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Ethical legitimacy of criminal law☆

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A B S T R A C T

The paper argues that the model of ethical legitimacy of criminal law should be welcomed. Two types of legitimacy may be recognized - primary and secondary. Primary legitimacy derives its validity from its coherence with ethical principles of responsibility, thus together shaping a message about what is right and wrong. Under this interpretation, severing of the ties between law and ethics does not mean that criminal law ceases to bind in the formalistic sense. Clearly, however, in such a case it loses one of the fundamental rationales for its validity, and it becomes increasingly more difficult to enforce it. Secondary legitimacy, contemporarily often considered the only one, reposes the validity of criminal law in decisions of an authorized legislator, thus deciding upon the bindingness of normative determinations (however, other constructs may also perform this function). Justifiability of ethical legitimacy of criminal law, where the principle of dignity of the person is dominant, is shown by reference to the example of unconscious non-intentionality. Of course, ethical legitimacy of criminal law and the choice of a constitutional anthropological vision have implications not only for this institution. Others include the theory of a criminal act, attempt, assignment of liability for a consequence, defences and errors.

1. Introduction. Limitations of the formal-dogmatic method

Suppose, and let this stay entirely in the realm of imagination, that the world has been almost completely destroyed after nuclear fallout. Only a few hundred people, from different corners of the world survived thanks to seeking shelter on an archipelago of deserted islands.[2] After some time it transpires that they cannot return home as not only did everything get destroyed, but also severely infected, so they decide to stay on the islands and organize a society. It also quickly turns out that the survivors are not impeccable and there is a pressing need to enact criminal laws, not only to sanction violations of other instituted norms, but also to protect the fragile societal relations and other goods the new society considers important. An assembly of the survivors' representatives needs to decide not only on a catalogue of prohibited acts, but also on the principles of criminal liability, holding perpetrators liable (bringing people to justice) and administering punishment. This is not an easy task due to drastic differences between the survivors on many levels which makes it so that a simple reconstruction of relations from before the nuclear blast is insufficient. It becomes necessary to search for another platform of understanding, one that is a source of convictions in respect of

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[2] We are not discussing here whether such a retreat would be at all possible. Rather, I wish to merely paint a picture where people of different ethnic, national and cultural backgrounds must reach an agreement as to a model of fundamental state institutions, including the type, scope and content of the basic branches of law.

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who and for what may be held criminally liable.

Of course, contemporarily we are not challenged with having to build legal systems from scratch. Even newly found states, such as the United States or Israel, based their legislation, at least to a marked extent, on the system of their former sovereign. This is not to say, however, that in such cases, or following serious political transformations (like the collapse of the communist regime in Poland), the government need not establish the axiological fundamentals of the state anew, and, consequently, set up a comprehensive scheme of criminal liability. One of the chief aims of this paper is to consider possibilities of searching for sources of the model of criminal liability (perceived not through the prism of a catalogue of prohibited acts, but as principles of responsibility placed normally in the general part of a criminal code) outside of the legal system. Again, I do not wish to detract from the importance of the problem of catalogues of prohibited acts or say it is not fit to be assessed from the perspective of ethical legitimacy of criminal law. On account of the confines of this paper I chose to focus my analysis on the part of criminal law that functions as a mutual part, i.e. all that in maths appears before a bracket.

I realize readers coming from the Anglo-American legal culture may regard the above thesis as self-evident. Moralism is one of the principal methods of explaining criminal law there,[3] however it is nowhere near as widespread in Poland and surely in many other countries which embrace formal arguments as justifications for newly proposed legislation. Nonetheless, even if this aspect of the piece is not deemed innovative, an attempt to single out personalism as a philosophical strand capable of aiding in construing and explaining criminal law is an entirely inventive proposition.

Given the current condition of debates within legal philosophy it is difficult to tackle issues concerning the relations between law and morality. Ethical legitimacy of criminal law is just one case in point. Difficulties arise for at least two reasons. First, much has been said about the interplay between law and morality by lawyers and philosophers. Not only does this hamper one's ability to proffer an innovative account of the problem, but it also instils epistemic pessimism, as it were, by suggesting that the travails surrounding the relations between law and morality are impossible to dispel. A second and related reason is that looking for references or dependencies between law and morality necessitates, at some stage, delving into the notion of natural law. However, adoption of natural law as a declared point of reference generates a substantial risk as the term has proven ambiguous and triggered numerous intellectual controversies. Even though natural law has its place within debates at the core of legal philosophy, it tends to be overlooked in the discourse revolving around specific dogmatic branches of the law. Therefore, an attempt to overlay, as it were, natural law onto the academic discussion may be perceived as unprofessional and unscholarly. The Polish doctrine of criminal law and, it may be surmised, the tradition of civil law inherently permeated by legal formalism, are dominated by the dogmatic-literal construction which, at all costs at times, is used to seek solutions to multiple challenges that the state and its legal system must face up to.

Doubtless, the dogmatic-literal method is capable of offering answers to difficulties cropping up in the process of applying the criminal law. However, a law-enforcing institution grappling with a difficult question posed thereto often resorts, in light of the limitations of the leading interpretative trend, to discretion and equity whilst ostensibly couching its decision in terms characteristic of dogmatism-literalism. One example of such an equity-based decision is the resolution of the Criminal Chamber of the Supreme Court of Poland dated 12 December 2007 (citation number: III KK 245/07) where it was pronounced that “Extraordinary mitigation of punishment for a defendant guilty of aggravated murder by virtue of Article 148 § 2 of the Criminal Code, where he faces 25 years' or life imprisonment, is not contrary to the substantive law because there is no provision that would prohibit the application of this device, and deduction of such a prohibition from the fact that the legislator neglected to determine the principles of extenuating the punishment of 25 years' imprisonment would lead to an alteration of the principles of criminal liability enshrined in the Code, in a way falling foul of the constitutional principle of a state ruled by law”. The case concerned Andrzej A. who was convicted of aggravated murder and using an identification document belonging to another person.[4] The court extraordinarily mitigated A.’s sentence and stated it at 12 years.[5]

Pursuant to Article 148 § 2 of the Criminal Code, a person is guilty of aggravated murder if they kill another:

1) with particular cruelty,
2) in connection with hostage taking, rape or robbery,
3) for motives deserving special condemnation,
4) with the use of explosives.

