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Freedom's protection and disciplinary proceedings in police formations in the light of Isaiah Berlin's concept of liberty

Introduction

The aim of this paper is an attempt to analyze the issue of liberty in terms of Isaiah Berlin's concept. Accordingly to Berlin's theory, there are two main aspects of liberty¹: the negative one (freedom from...), and the positive one (freedom to...). The aim of the presented analysis is to scrutinize the implementation of the aforementioned concept in the light of the disciplinary proceedings against police officers. The concern will also be presented with the support of the rules governing the disciplinary proceedings in question. Among the analyzed issues there will be freedom from degrading or inhuman treatment, the freedom from being punished when doubts about guilt remain, freedom from unjustified punishment as part of the principle of an appropriate disciplinary reaction, freedom to be found innocent until a disciplinary decision is issued, freedom to choose the method of defense by an accused.

Positive and negative liberty by Isaiah Berlin

Firstly, it is worth briefly reminding Berlin's concept of liberty.² The theorist determines two aspects of liberty – negative freedom and positive freedom. In the first case liberty seems to be a mere *absence* of something (i.e. of obstacles, barriers, constraints, or interference from others); in the second case, it seems to require the *presence* of something (i.e. of control, self-mastery, self-determination, or self-realization).³ The negative freedom covers both intentional (and therefore compulsion) and unintentional tampering. Referring to the views of Berlin, the

¹ The terms 'liberty' and 'freedom' are normally used interchangeably by political and social philosophers. See: I. Carter, *Positive and Negative Liberty*, [in:] *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition), ed. E.N. Zalta, forthcoming URL: plato.stanford.edu/archives/win2021/entries/liberty-positive-negative/ [access on: 15.12.2021].

² See: I. Berlin, *Four Essays on Liberty*, Oxford 1969, *passim*.

³ *Ibidem*.

positive dimension of freedom manifests itself in deciding about her/his fate, taking her/his own life into her/his own hands. This dimension of freedom relates to the possibilities that are shared by the individual and what is the right he/she has at his/her disposal. Berlin pointed out that freedom emphasizes human dignity.⁴ Since a person is given the possibility to run his own life freely, he/she is thus lifted.

Freedom's protection and the disciplinary proceedings – an outline

It is necessary here to clarify exactly what is meant by disciplinary proceedings⁵ in police formations and how they can be described. In the given paper the focus is solely on disciplinary procedures of police formations, i.e., structures whose activities are aimed at protecting the safety of people, the state, and maintaining public order. They include the Police,⁶ the Central Anticorruption Bureau,⁷ the Internal Security Agency and the Intelligence Agency,⁸ the Border Guard,⁹ and the State Protection Service.¹⁰ The factor connecting all the indicated services is the fact that they are subordinate to the minister competent in internal affairs. The area of disciplinary procedural law deals with the analysis of issues related to disciplinary proceedings. I assumed that procedural disciplinary law *sensu largo* is a set of norms regulating legal relations of a formal nature in the organization and course of proceedings concerning the application of negative consequences in the form of professional sanctions for violation of professional obligations (disciplinary offenses) resulting from the performance of a public office.¹¹ Disciplinary proceedings refer to the set of statutory and sub-statutory norms regulating the disciplinary liability of these professional groups.

Here raises a problem: what manifestations of the protection of freedom can be found in the analysis of the regulations governing disciplinary proceedings against police officers? This topic can best be treated under two headings: negative freedoms and positive freedoms. To start the analysis, I will point of the so-called negative freedoms – freedoms from. There are several negative liberties that can interfere with freedom's protection. These are the freedom

⁴ See more: R.A. Kocis, *Reason, Development, and the Conflicts of Human Ends: Sir Isaiah Berlin's Vision of Politics*, "The American Political Science Review" 1980, Vol. 74, No. 1, *passim*.

⁵ Generally on the disciplinary liability see more: R. Giętkowski, *Odpowiedzialność dyscyplinarna w prawie polskim*, Gdańsk 2013, *passim*.

⁶ Act of 6 April 1990 on the Police, Dz.U. 2021.1882.

