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PHILOSOPHICAL ROOTS OF PUNISHMENT IN MODERN CRIMINAL LAW AND ITS PRACTICAL LIMITS (WITH SPECIAL REGARD TO FOREIGN CULTURES AND TERRORISM)

1. INTRODUCTION

This article originates from my participation in the 21th Polish-Austrian Seminar on Criminal Law, held at Warsaw University in June 2016. The leading subject of that seminar was *Current challenges for criminal law: foreign cultures and terrorism*. It is already a tradition to view the same subject from the viewpoint of Polish and Austrian lawyers. The inquiry is not limited to Polish and Austrian criminal law, yet we are aware that practice, place and time as well as local professional experience shape the perception. I was assigned the same subject as Anna Maria Blamauer from the Faculty of Law at Salzburg University. We both spotted the limits that the criminal law and punishment can play in regulating unwanted behaviour. The difference in our approach to the issue is partly the result of the legal branch each of us represents. Whilst Professor Blamauer concerns herself primarily with dogmatic criminal law, criminology, but also the impact of feminist jurisprudence, serves as my chief point of focus¹. The different political economies that shape penal tendencies in Poland and Germany also play a role. What we share, however, is a similar opinion on efforts to solve the danger of a terrorist air attack. It is the story of two legal acts: the German Air Security Act *Luft-sicherheitsgesetz* (Aviation Security Act of January 11, 2005), and the Polish State Security Borders Act, particularly its art. 122a in the amended form (of October 12, 1990, Journal of Laws of the Republic of Poland from 1990, No. 78, item 461, as amended). In both cases constitutional courts took a stand we agree with. Yet the fact that such laws were created indicates an actual danger of loss of control while giving room to panic and fear. Employing criminal law to fix a problem

¹ L. A. Haney, *Feminist State Theory: Application to Jurisprudence, Criminology, and the Welfare State*, "Annual Review of Sociology" 2000, issue 26, pp. 641–666.

is not necessarily a correct solution if what we are seeking is minimizing damage and ensuring the values of democratic society as well as observing human rights.

Decisions of both Polish and German Constitutional Courts provide an adequate platform for discussing the philosophical roots of punishment in modern criminal law and its practical limits (with special regard to foreign cultures and terrorism). Foreign cultures in a global multicultural world can have a positive impact by enriching our horizons and contributing to cultural diversity that, in turn, helps strengthen democratic open society. Within the narrowing space of nationalism, calls for security and insatiable religious fanaticism hint towards public acceptance of erecting walls and closing the borders². A similar sentiment and reaction may be invoked by the word "terrorist"³. It does not raise so much awareness. It often favors exclusion and prevents humanitarian aid from being tendered to those in need. What otherwise would be found grossly improper, is let off where reason is replaced with fear and panic⁴. This is not the exclusive but only an additional reason to blame for the rise of punishment. It also promotes an expanded use of criminal labels with regard to behaviour otherwise located rather within social policy than criminal law. The discussion concerning philosophical roots of punishment often overlooks consideration of the nature of crime. What, why and for what purpose something is labeled as a crime is equally important. In the case of a hijacked plane we will see that one's mere presence on the plane might be enough to turn such an individual into a dangerous person.

The above proves that the more space is given to criminal law, the more neglected adequate social policy might be⁵. This is the case because time, money, efforts, and hope for solutions are transferred to the area of crime. Nils Christie has questioned taking such steps as well as the existence of "real" crime and "real" criminals⁶. What is "a crime", and who is "a real criminal"? It seems necessary to go back to the roots of punishment to grasp an essence of the label we use. This is especially vital today when we tend to identify people as dangerous based merely on their shared refugee status, religious identity or ethnicity. The format of the article leaves no space for even a summary of the theory of philosophical roots of punishment⁷. It does, however, leave space for an idea

² I. Jakubowska-Branicka, *O dogmatycznych narracjach. Studium nienawiści*, Warszawa 2013, pp. 92–113.

³ V. Klemperer, *LTI. Notatnik filologa*, translated by J. Zychowicz, Kraków, Wrocław 1983, pp. 206–207.