Historically, this criminal offence used to be subjected to imprisonment for not less than 12 years, 25 years or life. However, the Act of 27 July 2005, which entered into force on 16 September 2005, limited the range of punishments available to 25 years' and life imprisonment. Ultimately, due to improprieties of formal nature this amendment was struck down as unconstitutional by the Constitutional Court. Still, the Court handed down its judgment to that effect only on 23 April 2009 so the law remained intact and binding for almost 4 years. It gave rise to a plethora of doubts, including around fundamental principles such as judicial discretion as well as more practical ones pertaining to the procedure to follow in the case of offenders between 17 and 18 years old who, according to the Polish law, cannot be sentenced to life imprisonment. One notable difficulty triggered by the meaning of Article 148 § 2 begged the question whether a sentence of 25 years' imprisonment may be extraordinarily mitigated something the Criminal Code, as it stood

[3] This is the opinion of; *inter alia*, John Kleinig, who points to M.S. Moore's moralism as a major criminalization conception. Cf. J. Kleinig, “Paternalism and Human Dignity, Criminal Law and Philosophy” 11 (2017), p. 31. See also M.S.Moore, Placing Blame: A General Theory of the Criminal Law (Oxford: Clarendon Press, 1997).

[4] Article 275 §1: “Whoever uses a document confirming another person's identity or property rights, or steals or appropriates such document, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years.

[5] “Extraordinary mitigation of punishment” is a proper noun referring to an institution prescribed in the Polish Criminal Code which allows for mitigation of punishment in the event that certain circumstances envisaged in specific provisions materialize.

at the time, did not envisage, despite making mitigation available with regard to other types of punishment.

As the Supreme Court rightly noted in the resolution referenced above: "Extraordinary mitigation of punishment is one instrument available to judges when determining the degree of penalty to be imposed. It makes provision for varied treatment of acts which fit the *actus reus* and *mens rea* of the same offence, as well as of various characteristics of offenders the sum of which makes it often so that, in case of a specific defendant, even the imposition of the most lenient permissible punishment would be too rigid". Extraordinary mitigation's aim is to shield the offender and the law enforcement apparatus from the threat of handing down unfair judgments. In the Polish criminal law, like in Germany, the scope of actions capable of being caught by a given criminal offence is relatively wide. Given such a peculiarity of Polish criminal law, most sanctions are, in principle, indeterminate, with much room between the upper and lower ends of the spectrum. This, in turn, allows the court to impose punishment that is adequate to the particular act committed by the defendant. In exceptional circumstances the law envisages even mandatory extraordinary mitigation of punishment. Where extraordinary mitigation is unavailable and sanctions are fixed-term, the risk of inflicting unfair punishment, that is one that is inadequate to the extent of social harmfulness of the act committed, rises significantly. To avoid such a scenario, the Supreme Court founded its judgment upon equity by exercising sizable discretion, a move it admitted in the reasons: "The reasoning presented above [one that permits the use of extraordinary mitigation of punishment in a manner similar to fixed-term prison punishments – author's note] relies on an analogy for the benefit of the defendant, which is a permissible method of interpretation. It does, regrettably, treat 25 years' imprisonment as a fixed-term punishment,[6] however that was necessary in the systemically defective reality created by the legislator. It must be noted that defendants, who just like Andrzej A. committed aggravated murder before turning 18, 25 years' imprisonment is the exclusive sanction envisaged by Article 148 § 2 of the Criminal Code, therefore it is for the court to rectify a legal loophole by rationally mitigating it in order to impose a punishment that is adequate to the objective and subjective circumstances of the case as established in court. To not do so would result in a grave violation of the principle of humanitarianism (…)".

2. Two types of legitimacy of criminal law

The judgment is but one example exposing serious limitations of the dogmatic-literal method of legal interpretation if it is to be considered a basic and, at the same time, the ultimate tool to ensure correct application of criminal law. Inasmuch as one dissects the equity or fairness of a judicial pronouncement, one must reconstruct a point of reference from which the justifiability of a particular determination may be verified. On the facts like those above, such a point of reference would not be provisions of the Code itself, because it is precisely their application that would produce an unfair result. It could be the constitution, however constitutions are incapable of providing sufficiently unambiguous legal categories which would enable rendering a justified determination.[7] Another way to go, not only at the stage of application but already at that of enactment, is to have recourse to ethical debates. It is the thesis of this paper to signal the necessity of establishing the ethical legitimacy of criminal law. For one may point two types of such legitimacy – primary and secondary. Primary legitimacy derives the legal validity of criminal law from its coherence with the ethical rules of responsibility. On this account, criminal law shapes, together with ethics, a cogent message regarding what is right and wrong. The fact that the law may deviate or even break free from ethical principles does not mean that it ceases to bind in a formalistic sense. It is not open to doubt, however, that it loses one of the fundamental justifications for its bindingness, and the enforcement thereof becomes significantly more difficult. Secondary legitimacy, contemporarily often considered the only one, reposes the validity of criminal law in decisions of an authorized legislator, thus deciding upon the bindingness of normative determinations (however, other constructs may also perform this function).

As the formal-dogmatic method has its limits and ethical legitimacy of criminal law must be pursued, as argued above, one is compelled to search for ethical rationales and justifications of criminal law outside of the legal system. A system of legal norms enacted by the legislator may, independently of any autonomous investigation, provide a basis for seeking ethical justifications in extra-legal sources. The natural starting point in the discussion concerning the ethical legitimacy of Polish criminal law is the principle of dignity of the person enshrined in Article 30 of the Polish Constitution: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities". I do not wish to say, however, that such a point of reference is feasible only in those countries whose legal systems refer directly and explicitly to the principle of dignity of the person.[8] A particular vision of a

[6] Pursuant to the provisions of the Polish Criminal Code, the term "fixed-term punishment" encompasses imprisonment punishments of up to 15 years. In addition, the catalogue of punishments contains a separate sanction of 25 years' imprisonment as well as life imprisonment.

[7] For more on proconstitutional construction of criminal law and difficulties associated therewith, see: Krzysztof Szczucki, Proconstitutional Interpretation of Criminal Law (Lanham: Lexington Books, 2016).

