań proponowanych przez tę organizację.* Celem zweryfikowania podanej hipotezy przeanalizowałem *Konwencję o ochronie praw człowieka i godności istoty ludzkiej wobec zastosowań biologii i medycyny: Konwencja o prawach człowieka i biomedycynie* i wybraną literaturę przedmiotu dotyczącą dyskursywnych zmian we współczesnej polityce oraz prawie. Aby zachować spójność między zweryfikowaną hipotezą, wykorzystywaną teorią oraz analizowanymi źródłami, przyjąłem perspektywę dyskursywną, wykorzystałem neo-Weberowską koncepcję typów idealnych oraz metody: analizy zawartości i dyskursywną. Wyniki falsyfikują hipotezę, co przeczy koncepcjom postmodernistycznym, zgodnie z którymi współczesne regulacje prawne i polityczne mają charakter symulacyjny.

Keywords

Biopolitics, biopolitical security, ideal-types, Council of Europe, legalistic and projective type

Słowa kluczowe

Biopolityka, bezpieczeństwo biopolityczne, typy idealne, Rada Europy, typ legalistyczny i projekcyjny

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