⁴ E. Traverso, *Europejskie korzenie przemocy nazistowskiej*, translated by A. Czarnacka, Warszawa 2011, pp. 51–65.

⁵ D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford 2002, pp. 1–26.

⁶ N. Christie, *A suitable amount of crime*, London 2004, pp. 101–105.

⁷ See L. Lernell, *Podstawowe zagadnienia penologii*, Warszawa 1977, pp. 20–27; M. M. Feeley, M. Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, "Criminology" 1992, Vol. 30, issue 4, pp. 449–474; A. R. Ackerman, M. Sacs,

that philosophical roots play a minor, secondary role in shaping the actual level of criminal sanctions. They do play a major role in disguising the real factors behind a specific criminal system. Retributive arguments, which see punishment as a means of deterrence, may serve to justify both expansion and restriction of the scope of criminal law and its sanctions. The same conclusion applies to arguments which stress rehabilitation and corrective justice⁸. Most systems are not explicitly orientated towards any one of those but rather a mixture of several ones. In the Polish Criminal Code, there is space for retribution, incapacitation, deterrence, rehabilitation (art. 53) and, in the Code of Criminal Procedure, for restoration (see art. 4). Despite philosophical similarities, criminal justice systems differ from each other. Philosophical roots tend to serve as an excuse to justify specific political needs and policy – the Hammurabi Code and the phenomenon of misreading its retributive justification is a good example of that process.

2. HAMMURABI AND THE PHILOSOPHICAL ROOTS OF PUNISHMENT IN MODERN CRIMINAL LAW

Hammurabi is often called upon in a discussion on the philosophical roots of punishment. Unfortunately, his achievements are often misread. It has been accepted that the idea of “an eye for an eye” embodies approval of strict punishment and proves its efficiency. This conviction is so entrenched that a proper interpretation of the rule has eluded most people. Consistent application of the “eye for an eye” rule would leave us all blind. “An eye for an eye” read as an invitation for harsh punishment is wrong. It is also wrong to argue that repression is an adequate tool to deal with foreign cultures and terrorism. It’s time to re-read the idea of “an eye for an eye”.

Hammurabi’s code is widely known, not only among lawyers⁹. Yet it is loud-mouthed lawyers advocating an increase in the intensity of sanctions that point with *braggadocio* upon his name and recall “an eye for and eye, and a tooth for a tooth”. But it is time to contest the fairness of that argument. Exploiting Hammurabi as an advocate of harsh punishment is a mistake; commonly repeated, but a mistake. When advocates of harsh punishment take to the floor they call for increase and for more punishment. With what almost makes an impression of a sadistic pleasure, they argue for changing the law and provide for more, longer, stricter punishment. Proposed new sanctions exclude space for leniency

R. Furman, *The New Penology Revisited: Criminalization of Immigration as a Pacification Strategy*, “Justice Policy Journal” 2014, Vol. 11, issue 1, pp. 1–20.

⁸ M. Platek, *Systemy penitencjarne państwa skandynawskich*, Warszawa 2007, pp. 485–489.

⁹ *Kodeks Hammurabiego*, translated by M. Stępień, Warszawa 1996, pp. 5–7.

and welcome life imprisonment and even death punishment¹⁰. Hammurabi is supposed to be a good patron of the idea and an illustrative example thereof. The point, however, is that such an interpretation is utterly wrong. Hammurabi did not ask for anything more but proven injury, and he certainly did not welcome excess. On the contrary, he favored limiting the gravity of possible punishment. Revenge, albeit civilized, was acceptable. No butchery, bloodshed or cruelty was invited. What was acceptable under the disguise of justice was limited to not more than “an eye for and eye”. At the same time, behind bold and scrupulous *ius talionis*, a financial resolution rather than actual “eye for an eye”, was common and invited. Hammurabi satisfied social sentiments in a way that strengthened his position. The limits, though, were clearly delineated; not more for an eye than an eye. It could look severe and was meant that way. It was supposed to look severe. And had to stay under control. The catalog of those sanctions and ways of legal reasoning applied in that era differed from contemporary ones¹¹. It was justifiable in the harsh conditions people endured at that time. It took time to transition from the Hammurabi era to the concept of human rights and a rise of social sensitivities¹². Yet the fact is that Hammurabi put emphasis on inevitability of punishment rather than on its harshness¹³. Hammurabi’s aim to render the perspective of a sanction unavoidable could make an impression of harshness. It was well sold. We have bought that impression neatly. Yet in “an eye for an eye” there is no trait of general prevention. Once more – revenge is welcome but within the limits of retribution.