[8] Poland and Germany are no exception. In the preamble to the Constitution of Hungary it is declared that human dignity is the foundation of being human. This is elaborated upon in Article II of a chapter entitled "Freedom and responsibility," where dignity is stipulated to be inviolable. Every person is granted a right to life and respect for their dignity. Dignity is also recognized in Article 10(1) of the Spanish Constitution, which sees it as a guarantee of inviolable rights, free development of personality and respect of fundamental rights and freedom. In the Constitution of Portugal, similarly to the German Constitution, a reference to dignity appears as early as in Article 1, pursuant to which dignity underpins the whole structure of the state and its engagement in building a free, fair and solidary society. Art. 23 of the Constitution of Belgium guarantees to every person the right to lead a life consistent with the requirements of dignity. The economic, social and cultural rights declared in the constitution are to constitute means of realizing this goal. It is also worth pinpointing Article 3 of the Constitution of Italy which avails itself of the term "equal social dignity". That dignity is not explicitly featured and spelt out in other constitutions does not equal its rejection, but rather that the national legal system is entrenched therein. An example is Article 2 of the Greek Constitution which considers respect for the human being and protection of its value as the most important duty of the state.

person, including the principle of dignity, is rooted in the most momentous international documents. The Universal Declaration of Human Rights takes the central place here, and it calls upon dignity already in its preamble ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world") and in Article 1 ("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"). The picture would not be full without Article 6: "Everyone has the right to recognition everywhere as a person before the law". During the drafting works on the Declaration as well as after their conclusion, dignity was interpreted as a universal category, one that should not be limited only to the Western culture. In fact, it was accepted as a foundation for a budding system of human rights also by people whose moral code was shaped by Hinduism, Buddhism or Confucianism.[9]

To look for the entrenchment of dignity of the person in the system of sources of law does not mean that dignity's validity is derived from its inclusion in that system. The objective here is rather to forge a bridge, as it were, between ethics, or personalist ethics in this case, and law. Two groups of consequences may be pointed to that arise from the fact that dignity of the person was introduced into the legal system at the constitutional level and its significance as against other human rights and freedoms. Let me refer to one group as immediate and the other as distant. By an immediate consequence I understand perceiving the principle of dignity as a normative category which determines the subjectivity of the person as well as absolute and equal protection of that subjectivity.[10] The distant consequence is demonstrated by the anthropological influence of human dignity upon the law, particularly criminal law. This connotes that the principle of dignity serves to conceptualize how a person (and their realm of ethical responsibility) is perceived by the legislator, and, consequently, how to structure criminal laws so that they correspond with that vision of man. The scope or realm of criminal liability should not exceed the scope of ethical responsibility. In fact, the reverse is permissible and even desirable. For instance, if by virtue of an accepted anthropological vision of man we were to agree that a person should not be held responsible for some evil provided they act based upon the principle of double effect, so his basic aim is to protect a good, and it is a secondary and unintended consequence that another good is violated – criminal law should also refrain from imposing liability in such a scenario. One may be satisfied with the immediate consequence when analysing the relations between human dignity and a legal system. Here, efforts will be made towards achieving a better understanding of the distant consequence of the influence human dignity exerts upon criminal law.

Nevertheless, irrespective of which consequence of human dignity one may be prompted to analyse, it is necessary to establish the content of the principle, at least its fundamental elements. Dignity is a notion that marks humans out by pointing to their autonomy, supreme value and irreplaceability.[11] Eleanor Roosevelt, a co-author of the Declaration, maintained that the principle of dignity in and of itself does not refer to specific rights as it rather explains why people have rights at all.[12] The corollary is not that dignity has no content. Conversely, it is the foundation of people's agency (treating people as subjects or agents).

Examples may be drawn of the influence dignity has on criminal law already in the immediate sense. The Polish Constitutional Court has noted that predicating criminal liability upon guilt is a principle stemming from dignity. A similar corollary has been expressed in relation to the presumption of innocence: "The elevation of the presumption of innocence to a constitutional principle makes it a significant factor determining the position of a citizen within a society and against the government, thus guaranteeing proper treatment of him, particularly in the face of a suspicion that a criminal act was committed. The presumption is strictly connected with personal inviolability and protection of dignity and freedoms of the person treated as innate and inalienable goods. (…) The constitutional legislator prioritized human dignity by constructing the relevant provisions in a way that aim to effectively protect it. It is due to this legislative intention that Article 42(3) of the Constitution envisaged a special procedure for refuting the presumption of innocence. The provision clearly and unequivocally pronounces that the presumption of innocence holds until a final judgment of the court is issued".[13]

3. Philosophical anthropology and criminal law

This short description of the principle of human dignity warrants the corollary that dignity is an anthropological notion in a philosophical sense, and that it expresses a preference towards a certain understanding of a person.[14] It is incorporated into the law, together with the context surrounding it, by the legislature, the doctrine and the courts. It appears, however, that the understanding of the distant consequence of dignity is enhanced greatly by examining the philosophical character of the principle of dignity.

Philosophical anthropology is a branch of philosophy which strives to interpretatively explain the human being, the human, and his actions.[15] It attempts to establish what being a human means and how it came about. To that end it seeks to describe humans both from the outside and from the inside, their cognitive abilities, freedom, reason, proclivity towards societal life, and their autonomy. In short, philosophical anthropology aspires to provide a comprehensive description of a person, including his actions and the relations

[9] Glenn Hughes, "The Concept of Dignity in the Universal Declaration of Human Rights", Journal of Religious Ethics 39(1) (2011), p. 5.

[10] In line with Leszek Bosek, "Komentarz do art. 30″, in: M. Safjan, L. Bosek (eds.), Konstytucja RP. Tom I (Warszawa: CH Beck, 2016), p. 723.

[11] In line with Leszek Bosek, "Komentarz do art. 30″, in: M. Safjan, L. Bosek (eds.), Konstytucja RP. Tom I (Warszawa: CH Beck, 2016).

[12] Glenn Hughes, The Concept of Dignity in the Universal Declaration of Human Rights, Journal of Religious Ethics 39(1) (2011), p. 3.

[13] Judgment of the Polish Constitutional Court of 16 May 2000, P 1/99.

[14] As noted by G. Hughes: "In other words, the concept of inherent dignity heuristically invites us, and rationally requires us, to elucidate to some extent a philosophical anthropology" (Glenn Hughes, "The Concept of Dignity in the Universal Declaration of Human Rights", Journal of Religious Ethics 39(1) (2011), p. 15).

[15] Andrzej Maryniarczyk (ed.), Powszechna Encyklopedia Filozofii, (Lublin: Polskie Towarzystwo Tomasza z Akwinu, 2000), entry: Antropologia Filozoficzna. Na antropologiczny kontekst godności szczególną uwagę zwraca Glenn Hughes (Glenn Hughes, see note 9, p. 5 *et seq*.).

between him and the surrounding reality. Therefore, if it is to be assumed that a certain vision of a human being lies at the core of a legal system and forms, at the very least, its constitutional axiology, it is necessary to look for such a model of criminal liability that would correspond with that vision to the greatest extent. That this is so may be buttressed by two reasons: a formal and a substantive one. The formal reason is traced back to the provisions of the constitution and their character. The constitution is the foundation of a legal system, one that determines its axiological profile. The constitution also implies the requirement of its direct application.[16] In addition, if it is defended that the principle of dignity of the person is an expression of a certain anthropological vision, then, under Article 30 of the Polish Constitution, which affirms dignity as the source of all rights and freedoms, it is difficult to deny that those rights and freedoms shall be coherent with the constitutional legislator's anthropological vision. By referring to the principle of dignity and pointing to it as the basis for a system of rights and freedoms the society performed its role of designating the values constitutive thereof. As Roger Brownsword rightly noted, values constitutive of a society evince its mission, direction, and delineate the boundaries of acceptability of various actions.[17] This role, surely, also belongs to human dignity.