⁷ Act of 9 June 2006 on the Central Anticorruption Bureau, Dz.U. 2021.1671.

⁸ Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency, Dz.U. 2022. 557.

⁹ Act of 12th October 1990 on the Border Guard, Dz.U. 2021.1486.

¹⁰ Act of 8th December 2017 on the State Protection Service, Dz.U. 2021. 575.

¹¹ See more: B. Baran, *Postępowania dyscyplinarne w sprawach funkcjonariuszy formacji policyjnych. Modele i zasady*, Warszawa 2021, pp. 22 et seq.

from degrading or inhuman treatment, the freedom from unjustified punishment, and the freedom from being punished when doubts about guilt remain.

Firstly, one of the most fundamental and non-negotiable freedoms regarding disciplinary proceedings is freedom from degrading or inhuman treatment. This freedom is inextricably linked with the principle of procedural fairness. The inherent attribute of this principle is humanitarianism in the treatment of persons participating in the proceedings. Its essence in repressive procedures and these are undoubtedly disciplinary proceedings, comes down to the obligation to respect people taking part in them, regardless of their role. On this background, it is worth recalling L. Fuller's view¹² that the basic assumption underlying any legal system is the deliberate submission of human behavior to rules. This should take place while respecting the procedural rules, as they lead to respect for the substantive rule of law (external morality of law).¹³ This means an imperative directive, according to which all actions taken by procedural organs must not exceed the necessary necessity to violate the dignity and other personal rights (e.g., body integrity) of the participants to the proceedings.¹⁴

Disciplinary proceedings were defined as repressive.¹⁵ They are inherently aimed at prosecuting and punishing a person guilty of a disciplinary offense. In this aspect, therefore, there is a similarity to criminal proceedings, which have identical goals, only that they are directed at a generically different types of prohibited acts, such as crimes and offenses. Therefore, an essential element of disciplinary proceedings is the threat of a disciplinary sanction or a disciplinary penalty. Hence, freedom from unjustified punishment is prominent. Freedom from unjustified punishment is a part of the principle of an appropriate disciplinary reaction. The principle of an appropriate reaction in disciplinary proceedings is a directive, according to which every officer of a police formation who is guilty of a disciplinary offense should bear the responsibility for it, and only as much as he / she deserves under the disciplinary law.¹⁶ Its essence, therefore, is not to punish the innocent and punish the guilty. It is possible to identify several manifestations of freedom from unjustified punishment in disciplinary proceedings. A manifestation of freedom from unjustified punishment is acquittal decisions.

¹² See: L.L. Fuller, *The Forms and Limits of Adjudication*, "Harvard Law Review" 1978/92, pp. 364 et seq.

¹³ See: idem, *Moralność prawa*, Warszawa 2004, p. XV.

¹⁴ See more: B. Baran, *Postępowania dyscyplinarne w sprawach funkcjonariuszy formacji...*, pp. 124 et seq.

¹⁵ Ibidem, p. 55. See also: D. Bek et al., *Odpowiedzialność dyscyplinarna w systemie polskiego prawa represyjnego*, Warszawa 2019, *passim*.

¹⁶ B. Baran, *Postępowania dyscyplinarne w sprawach funkcjonariuszy formacji...*, p. 132.

Their essence is to free the accused officer of the police formation to the full extent from the charges against him relating to the commission of an offense. A judgment of acquittal is a confirmation of the lack of perpetration of a disciplinary offense, although it should be borne in mind that it may be issued due to the lack of sufficient evidence against the accused officer. The other mechanism relating to freedom from unjustified punishment is decisions on the discontinuation of disciplinary proceedings. Within the framework of freedom from unjustified punishment, no guilty person must bear more responsibility than he deserves. Hence, within the disciplinary jurisprudence, it is necessary to consider by the superiors of disciplinary extenuating circumstances, which speak in favor of the accused officer. Some of the grounds for issuing a decision on the discontinuation of disciplinary proceedings refer directly to situations in which the accused officer cannot be attributed guilt, and therefore directly implement the principle of an appropriate disciplinary reaction.