The distinction between wrongdoing and attribution (accountability, culpability) raises a critical set of issues questioning the rationale of punishment¹⁴. The revival of the retributivist approach to punishment has led many to advocate for just deserts. Originally, just deserts represented the idea that punishment should correspond with the crime. Fair and appropriate punishment should be related to the severity of the committed crime. Later, however, just deserts in some coun-

¹⁰ See a proposition of the Polish Minister of Justice to amend the criminal law and introduce a sanction of 25 years of imprisonment for fiscal offences (at <http://kurier.pap.pl/depesza/167393/> (visited August 15, 2016)); a proposition to re-introduce death penalty for some offences, at K. Majak, *Dyrektorka telewizji Republika chce kary śmierci dla Tuska*. Ewa Stankiewicz: *należy się najsurowsza z możliwych kar*, at <http://natemat.pl/176857/dyrektor-telewizji-republika-chce-kary-smierci-dla-tuska-ewa-stankiewicz-chcialabym-moc-realizowac-sie-zawodowo> (visited August 15, 2016).

¹¹ J. Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, pp. 101–103.

¹² P. Spierenburg, *The Broken Spell: A Cultural and Anthropological History of Preindustrial Europe*, New Brunswick, 1991, pp. 1–10; S. McGlynn, *By Sword and Fire. The savage reality of so-called “Age of Chivalry”*, London 2008, pp. 91–140.

¹³ C. Beccaria, *O przestępstwach i karach*, translated by E. S. Rappaport, Warszawa 1959, pp. 75–79; K. L. Montesquieu, *O duchu praw*, Vol. 1, translated by T. Żeleński (Boy), Warszawa 1927, pp. 262–284.

¹⁴ M. A. R. Kleiman, *When Brute Force Fails. How to have less crime and less punishment*, Princeton, Oxford 2009, pp. 117–148.

tries (USA & Poland included) became an argument for increased and harsher punishment than one people got used to¹⁵. Trying to back up such a stance with the authority of ancient Hammurabi is not justified. It is misleading to read Hammurabi as one who opts for escalation of criminal sanctions. Criminality, crime, punishment and justice – those aspects played a secondary role. The political role in promoting “eye for an eye” rule was vital. It was necessary to prevent excessive revenge that could threaten the leader’s political and military position. “An eye for an eye” formula was all that could be accepted. It constituted a limitation on popular rage and a measure that could be accepted as justice. Justice was just a word. A word used as a tool to keep together the vast kingdom Hammurabi formed.

The Babylonian king Hammurabi reigned from 1792 to 1750 B.C. He inherited a small kingdom from his father. It was some 150 km long, and 50–60 km wide with Babylon as the capital city. He started his term as a king with liberating many. Lauded at the outset of his reign as a liberator, he could have in fact perceived freedom as a precious value, however sources to that effect are scarce. What is certain is that he was aware of the concept of freedom. To bring his plans to fruition he needed devoted and dedicated people. Following decades of conquer and expansion, Hammurabi, once the king of a small kingdom, became the ruler of Mesopotamia¹⁶. With the expansion of the city-state of Babylon along the Euphrates River he united all of southern Mesopotamia. The territory of his kingdom was vast enough to include diverse customs, mores and practices. One way to strengthen a king’s position was to declare local rituals, routines and practices as one’s own and call them the law given to the people. Criminal sanctions bore the potential of dominance and supremacy. Permission to allow unlimited retaliation in the name of retribution can easily undermine the actual power of a ruler and imperil his position. Hammurabi was smart enough to know that. Therefore, he was accepting of the tradition of the conquered lands, adopting the relevant local customs as his law. It was a smart way of winning public compliance with his rule. Respect for old tradition gained acceptance for the new king. Generally, no new laws were imposed aside from the “eye for an eye” rule¹⁷.