The substantive reason has its source not in the constitution itself, but in the need to look for such solutions pertaining to the shaping of principles of criminal liability that could correspond best with one's estimation regarding one's responsibility. It should, to a significant extent, derive from a person's ethical convictions. I do not refer here to the scope of criminalization with regard to specific criminal offences, that is one's estimation as to what is right and wrong. By one's ethical estimation regarding the scope of liability I understand the scope of liability traditionally regulated by the general part of a criminal code and analysed in the study of crime. Shaping the principles of liability in such a way may not only be more comprehensible to an ordinary citizen, but they also have a greater chance of being obeyed. Filling the criminal law with artificial constructs, with more normative rather than factual elements, and wide use of legal fictions, may render criminal law purely conventional, one that does not strive to relate to the sense of justice shared by its subjects.[18] One cannot forget about the relational requirement of the principle of dignity. The internal value of the person demands that he be treated like a subject by the state and other people alike.[19] This is true also in the context of criminal law.

Polish constitutional law scholars generally agree that the object of protection of Article 30 of the Constitution has its source in personalist philosophy.[20] By "personalism" I understand here "Thomistic personalism", also referred to as Christian personalism.[21] Karol Wojtyła was a prominent proponent of this philosophical strand, which provided a synthesis of the Aristotelian and Thomistic approaches with the phenomenological method. Personalist philosophy positions the person in the centre and underscores an essential difference between persons and other beings. For what distinguishes the person from other beings is, first and foremost, the former's rational nature, to which dignity of the person is directly tied.[22] Personalism accentuates the notion of the "person" as opposed to the separate idea of the "individual". The difference is much more momentous than it appears at face value. For an individual, in and of itself, may be replaced by another individual of the same species. However, a person is unique and irreplaceable.[23] Contrary to other beings, a person is a subject and their subjectivity consists in freedom and internal autonomy. Besides the external manifestation that is life, one may also detect in a person manifestations of moral and religious life. As J. Maritain noted: "Man is an individual who holds himself in hand by his intelligence and his will. He exists not merely physically; there is in him a richer and nobler existence; he has spiritual superexistence through knowledge and through love."[24] For personalism, human dignity and its affirmation are key. For it is in dignity that a person's uniqueness is expressed, as is their innate value, as "somebody" and not "something". In addition, it is from those premises that K. Wojtyła derived his personalist norm in the following words: Anyone who treats a person as a means to an end does violence to the very essence of the other, to what constitutes its natural right.[25]

This is not to say that other strands of philosophy, such as stoicism, medieval philosophy and Kantianism[26] are not relevant.[27] It

[16] More on this: Krzysztof Szczucki, Proconstitutional Interpretation of Criminal Law (Lanham: Lexington Books, 2016).

[17] Roger Brownsword, "Human dignity from a legal perspective", in M. Düwell, J. Braarvig, R. Brownsword, The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2014), p. 8.

[18] A similar thought has been expressed by R. Brownsword: "If humans are to express their dignity by doing the right thing for the right reason, they need a context in which they can develop moral virtue and then act on it. One of the key roles that the express legal referencing of human dignity might play in an increasingly technological setting, is to compel regulators to be very careful about employing strategies that might corrode the essential context for moral virtue" (Roger Brownsword, "Human dignity from a legal perspective", in M. Düwell, J. Braarvig, R. Brownsword, The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2014), p. 19).

[19] Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, The European Journal of International Law 19(4) (2008), p. 679.

[20] Leszek Bosek, Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne (Warszawa: Wydawnictwo Sejmowe, 2012), p. 21. Cf. Also Oktawian Nawrot, Ludzka biogeneza w standardach bioetycznych Rady Europy (Warszawa: Wolters Kluwer, 2011), p. 415.

[21] T. D. Williams, What is Thomistic Personalism?, Alpha Omega, VII, n. 2 (2004), s. 163 i n.

[22] T. D. Williams, What is Thomistic Personalism?, Alpha Omega, VII, n. 2 (2004), s. 176.

[23] In this is manifested the unique character of man also in relation to other beings: "«The human being holds a position superior to the whole of nature and stands above everything else in the visible world. This conviction is rooted in experience (…) Our distinctiveness and superiority as human beings in relation to other creatures is constantly verified by each of us … It is also verified by the whole of humanity in its ongoing experience: in the experience of history, culture, technology, creativity, and production (…) A being that continually transforms nature, raising it in some sense to that being's own level, must feel higher than nature and must be higher than it» (Karol Wojtyla, "On the Dignity of the Human Person", in: Person and Community: Selected Essays, vol. 4 of Catholic Thought from Lublin, ed. Andrew N. Woznicki, [New York: Peter Lang, 1993], p. 178).

[24] J. Maritain, *The Rights of Man and Natural Law* (Glasgow: Robert Maclehose and Co./The University Press, 1945), p. 6.

[25] K. Wojtyla, *Love and Responsibility*, [New York: Farrar, Straus, and Giroux, 1995], p. 27.

[26] The philosophy of Immanuel Kant is perhaps the most commonly cited interpretative lens of the principle of human dignity in Western Europe. Cf. Christopher McCrudden, see note 19, pp. 659–660.

[27] Hubert Izdebski, "Godność i prawa człowieka w nauczaniu Jana Pawła II", Studia Iuridica 45 (2006), p. 299 *et seq*.; Wojciech Arndt, "Godność człowieka jako istotny element racji stanu", in A. Krzynówek-Arndt (ed.), Kryterium etyczne w koncepcji racji stanu (Kraków: WAM, 2013), p. 65; Meir Dan-Cohen, "A Concept of Dignity", Israel Law Review 44 (2011), p. 11 *et seq*.

should not give rise to doubts to avail oneself of one strand of philosophy to interpret notions genetically originated in another. On the contrary, to not do so could lead to an inference that a given notion is vague or even ambiguous. The principle of dignity is a case in point as it – depending on the intellectual context – is interpreted in various ways, many of which are mutually exclusive.[28] This problem has been highlighted by Julia Davis by reference to the "dwarf tossing" case considered by the UN Human Rights Committee, where both parties referred to the principle of dignity to back up their arguments.[29] The state claimed the practice violated the rights of the people subjected to it, whilst the particular participant himself maintained he did not feel harmed and, what is more, his dignity gives rise to a right to work and non-discrimination because of his height.[30] The case is interesting not only because it exposes problems associated with applying the principle of dignity where no appropriate context is discernible. Its importance also stems from the fact that it amplifies the difficulties many have with differentiating what may be called dignity of the person from personal dignity. Dignity may be perceived objectively, as a characteristic resulting from human nature.[31] Within this meaning it is stressed that dignity is inherent to every person and it is deservedly accorded to everyone regardless of their achievements.[32] There is therefore no doubt, in this sense, that "dwarf tossing" encroaches upon the dwarfs' dignity, entitlement to which flows directly from their humanity. For dignity is an expression of one's internal value as the value of a person, equal to the value of everyone else. On the contrary, dignity may also be cast in terms of a certain social status, respect and something a person deserves, which may be violated, for instance, by humiliation.[33] On this account, dignity is recognized as something one achieves.