Summarizing the issue of acquittal decisions of the accused officers of police formations, it is worth emphasizing that from the axiological, functional, psychological, and social point of view, an acquittal decision is more important than a decision on the discontinuation of disciplinary proceedings, issued due to failure to commit an act or failure to fulfill the features of an offense. It allows the accused officer to clear his/her name to a fuller extent, which may be important not only for him/her personally but also for his/her relatives, as well as for his/her colleagues and sometimes even for the entire community of officers employed in the unit.

There is another negative freedom that can be outlined here – it's the freedom from being punished when doubts about guilt remain. This directive means that irremovable doubts should be resolved in favor of the accused. At the same time, doubts cannot be resolved to the disadvantage of the accused officer.¹⁷ It is consistent with the *in dubio pro reo* principle, which is one of the disciplinary proceedings' principles. Allowing freedom from being punished when doubts about guilt remain to function in all disciplinary proceedings of officers of police formations, which is objectively beneficial for the accused officer. It directly implements the standard of procedural equity and correlates with the idea of the rule of law. The freedom implies also as unacceptable that the disciplinary authorities make alternative or circumstantial arrangements aimed at proving the perpetration of a specific officer. The subjective circle of addressees of the given principle applies to all disciplinary bodies, not only disciplinary

¹⁷ See: P. Kruszyński, S. Pawelec, [in:] *System Prawa Karnego Procesowego. Zasady procesu karnego*, t. III, ed. P. Wiliński, Warszawa 2014, pp. 1612 et seq.; M. Lipczyńska, *Znaczenie i funkcje zasady „in dubio pro reo” w procesie karnym*, „Państwo i Prawo” 1967, No. 10, pp. 552 et seq.;

superiors but also disciplinary proceedings representatives. The controversy concerns the question of whether irremovable doubts concern only the factual sphere (e.g. the course of an incriminated disciplinary offense) or also the legal sphere (e.g. the interpretation of legal provisions applied *in concreto*). Relevant norms do not differentiate these doubts, and therefore it is justified to conclude from the *lege non distinguente* argument that the analyzed principle is applicable, in procedural disciplinary law, to both categories of doubts.¹⁸ In practice, the principle of *in dubio pro reo* most often applies to doubts of a factual nature, which in a given case have an indelible attribute (e.g. death of the only eyewitness to an event classified as a disciplinary offense). It is also unacceptable that the disciplinary authorities make alternative or circumstantial arrangements aimed at proving the perpetration of a specific officer. As a result, it is legitimate to say that any naturally irremovable doubts about the actual course of events, resulting from the inability to explain them, oblige the application of the *in dubio pro reo* principle.

The second group of freedoms can be described as positive freedoms. What can be classified here are: freedom to be found innocent until a disciplinary decision is issued and the freedom to choose the method of defense by an accused officer.

What should be mentioned here is the freedom to be found innocent until a disciplinary decision is issued. Freedom is strictly bounded by the principle of the presumption of innocence.¹⁹ The essence of the principle of the presumption of innocence in disciplinary matters is the legal presumption according to which the accused is innocent until proven guilty.²⁰ This means that a substantive decision unfavorable to the accused (e.g., about punishment) must be based on proven facts. A different mechanism applies in the case of

¹⁸ Cf. B. Baran, *Postępowanie dyscyplinarne w sprawach funkcjonariuszy Służby Więziennej*, Warszawa 2016, p. 114.

¹⁹ M. Czwojda, P. Herbowski, *Zasada domniemania niewinności w postępowaniu dyscyplinarnym policjantów (wybrane zagadnienia)*, [in:] *Wina w prawie dyscyplinarnym służb mundurowych. V Seminarium prawnicze z cyklu „Odpowiedzialność dyscyplinarna w służbach mundurowych”*, ed. W. Koziół, P. Jóźwiak, K. Opaliński, Piła 2015; P. Kruszyński, S. Pawelec, [in:] *System Prawa Karnego Procesowego...*, vol. III, p. 2. *Zasady procesu karnego*, ed. P. Wiliński, Warszawa 2014, pp. 1568 et seq.; M. Mozgawa-Saj, *Rzymskie korzenie domniemania niewinności i prawa oskarżonego do obrony*, „Zeszyty Naukowe Uniwersytetu Rzeszowskiego” 2018, No. 101, pp. 104 et seq.