The new authority was better off with less rather than more changes. Criminal law, though, was a notable exception. The king could have his emissaries, legates and clerks, but in order to sustain the power he had to be the one and mighty.

¹⁵ G. P. Fletcher, *Rethinking Criminal Law*, Boston 1978, pp. 459–460.

¹⁶ Hammurabi was the sixth king in the Babylonian dynasty, which ruled in central Mesopotamia (present-day Iraq) from c.1894 to 1595 B.C. His family descended from the Amorites, a semi-nomadic tribe in western Syria, and his name reflects a mix of cultures: Hammu, which means “family” in Amorite, combined with rapi, meaning “great” in Akkadian, the everyday language of Babylon. Hammurabi expanded his kingdom up and down the Euphrates, until all of Mesopotamia was under his sway.

¹⁷ Hammurabi’s Code includes many harsh punishments, sometimes demanding the removal of the guilty party’s tongue, hands, breasts, eye or ear. But the code is also one of the earliest examples of the idea of the accused being considered innocent until proven guilty.

He could not allow for the military and political prevalence of local knights, which could conceivably materialize under the guise of justified revenge. When unleashed and powerful it could prove superior to the king, which is why there was a need for it to be limited. Therefore ‘an eye rule’ could raise a claim for no more than an eye, and a tooth could not cost and justify decapitation. All that justified taking out a tooth was a tooth only. Big words like “crime” and “justice” are just words. They are useful for one in power to justify one’s actions, yet not necessarily so for subjects who have to obey and live in line with them. That is why financial compensation was permissible and could be easily exchanged for an eye or a tooth (of course bearing in mind class, social status and pecuniary chances).

The Hammurabi code is not a code in the sense that it consists of a set of methodological systematizations of a body of laws. Rather, it is a collection of 282 laws and standards, rules stipulated for the purposes of commercial interactions which set fines and punishments with a view to meeting the requirements of justice. Carving it into a massive, finger-shaped black stone “stela” was meant to make an impression and it did¹⁸. At the top of the column there is a bas-relief depicting the god Shamash, an ancient god of light and darkness, god of justice and the whole universe. He rules the Earth, the sky and the underworld. He is mighty, just and merciful. Shamash is pictured seated on a throne, wielding the emblems of power, justice and righteousness and passing them to Hammurabi. The symbolism is clear and serves the strengthening of Hammurabi’s position. The god not only grants Hammurabi the power, but also makes him his equal. Now Hammurabi can exercise the power to divide light from darkness, good from evil, and judge his people.

The legend that the Babylonian king received his code of laws from Shamash also was to help impress the people and shut off possible discussion about the imperfections of the law carved in stone.

We are not sure to what extent Hammurabi replicated the patterns of his predecessor while carving the laws in stone and backing up his position with the might of a god. Yet aspiring to the role of a god’s kin is evidently what humans do to lure and seduce the audience. History proves this pattern to be a stable one. Human beings are very much like each other. We look the same. We share dreams and needs. We are born and we die. There is no exemption and no exclusion from that rule. To justify excess consisting in abuse of power and position we create distinctions aimed at substantiating the otherness, exceptionality of a given person and their position¹⁹. The story of gods and being a god’s relative serve as an argument to validate and defend excess of power as “natural”. Divine anointment may be one form of a rationalization for the elevation that we feel entitled to.

¹⁸ It was looted in 12 BC by invaders and rediscovered in 1901 by a French archaeological team in present-day Iran.

¹⁹ P. Bourdieu, *Dystynkcja. Społeczna krytyka władzy sądzienia*, translated by P. Biłos, Warszawa 2005, pp. 129–151.

It was Jean Rostand, a French philosopher and biologist, who observed that “When you kill one man, you are a murderer. When you kill millions, you are a conqueror. Kill them all, and you are a god”. Hammurabi would most probably not welcome involvement in such a discussion. People in his kingdom could be granted freedom, yet they were still his people. Their life was very much in his hands, and they were his subjects and serfs. The notion of individual freedom, social contract and democratic state of law were long ahead to come. But the notion of collusion of church, gods and the state present in Hammurabi’s days is still preserved in some countries. It is so even despite constitutionally declared separation of state and religion. It is so because political interdependence and personal profits prevail over the letter of the law. And the motivation goes back in time and is similar to that in play under Hammurabi’s time. When credibility is otherwise feeble, sanctity is to be harnessed. Gods are useful, also to put blame on. Wars, human massacres, production and selling of arms, violence and intolerance – these are human actions where blame is shifted to one or the other god. It is said to be done “for God”, “in the name of God”, “under God’s command” etc., etc.