The objective dignity of the person concept may serve as a principle that indicates a given anthropological vision adopted by the constitutional legislator, or at least this seems reasonably clear by reference to the axiological context accepted in Poland, Germany, and, in particular, the Universal Declaration of Human Rights. Dignity, within this meaning, is objective, relating to the person, and not factual - personal. Dignity of the person was violated in the "dwarf tossing" case. It is difficult to agree with Julia Davis when she writes that it was an argument from the subjective variant of dignity - the victim's self-esteem - that was raised against the practice.[34] I do not wish to say this meaning is irrelevant here, however "dwarf tossing" does certainly violate dignity of the person, understood objectively and normatively. The practice objectifies the person taking part therein, more on which further below. In addition, the objectification pertains not only to the particular dwarf who consents to taking part in the tossing at any given time, but it affects the status of all people characterized by this disorder, thus objectifying them indirectly. It is another question whether this degree of violation necessitates a reaction from the criminal law, and this cannot be unequivocally decided within the confines of the paper.

In pursuit of the correct interpretative backdrop against which dignity is placed in the Polish legal system, the preference towards Christian personalism is substantiated by reference to the preamble of the Polish Constitution which mentions dignity in the context of "the Christian heritage of the Nation and universal human values".[35]

Before I single out the fundamental elements comprising the principle of dignity of the person it shall be noted that the interpretative model adopted here does not, in any way, transgress the neutrality of the law nor its neutrality. Academics have differentiated between three types of ideological neutrality of the law: correlative, genetic and argumentative.[36] Correlative neutrality indicates that determinations made within a legal system are not convergent with determinations made by reference to a specific ideology or religious doctrine. Genetic neutrality denotes a situation where legal notions present within a legal system, including the constitution, have no source in a given ideology or religion. Where the presence of a legal notion is legitimized by its religious origin and interpretation of its meaning is dependent upon decisions made within a doctrine or ideology, or one's belonging to a church or other religious organization – we may talk about a lack of argumentative neutrality. Achieving correlative and genetic neutrality is impossible and, more importantly, unjustified. For it is often the case that decisions made within a legal system resemble those made or contemplated within religious or ideological doctrines, which does not mean that determinations made by public institutions hinge upon judgments made in extra-legal contexts. It is natural that the legislator internalizes notions entrenched within society, ones that often derive from philosophy or religion. By introducing novel instruments into the law it is possible to endow them with a specific definition or stick to their extra-legal connotation. As a consequence, it shall be accepted that law preserves its argumentative neutrality as its determinations do not hinge upon judgments made within religious organizations or ideological movements. This is not to say, however, that whilst interpreting an idea – especially in the face of discarding genetic neutrality – one cannot refer to its axiological source and original characteristics. When interpreting a notion, including that of dignity of the person, one cannot overlook its axiological source, namely the context in which the notion was conceived and subsequently adopted in a legal system.

[28] R. Brownsword has commented on this as follows: "Whereas, in some cases, human dignity is articulated and applied in a 'liberal' spirit (underpinned by an 'empowerment' conception), in others the guiding spirit is 'conservative' (underpinned by a conception of 'human dignity as constraint'). Broadly speaking, while liberals appeal to human dignity in order to protect and to extend the sphere of individual choice, conservatives appeal to human dignity in order to impose limits on what they see as the legitimate sphere of individual choice" (R. Brownsword, see note 17, p. 1).

[29] *Manuel Wackenheim v France*, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

[30] Julia Davis, "Doing Justice to Dignity in the Criminal Law", in J. Malpas, N. Lickiss (eds), Perspectives on human Dignity: A Conversation (Springer: New York, 2007), p. 177.

[31] Markus D. Dubber, "Towards a Constitutional Law of Crime and Punishment", Hastings Law Journal 55 (2004), p. 515.

[32] Glenn Hughes, see note 9, p. 10.

[33] Julia Davis, see note 25, p. 177.

[34] Julia Davis, see note 25, p. 177.

[35] Leszek Garlicki, "Komentarz do art. 30″, in Leszek Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, vol. 3 (Warszawa: Wydawnictwo Sejmowe, 2003), pp. 3–4.

[36] Michał Królikowski, Krzysztof Szczucki, "Państwo świeckie, neutralne czy bezstronne", Więź 11–12 (2010); Józef Krukowski, "Konstytucyjny model stosunków między państwem a Kościołem w III Rzeczypospolitej", in A. Mezglewski (ed.), Prawo wyznaniowe w systemie prawa polskiego (Lublin: Wydawnictwo KUL, 2004), p. 93; Douglas Laycock, "Substantive Neutrality Revisited", West Virginia Law Review 110 (2007), p. 51 *et seq*.; Scott E. Williams, "Religious Exemptions and the Limits of Neutrality", Texas Law Review 74 (1995), p. 119 *et seq*.

The interpreter need not embrace the understanding of the notion professed by such a source as is, but a decision to depart from that understanding shall be justified.

If a constitution does not necessitate the adoption of a maximalist view of dignity, this cannot be achieved by establishing a fitting interpretative context. Otherwise, only a minimalist account would be available. As M. Düwell rightly argues, such interpretations are plausible, yet they do not go far towards understanding human dignity in a way that would determine the content of a catalogue of human rights, and therefore influence the scope and shape of liability in criminal law.[37] Dignity should not be understood as an open norm to be filled with meaning *ad hoc* depending on the structure of specific societal relations. Similarly, dignity cannot be reduced to a person's right to have rights nor to a prohibition on treating a person like an object.[38]