²⁰ See: D. Korczyński, *Wina jako przesłanka odpowiedzialności dyscyplinarnej funkcjonariuszy służb mundurowych*, [in:] *Węzłowe problemy prawa dyscyplinarnego w służbach mundurowych. II Seminarium „Odpowiedzialność dyscyplinarna w służbach mundurowych”*, ed. P. Jóźwiak, K. Opaliński, Piła 2012, pp. 13 et seq.

disciplinary decisions favorable to the accused, which may be based on presumptions if there is no evidence to refute these alleged findings.²¹

Another freedom that can be asserted as a positive one is the freedom to choose the method of defense by an accused officer²² which relates to the principle of the right to defense. Within it, there are mechanisms of material and formal defense. Mechanisms of material defense can be understood either as a defensive action of the accused himself or as all actions taken on his behalf, regardless of whom they are taken.²³ Formal defense can be understood as the procedural activity of the defender of the accused.²⁴ In practice, these two dimensions of the defense rights functionally interfere with each other, interpenetrating one another. As part of the freedom is the choice of a method of defense, it is possible to indicate all the rights of the accused which makes it possible to oppose the accusations or aim at mitigating disciplinary responsibility²⁵. It can be both active (e.g., questioning evidence against it, participating in procedural activities, presenting evidence to support one's statements) and passive (e.g., refusal to provide explanations). The use of powers constituting the right to defense or even the lack of cooperation with disciplinary authorities cannot be qualified by the disciplinary authorities as unlawful obstruction of the proceedings. It is worth emphasizing that the right to defense in disciplinary proceedings is not an obligation, but a right, of the accused. The rights of the accused officer may not be abused and, as a result, unlawfully dysfunctional the course of the disciplinary procedure. He/she may not take illegal actions, such as, for example, intimidating witnesses of a disciplinary offense, persuading witnesses to change their testimonies, or destroying the files of the proceedings. It should be emphasized that the right to defense applies only within the limits and forms defined by the provisions of the disciplinary law system²⁶. It is justified to analyze the individual types of rights of the accused. Firstly, mechanisms are the one that the accused person has the right to submit explanations and the right to refuse to do so. Providing explanations is a legally indifferent act, i.e., both unconjugated and unconfessed. In my opinion, it correlates with the essence of the principle of the right to defense, which allows for both: actions and omissions on the part of the accused officer of the police formation. It is

²¹ See: B. Baran, *Postępowania dyscyplinarne w sprawach funkcjonariuszy formacji...*, pp. 235.

²² See more: P. Józwiak, J. Kubiak, *Prawo do obrony w postępowaniu dyscyplinarnym policjantów*, [in:] *Odpowiedzialność dyscyplinarna w Policji. I Seminarium prawnicze w Piła z cyklu „Odpowiedzialność dyscyplinarna w służbach mundurowych”*, ed. P. Józwiak, W.S. Majchrowicz, Piła 2011, p. 99–114.

²³ See: P. Wiliński, *Obrona formalna i materialna w procesie karnym*, [in:] *Problemy prawa i procesu karnego. Księga poświęcona pamięci Profesora Alfreda Kaftala*, ed. G. Rejman, Warszawa 2008, pp. 341 et seq.

²⁴ M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1971, p. 30.

²⁵ See: R.A. Stefański, *Obrona obligatoryjna w polskim procesie karnym*, Warszawa 2012, p. 24.