Hammurabi, while expanding his territories, set double standards – it is not life that matters, but who controls death. When he was killing legions he was a conqueror. A carved stela and a place in history beside Alexander the Great and Napoleon was the judgment he received. It gained him a name of a chieftain and leader and never a murderer and a mass killer. It is different when death comes as a result of an unhappy, tragic or imprudent, impulsive event. Then, we start a discourse of crime, law and justice. We are tempted to talk about justice but in fact we have law and order in mind. It is an emperor’s commandment that one shall not kill. Life is not what matters here. What matters is an order, one that has to be observed. The quality of life is not what we are after. A crime is associated with its victim, but neither is the victim relevant here. A conversation about punishment concentrates on power. There must be a breach of an order which commands to follow the law. And the emperor’s whim is part of it. You can kill when it pleases the ruler, and you will be killed when it does not. And it does not please the ruler when your action undermines his status. This is why the price for an eye is no more than an eye. This illustrates the structure of power so brilliantly described by Michel Foucault in his *Discipline and Punishment*. Punishment, as Foucault stresses, belongs to a political technology. “In the darkest region of the political field the condemned man represents the symmetrical, inverted figure of the king”²⁰. The point is not to advocate refraining from punishing or excusing inaction. On the contrary, what Hammurabi did shall be examined from Nils Christie’s perspective. He has remarked that there are horrible events, displays of unwanted

²⁰ M. Foucault, *Discipline and Punishment. The Birth of Prison*, translated by A. Sheridan, New York 1982, pp. 29–31.

behaviour and people who commit outrageous, horrific deeds. Yet “crime” and “offence” as such do not exist, as they have no material form. A dead body is dead no matter if we call the killer a murderer or a hero. It will not bring back the life. And the label applied to a killer most probably does not respect the killed person’s opinion. It is not naïveté but a fair observation. Crime is not a fixed concept. Acts considered criminal vary between societies and over time. Any act can be defined as criminal. Any act that can be defined as criminal can cease to be that when committed by a person in power. Crime is otherwise in endless supply and so is punishment. Nils Christie on purpose used with regard to “crime” and “punishment” the word “supply” otherwise associated with trading goods to make us aware of the potential resting in those terms. It seems, though, that the Hammurabi rule drew limits at least in relation to punishment. “An eye for an eye” should be read as: no more than an eye for an eye. Nils Christie, on the contrary, drew limits to crime. It is up to us how many criminal offences we codify – there can be as many as we want. In the light of this, it is our responsibility to determine the kind of behaviour which deserves the label of “crime”. We have as many of them as we want, as many as it suits us. The number has nothing to do with actual harm caused by unwanted behaviour. Being unwanted does not necessarily point towards terming a particular manifestation of behaviour an “offence”. There are many ways to deal with what is unwanted in society. Criminal law and criminal policy is the last resort, and should not be the first. It is an issue centered around making a political decision on a suitable amount of crime²¹. A suitable amount of crime is correlated with the role that punishment plays in society. What is a suitable amount of control through the penal apparatus? And eventually, what is a suitable number of officially stigmatized sinners?²² This has less to do with the actual amount of unwanted behaviour, more with penal policy. Penal policy, in turn, depends on socio-economic indices.

3. THE STRUCTURE OF PUNISHMENT IN MODERN CRIMINAL LAW

As Nils Christie observed, “Penal systems carry deep meaning. They convey information on central features of the state they represent. Nothing told more about Nazi Germany, about the USSR or about Maoist China than their penal apparatus – from their police practice, via courts to prison, camps and Gulags. In concrete cases, we can evaluate states according to their penal systems”²³. Different coun-

²¹ N. Christie, *A suitable amount...*, p. 75.

²² *Ibidem*, p. 101.