4. A person and his acts

In line with the personalist interpretation of dignity, it occupies the top position in the hierarchy of notions (beings) known to man. It begs the question what is so special about people's nature, what makes them unique and why are they accorded fundamental rights, as opposed to other living beings.[39] It has been argued that, together with their acts of cognition and love, they overstep nature.[40] From the perspective of the significance of the principle of dignity in criminal law it is necessary to expound upon an anthropological description of a person as the doer of an act. A person realizes his own structure of self-possession and self-rule through his actions. It is proposed in the literature that dignity of the person is shaped primarily by three key factors: protection of one's own identity and a system of convictions, activity directed towards others and creative endeavours.[41] By wanting to act and acting intentionally one exceeds beyond oneself, as it were, towards what one considers to be diverse good. At the same time, an act is a manifestation of one's "I" and an expression of one's self-determination.[42] Man's reason and freedom serve as the rationale of individual actions. G. Hughes notes that the core constellation of meanings in the concept of human dignity consists of four elements: liberty, responsibility, irreplaceability and vulnerability to suffering and degradation.[43] This account does not, in any way, exclude from the ambit of dignity people who are physically or mentally ill. Dignity of any person does not depend upon their intellectual or moral achievements. Its understanding should also be detached from intellectual and moral aptitudes.[44] Reason and freedom constitute a natural foundation for human dignity.[45] For dignity of the person, concentrating on man's reason and freedom, is the basis for human actions. Therefore, if it is an act that lies at the core of the study of criminal law, if the human act is chiefly the object of criminal assessment, human dignity and the characteristic of the human condition stemming therefrom shall not be overlooked in the analysis of the notion of an act and criminal liability. It is submitted that human behaviour may be classified as consistent or inconsistent with human dignity.[46] Consequently, it is all the more justified to maintain that criminal should in their assessment of persons be coherent with the assessment made by reference to human dignity, at least to the extent that it shall not criminalize acts compatible with the principle of dignity or acts capable of having, as it were, a dignity-based recommendation.

A person's capacity for self-determination (so, in essence, his freedom) is a demonstration of dignity. This observation warrants a worthwhile assertion: criminal law should classify as an "act" only conscious and voluntary actions by persons.[47] All other actions, incapable of being described as conscious and voluntary, should be excluded from the definition of an "act". It is reason and freedom, part and parcel of dignity, that lie at the essence of reasons for human behaviour. Therefore, dignity determines one's ability to act and to bear responsibility for them.

To a certain extent the understanding of dignity demonstrated above finds an analogous interpretation in the account of dignity as one's right to live a life of one's own.[48] This perspective should not, however, be interpreted too individualistically. The construction of dignity made for the purposes of criminal law shall not lose sight of the societal dimension, emboldened in the Polish Constitution by reference to the principle of common good.[49] In this connection, it is pertinent to note that a person realizes himself through his own actions, has a broad right to shape his decisional discretion, and the related ability to bear responsibility for those actions.[50]

Before I single out a handful of criminal law constructs which should reflect the anthropological vision adopted by the legislator, one more question should be discussed. It is generally accepted by academic writers that human rights founded upon dignity should

[37] M. Düwell, "Human dignity: concepts, discussions, philosophical perspectives", in M. Düwell, J. Braarvig, R. Brownsword, The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2014), p. 8.

[38] M. Düwell, "Human dignity: concepts, discussions, philosophical perspectives", in M. Düwell, J. Braarvig, R. Brownsword, The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2014).

[39] Thaddeus Metz, "African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights", Human Rights Review 13 (2012), pp. 19–20.

[40] Mieczysław A. Krąpiec, Człowiek i polityka (Lublin: Polskie Towarzystwo Tomasza z Akwinu, 2007), p. 270.

[41] Jacek J. Mrozek, "Godność osoby ludzkiej jako źródło praw człowieka i obywatela", Civitas et Lex 1 (2014), p. 44.

[42] Karol Wojtyła, Osoba i czyn oraz inne studia antropologiczne (Lublin: Towarzystwo Naukowe KUL, 2000), pp. 195–196.

[43] Glenn Hughes, see note 9, p. 10.

[44] Glenn Hughes, see note 9, p. 14.

[45] Karol Wojtyła, see note 37, pp. 212–213; Tadeusz Styczeń, "Być sobą to przekraczać siebie – o antropologii Karola Wojtyły. Posłowie", in: K. Wojtyła, Osoba i czyn oraz inne studia antropologiczne (Lublin: Towarzystwo Naukowe KUL, 2000), p. 495.

[46] Marian Szymonik, Filozoficzne podstawy kategorii godności człowieka w ujęciu personalizmu szkoły lubelskiej, Lublin 2015, pp. 215–216.

[47] Karol Wojtyła, see note 37, p. 73.

[48] Marcus Düwell, see note 32, pp. 38–40. This account of dignity was first proposed in the American literature by A. Gewirth. Cf. Alan Gewirth, Reason and Morality (Chicago: Chicago University Press, 1978); Alan Gewirth, "Human Dignity as the Basis of Rights", in M.J. Meyer and W. Parent (eds.), The Constitution of Rights: Human Dignity and American Values (Ithaca, New York: Cornell University Press, 1992), pp. 10–28.

[49] Article 1: "The Republic of Poland shall be the common good of all its citizens".

[50] To a similar effect: Meir Dan-Cohen, Harmful Thoughts. Essays on Law, Self, and Morality (Princeton: Princeton University Press, 2002), p. 135.

have the following characteristics: they should (1) form a coherent system, of a meaning greater than simply the sum of its parts, (2) be universal, so not entrenched in any particular culture or geographical location and open to diversity, (3) point to the person, regardless of one's specific characteristics, and treat every person as an independent agent, (4) not derive their legitimacy from a determination of the government, (5) transcend ideological conflicts, (6) be humanistic, that is not based on any particular set of religious principles or beliefs but nevertheless consistent therewith, (7) be timeless.[51] If one of the requirements of dignity of the person (recognized as the foundation of a given anthropological vision) is to shape criminal law in accordance with that vision, adequately to the prevailing understanding of people and their acts, one should wonder whether the same requirement should be applied to criminal law. In other words, it is arguable that dignity of the person does not allow for any peculiarities nor discrepancies between those legal systems which are underlain by the foundation of dignity.

It is evident at face value that legal systems in various countries or regions may differ greatly. Differences may also be noticed among the countries where the principle of dignity is enshrined in the constitution, within a similar meaning founded upon a like axiological tradition. On no account, however, does this imply that human dignity is not universal, or that it is merely an ornament. Dignity of the person is a general principle that sets the objectives of specific provisions, and determines certain threshold criteria, namely those which must be fulfilled as well as those which may not be violated. The sphere in between those borders may be filled differently according to the state in question.[52] Due to such threshold criteria, one may notice many a similarity between domestic criminal legislation, at least in terms of *rationes legum* if not concrete constructs. Testimony to a mutual ethical intuition - which I tend to refer to as primary legitimacy of criminal law - is born by normative judgments made in international criminal law, particularly in the Rome Statute of the International Criminal Court.