²⁶ See: M. Cieślak, *Polska procedura karna...*, p. 302.

obvious that they can take various forms, not only consisting in submitting or refusing to provide explanations but also various indirect forms, for example, consisting in canceling or changing explanations.²⁷ Another mechanism related to the freedom to choose a method of defense is the entitlement to submit evidence motions. In my opinion, it is legitimate to say that the evidence application should contain both the designation of the evidence and the evidence thesis, i.e., the circumstances that are to be proven. An element of the right to defense in the material sense is the possibility of accessing the files of disciplinary proceedings. *Lege non distinguente* I believe that the right to access files or possibly to copy covers the entire scope of disciplinary proceedings, except for explanatory activities, as at this stage the accused is not yet present as the subject of the proceedings. The defense strategy also relates to the formal aspect. In this respect, the right of the accused officer to use the assistance of a defense lawyer²⁸ in disciplinary proceedings is important. It comes down to the freedom to establish a specific, not necessarily professional, defender.²⁹ In terms of content, the group of people who may have the attribute of a defense lawyer seems to be unified and refers *de lege lata* to advocates, attorney-at-law, and officers of a specific police formation. It is worth noting here that the *de lege lata* regulations of police formations' pragmatics explicitly provide for the possibility of appointing another police officer as a defender.³⁰ The regulations do not impose any requirements on him/her as to the degree, function, and education. It is sufficient, therefore, that the officer remains in active service in a given formation. Admitting persons with specialist legal qualifications to defense in disciplinary procedures is not only justified by the individual interest of the accused but also indirectly contributes to the good of the proceedings, as it strengthens the possibility of establishing an objective truth in the course of the proceedings. It should be emphasized that participation in the proceedings of a defense lawyer does not eliminate the defendant's independent defense action.³¹ The provisions of police formations' pragmatics, in the broad sense, do not provide for a public defender.

²⁷ See: B. Baran, *Postępowania dyscyplinarne w sprawach funkcjonariuszy...*, pp. 189.

²⁸ See also: I. Adamczak, *Udział obrońcy w postępowaniu odwoławczym funkcjonariuszy Służby Celnej*, [in:] *Postępowanie odwoławcze w sprawach dyscyplinarnych w służbach mundurowych. VI Seminarium prawnicze z cyklu „Odpowiedzialność dyscyplinarna w służbach mundurowych”*, ed. W. Kozielowicz, P. Józwiak, K. Opaliński, Piła 2016, p. 55–63.

²⁹ See: Judgment of the Provincial Administrative Court in Opole of November 26, 2013, II SA / Op 458/13, LEX No. 1411018.

³⁰ See: Judgment of the Provincial Administrative Court in Szczecin of January 14, 2015, II SA / Sz 783/14, LEX No. 1625538.

³¹ See: Judgment of the Provincial Administrative Court in Wrocław of 23 May 2018, IV SA / Wr 56/18, LEX No. 2507621.

Conclusion

Summing up, several freedoms can be decoded based on regulations on disciplinary proceedings in police formations. Freedoms can be categorized into negative and positive ones. The first group consists of freedom from degrading or inhuman treatment, freedom from unjustified punishment, the freedom from being punished when doubts about guilt remain. The other group, described as positive freedoms, consists of freedom to be found innocent until a disciplinary decision is issued and freedom to choose the method of defense by an accused officer. Freedoms analyzed in today's presentation are reflected in the rules governing disciplinary proceedings in the police services. It may be indicated that the freedom from degrading or inhuman treatment can be juxtaposed with the principle of procedural fairness; the freedom from unjustified punishment with the principle of an appropriate disciplinary reaction; the freedom from being punished when doubts about guilt remain with the *in dubio pro reo* principle; freedom to be found innocent until a disciplinary decision is issued with the principle of the presumption of innocence and the freedom to choose the method of defense by an accused officer can be connected with the principle of the right to defense.

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Key words: disciplinary proceedings, police officer, police formation, positive freedom, negative freedom

Summary

The aim of the paper is an attempt to analyze the issue of freedom in terms of Isaiah Berlin concept's, i.e., negative freedom (freedom from...) and positive freedom (freedom to...) based on disciplinary proceedings against police officers. The problem is also presented with the support of the rules governing the disciplinary proceedings in question. Among the analyzed issues there are: freedom from degrading or inhuman treatment, freedom from unjustified punishment as part of the principle of an appropriate disciplinary reaction the freedom from being punished when doubts about guilt remain, the freedom to be found innocent until a disciplinary decision is issued, and freedom to choose the method of defense by an accused officer.