²³ *Ibidem*.

tries criminalize different behaviour. That alone is an argument for an absence of a solid, incontrovertible catalogue of crime. An effort to recall the Ten Commandments as proof of a hard, universal and unanimously approved set of forbidden acts proves fable and weak. No profound studies are needed. It is visible at first sight. Polish philosopher Maria Ossowska in her now classic work *Moral Norms*, demonstrates and explains the misleading nature of such a conviction²⁴. “Do not kill” and “sanctity of life” have their appeal and it is universally acknowledged that this should be the case. And yet monuments are crowded with killers whom we call heroes and preach that this is a different story. People, as Ossowska points out, have a tendency to pass simple, unequivocal judgments. “It is well known that people do not want to see the virtues of their opponents or the flaws of an ideology dear to their heart. We would like to love or hate, admire or condemn. Adolf Hitler was fully aware of this tendency when in his *Mein Kampf* he advised that it should be fully exploited in propaganda”²⁵. A simple evaluation attitude and clear-cut judging might be more common but change no fact; there is nothing like a standard crime. This also applies to punishment. There is nothing like standard punishments that represent worldwide moral collective ideas. In most cases, both crime and punishment are local, read and practiced in relation to resident socio-economic conditions²⁶. Crime and punishment alike change their form, with time passing by. The great US justice Oliver Wendell Holmes, Jr. leaves us with no mercy – we exercise rules and bans not because they are effective but simply because we got used to them. “A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, an ingenious minds set themselves to inquire how it is to be accounted for”²⁷. The way we use a set of customary measures are well described by Michael Cavadino and James Dignan. Measures applied by criminal law might depend on its philosophical roots. Yet the philosophical roots themselves are not free from contingent, local socio-economic settings. The way we think, create and apply ideas is determined by the conditions that create grounds and are the soil for our thinking. The philosophical roots we call upon expand the idea of interdependency of criminal sanctions, criminal law and state economy. It is not however clear to what extent philosophical roots are the right justification for ignorance of actual factors that shape a given criminal system. They are alike in the countries with diametrically different criminal systems. Therefore, it is not enough to look into ideas behind the choice of a sanction. It is more than

²⁴ M. Ossowska, *Moral norms, a tentative systematization*, translated by I. Gułowska, Warsaw 1980, pp. 22–44.

²⁵ *Ibidem*, p. 4.

²⁶ L. Svendsen, *A Philosophy of Freedom*, London 2014, pp. 25–90.

²⁷ O. W. Holmes, Jr., *The Common Law*, Toronto 1991, p. 5.

that. The shape of a penal system, as Dignan and Cavadino claim, depends on the features of a specific society. It is not a one-way process, but a two-way one. It is not only a specific socio-economy system that shapes a local criminal law system. A local criminal system shapes a local socio-economy (although this process is less recognized)²⁸. The local socio-economy equally shapes the existing penal system. It is both a result and a cause. Heavy dependence on punishment and criminal law affects economy and social integrity. It is only ignorance and a failure to see the real forces molding a penal policy that are strengthened by perceiving the structure of punishments as an effect of a well-established philosophy. The actual penal policy has more to do with social economy and with the system of power that happens to be in place. More stringent and autocratic regimes as well as democratic ones are supported by the same philosophical ideals. The emphasis might differ though. Cavadino and Dignan explain the process, basing their findings on a study of twelve penal systems of contemporary capitalist societies. Based on political economies of the countries, they locate the countries in several categories: neo-liberal, conservative-corporatist, social democratic and oriental-corporatist. Neo-liberal, as for example USA. Conservative corporatist, as in the case of Germany. Social democratic, as e.g. Sweden. And oriental corporatist, as in the case of Japan.