5. Travails of searching for primary legitimacy

It is not difficult to prove the necessity of searching for primary legitimacy (ethical legitimacy) for decisions with regard to criminalization in the specific part of a criminal code – those by which the legislator introduces new criminal offences or modifies the scope of those already in existence. The relation between such decisions and ethics appears directly evident chiefly because criminal offences by their own nature are orientated towards protection of goods, that is singling out the values particularly important for the society in which a given criminal code functions. The argument as to which goods shall be protected, as well as the scope of that protection, is not only a legal argument but also – or perhaps mainly – an ethical one. The specific part of a code does not exist in isolation, however. Among the fundamental issues – alongside the problem of the definition of an act described above – determined by the general part are, *inter alia*: the subjective side of a crime (*mens rea*), inchoate offences (e.g. attempts, including inept attempts, aiding and abetting, accomplices, incitement) as well as defences.

Depending on the legislator's decisions in the realms discussed above, the boundaries of criminalization may be pushed very far. Criminal liability for an attempt in connection with an offence which criminalizes merely abstract endangerment of a good (e.g. driving under the influence) widens the limits of liability. Similar conclusions may be drawn in a discussion regarding the subjective side of a crime (*mens rea*), particularly non-intentionality. Miriam Gur-Arye has discussed what the English common law terms common purpose or joint enterprise, which applies where an accomplice, without consulting it with the other perpetrator, oversteps the previously established scope of cooperation and commits another crime.[53] Take the example of two accomplices who agree to commit a larceny by using force, a crime whose *actus reus* does not entail murder. However, it so happens that one accomplice decides, during the course of committing the crime, to kill the victim. If a legal system bases liability on objective predictability rather than on subjective *mens rea* of the perpetrator, liability for murder could be ascribed to a person who did not intend a murder to occur. References are made to the standard of a reasonable person who should have predicted that their enterprise could have resulted in the victim's death. Gur-Arye refers to the concept as “natural and probable consequence in complicity”, however terms “common purpose” and “joint enterprise” are also used.[54]

Treatment of persons as agents responsible for their actions is derived from the principle of dignity of the person.[55] One result of complicity may be that crimes start to “share” certain elements of their *actus rei*, hence either of the accomplices need not perform all of the requirements of the crime, yet still be held liable for the entire act. The bounds of liability are delineated by the scope of the

[51] Christopher McCrudden, see note 19, p. 677.

[52] I wish to propose an analogy with a question posed by Saint Thomas Aquinas: “Whether the natural law is the same in all men?” He wrote that: “Consequently we must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail, both as to rectitude, by reason of certain obstacles (just as natures subject to generation and corruption fail in some few cases on account of some obstacle), and as to knowledge, since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature; thus formerly, theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans, as Julius Caesar relates” (St. Thomas Aquinas, Summa Theologiae, I–II, q. 94, a. 4, transl. Fathers of the English Dominican Province, http://www.newadvent.org/summa/index.html, accessed 31 May 2017). I submit that discrepancies in the application of both natural law and the principle of human dignity need not stem from depravity, but from cultural, historical and geographical differences. Unless and until the essence of the principle is violated, a purported legislative determination falls within the realm of permissible actions.

[53] Miriam Gur-Arye, “Human Dignity of “Offenders”: A Limitation on Substantive Criminal Law”, Criminal Law and Philosophy 6 (2012), p. 189.

[54] It is worth noting that the doctrine has not been adopted by Polish criminal law. Pursuant to Article 20 of the Polish Criminal Code, “Every accomplice to the prohibited act is liable within the limits of his intentional or unintentional behaviour, irrespective of the liability of other accomplices”. After the United Kingdom Supreme Court handed down its judgment in *R v Jogee* ([2016] UKSC 8) in February 2016, it is no longer sufficient under the law of the United Kingdom for the accomplice to merely predict a risk of committing a further crime (now the standard is intent).

[55] Miriam Gur-Arye, see note 48, p. 191. Cf. Also: Andrew Ashworth, Principles of Criminal Law, (Oxford: Oxford University Press, 1991), p. 128.

agreement, factual actions of the perpetrator and his intent or lack thereof. Adoption of the joint enterprise doctrine is based upon the assumption that the perpetrator far before setting out to commit a crime decides to accept any and all consequences that eventuate as a result of a criminal act perpetrated by two persons, even if he did not specifically agree to such consequences.

The Polish doctrine of unintentionality may also serve as a backdrop for verifying the adequacy of a given normative determination through the prism of the anthropological vision that underpins a legal system. The Polish Criminal Code distinguishes between conscious and unconscious non-intentionality. In each of those cases the defendant's violation of the relevant rules of caution in dealing with a good serves as the starting point, however conscious non-intentionality is in play where the offender predicted a possibility of committing the act even though he did not want it and did not agree to it, whilst unconscious non-intentionality – where the offender could have predicted the commission of the act.

Even though holding liable unintentional perpetrators does not give rise to doubts, the scope of that liability is questionable. The essence of unconscious non-intentionality boils down to establishing the ambit of the duty to predict the consequences of acts in breach of the rules of caution. The construct is propped up by a normative criterion which represents a specific obligation. Many criminal textbooks feature a hypothetical where a parent, whilst taking care of their child, puts a pot on the cooker to boil soup. Whilst the soup is heating up, the parent recalls having to find something in the wardrobe in another room. In the meantime, a kid enters the kitchen, pushes the pot down from the cooker and spills the soup on themselves, sustaining severe burns. The parent is at pains to explain that they did not predict such a tragic situation could arise within a few minutes after they left the kitchen. Under the Polish doctrine of unconscious non-intentionality, it must be established whether the parent could have predicted the commission of a crime. This, in turn, cannot be established without devising a model of a perfect parent or other guidelines of prudent behaviour.

The case law of the Polish Supreme Court stands for the proposition that the perpetrator may be liable for unconscious non-intentionality only where the criminal consequence that ultimately ensued was objectively predictable. In other words, the consequence "was recognizable for the so-called normative model having adequate knowledge and life experience"[56] In case of "lack of objective predictability of the criminal consequence under given factual circumstances" liability does not arise. Elsewhere the Court explained that mere objective predictability of the consequence ensuing is not sufficient; instead, one must look for "the predictability of a significant, and not any, degree of probability of the consequence ensuing".[57]

By constructing a model of a reasonable citizen, with all the requirements resulting from the social role such a person performs, one formulates an objective obligation isolated and independent from any subjective aspects that surround the perpetrator on the facts of any given case. That the assignment of liability is based upon a model of a person necessitates viewing human beings not as unique individuals, but representatives of concrete social roles.[58] This may risk overlooking the individual dimension of every person.

I do not seek to argue that perpetrators of non-intentional crimes should not be held liable at all. In fact, it is beyond the scope of the paper to present a complex argument on the nature of liability; *mens rea* is merely one factor taken into account when determining liability. It seems, however commendable to reconsider the assignment of liability for a criminal consequence of one's actions by reference to the reasonableness model where the perpetrator did not predict the consequence to eventuate. H.L.A. Hart points to a number of potentially drastic effects of rejecting liability for unconscious non-intentionality. For instance, a level crossing attendant who failed to lower the bar would get off the hook. Hart urged, however, that caution be exercised in constructing the reasonableness standard and that criminal law adopt mechanisms to assess the perpetrator's ability to act in line with the standard.[59] It is only in this way that strict liability is avoided. A lower standard could be embraced where a person consciously undertakes obligations correlated with greater responsibility.

Another related challenge that criminal law must face up to is assigning liability for a criminal consequence where the *mens rea* of the offence is unconscious non-intentionality (unconscious non-intentionality). Although the mere incidence of careless behaviour and lack of awareness as to the consequences thereof may necessitate a reaction, even a penal one, this does not inevitably bring about liability for the consequence. Certainly, by breaching the rules of caution the perpetrator causes a threat to a legal good. Attribution of liability should not be questionable in the sense that the perpetrator as a reasonable citizen shall know the established rules of caution and obey them. Conceivably, liability for a risk posed in the state of unconscious non-intentionality would automatically constitute liability for an illegal breach of the rules of caution. Liability for the consequence pushes the boundaries much further, bringing them closer to objectivity.

An answer to the problem so stated shall be sought in the vision of man professed by the anthropological principle of human dignity, particularly if it is treated by international law or the constitution as a foundation of its determinations. Dignity of the person becomes, therefore, a platform where primary and secondary legitimacy of criminal law may be reconciled. Dignity understood within the interpretative context proposed here mandates looking at a person as a subject that realizes himself through his free actions sourced in his capacity for self-determination.[60] The boundaries of self-determination should serve to delineate the scope of one's liability. In conclusion, it is doubtful to hold one liable beyond the bounds of one's intention.

[56] Judgment of the Polish Supreme Court of 4 July 2013, citation number III KK 33/13.

[57] Decision of the Polish Supreme Court of 15 February 2012, citation number II KK 193/11.

[58] Mateusz Rodzynkiewicz, Modelowanie pojęć w prawie karnym, (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1998), p. 107.

[59] "What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities" (Herbert L.A. Hart, Punishment and Responsibility. Essays in the Philosophy of Law, (Oxford: Oxford University Press, 2008), p. 152).

[60] Tomasz Duma, "Człowiek sprawcą czynu. Karola Wojtyły próba wyjaśnienia podstaw dynamizmu osoby", in A. Maryniarczyk, P. Sulenta, T. Duma, Wokół antropologii Karola Wojtyły (Lublin: Polskie Towarzystwo Tomasza z Akwinu, 2016), p. 258.

6. Conclusion

Above, I proposed a conception of ethical legitimacy of criminal law that is founded upon the principle of dignity of the person. Still, having read the paper one could ask: why should we debate the problem of ethical legitimacy of criminal law at all? There are at least several answers to a question so stated. First, the paper seeks to respond to the need to instruct on the ways of thinking about criminal liability. I do not refer here to historical sources or the origins of particular institutions and instruments, which is an interesting research topic in and of itself, but rather to intellectual sources, a conceptual context in which certain solutions in the realm of criminal liability we are accustomed to were shaped and embraced. For no one believes, I hope, that they are a special invention of contemporaneity or that they are traced back to some all-encompassing wisdom of a rational legislator. It is also untenable to think the shape of the principles of criminal liability is a result of coincidence, an effect of random concomitance of various circumstances. Instead, it appears that the constructs discussed here were formed throughout centuries under the influence of moral experience and ever-developing convictions regarding the scope of responsibility of a person. Ethics, particularly where practically applied, is a domain mastering of which necessitates lengthy experience amassed for generations, and one that is still open to new challenges. Criminal law too, a state ethical code, as it were, follows the ethical experience.

The method of analysis of criminal law I am espousing here has serious practical significance, on at least two levels. Recognition of this fact could allow legislators to properly devise the ambit of criminal law and its instruments. Thanks to reconciling criminal law with an anthropological vision of man and ethical experience criminal law is capable of becoming not an oppressive tool in the hands of the state, but a communal expression of a desired state of affairs. Multiple divergences between the ethical convictions of a polity and a criminal code they used to live under may be found under the regime of the 1969 Criminal Code in Communist Poland. Its Article 224 proclaimed that: “§ 1. Who, without permission, buys out, with a view to selling for profit, goods bought domestically for foreign currency, paid in Poland or abroad, or documents entitling to buy such goods, is subject to a penalty of imprisonment of up to 5 years. § 2. The same punishment pertains to a person who sells for profit goods or documents specified in § 1”. The Code criminalized an act commonly accepted in societies organized around a free market economy, one that, moreover, is consistent with the economic intuitions of an average person: “buying for less and selling for more”. The provision was situated in the specific part of the Code, but is not difficult to draw upon an example from the general part. An extreme one could be found in the Criminal Code of the Soviet Union which codified a principle of social danger, understood in a rather caricatured manner. For every socially dangerous act was considered a crime. The principle even replaced the principle of guilt, which was hailed as a great achievement of the Marxist school of criminal law.[61] Among socially dangerous acts were those which were inconvenient for the state government, and not those the society considered deplorable and reprehensible. Therefore, it can be assumed that where criminal law is shaped based upon the ethical experience of a society and its vision and understanding of man, their abilities and scope of liability, one may expect a greater degree of effectiveness of this branch of law.

Recognition of the problem of ethical legitimacy of criminal law also helps to correctly interpret individual provisions. As long as one agrees that criminal law does not come out of thin air and that it is ethically relevant, for sure it is easier (and comes at a lesser risk of making an error) to construe a provision, provided one is guided by the anthropological vision of man adopted by the legislator. It is usually the case that traces of that vision and the ethical convictions of a polity may be found in legal pronouncements and determinations fundamental to a given society, as well as in international treaties a given state has entered into and transposed into its own domestic system. This paper considers the principle of dignity of the person and its semantic context rooted in personalism as one such trace. Justifiability of the idea is shown by reference to the example of unconscious non-intentionality. Of course, ethical legitimacy of criminal law and the choice of a constitutional anthropological vision have implications not only for this institution. Others include the theory of a criminal act, attempt, assignment of liability for a consequence, defences and errors.

[61] George V. Starosolsky, “Basic Principles of Soviet Criminal Law”, North Carolina Law Review 4 (1950), p. 365.