Dignan and Cavadino point out that punitiveness of a penal culture and rates of imprisonment are strongly associated not with the amount of crime but with the political economy of a country. As mentioned above, countries might share the same philosophical roots of punishment; they might share an interpretation of Hammurabi rules. They might even share a similar reported crime rate, and at the same time their scale of applied punishment might very much differ. For one country might be extremely reluctant to impose imprisonment, whilst another might be equally unwilling to restrain the use of imprisonment²⁹. Punishment is a complex phenomenon. Dignan and Cavadino are not the first and not the only ones that point at this interdependence³⁰. I have already mentioned Foucault's *Discipline and Punishment*. Dignan and Cavadino refer to the pioneering work of Emile Durkheim, *Two laws of penal evolution*. Durkheim formulated his idea as follows: "The severity of punishment is greater where societies are of less advanced type and where the central power is more absolute in character"³¹. Durkheim observed that philosophical roots are just an element of a sanction system,

²⁸ M. Platek, *Partial justice. On collateral consequences of imprisonment*, (in:) T. Elholm, P. Asp, F. Balvig, B. Feldtmann, K. Nuotio, A. Strandbakken (eds.), *Ikke kun straf. Festschrift til Vagn Greve*, Copenhagen 2008, pp. 519–530.

²⁹ M. Cavadino, J. Dignan, *Penal policy and political economy*, "Criminology and Criminal Justice" 2006, Vol. 6, No. 4, pp. 435–456.

³⁰ See also: H. Mannheim, *The Dilemma of Penal Reform*, London 1939, pp. 213–228; G. Rusche, O. Kirchheimer, *Punishment and Social Structure*, New York 1939, pp. 193–207.

³¹ E. Durkheim, *The Two Laws of Penal Evolution*, "University of Cincinnati Law Review" 1969, Vol. 38, issue 32, p. 32. Durkheim's essay, entitled *Deux lois de l'évolution pénale*, was

and not necessarily the most influential thereof. J. Dignan and M. Cavadino rely on the work of David Garland and others who tried to explain differences between criminal justice systems in countries sharing philosophical roots of punishment³². To understand the differences in the way we approach criminal sanctions, they include a broad spectrum of factors that are shaped by and influence the level of punishment prevalent in local systems.

The differentiation factors are: economic and social policy organization, income differentials, status differentials, citizen-state relations, social tendency to inclusivity/exclusivity, political orientation, dominant penal ideology, and receptiveness to prison privatization.

It is interesting that all formerly slave countries included in the study (USA, England and Wales, Australia, New Zealand and South Africa) bear the colonial and slavery past. With free market and residual welfare state, extreme income differentials and merely superficial, formal egalitarianism, as well as social conservatism and pronounced tendency to social exclusion, these are societies with an exclusionary mode of punishment and state politics heavily dependent on severe punishment and criminal law. In the study, they were placed in the neo-liberal category. On the other hand, states like Sweden, Norway or Finland (counted as social democratic welfare states) with generous welfare programs, relatively limited income differentials, broadly egalitarian with a limited propensity towards social exclusion, gravitate towards an inclusionary mode of punishment and therefore rely on criminal law in their social policy to a rather limited extent³³.

Poland fits into the neo-liberal category, whilst Austria fits into the category of conservative corporatist states (together with Germany, France, Italy, the Netherlands). The economic and social policy organization in those countries is status-related, with moderately generous welfare state. The income differential is significant but not extreme. The status differential is moderately hierarchical, based on traditional occupational rankings. Social rights are moderately observed as moderate social inclusion is exercised. The dominant penal ideology is not based on the idea of rehabilitation and resocialization. It therefore differs from that prevalent in the USA and Poland, neo-liberal conservative mode, as well as from citizen right-based mode of punishment as in Sweden or Finland. In all those countries, despite their different socio-economic régimes, the historical and philosophical roots of punishment are the same. Yet criminal and penal policies in those countries do not have much in common. Understandings of what is deserved, how long is long enough, and how much is too much vary in the context of different regimes. Six-month imprisonment is perceived as a short time

originally published in "Annee Sociologique" 1900, issue 4, pp. 65–95; English translation: W. Jeffrey, Jr.

³² D. Garland, *Punishment and Modern Society*, Chicago 1990, pp. 249–276.

³³ *Ibidem*, p. 441.

in a neo-liberal country (e.g. Poland). Major discrepancies lie not in the scale or nature of crimes, but in political economy regimes.

The level of unwanted behaviour has a tendency to decline, regardless of the regime of a country³⁴. Steven Pinker explains this phenomenon by reference to changes in cultural norms. Popular rise in empathy and regard for human rights is one of them³⁵. It does not necessarily coincide with modern criminal justice and the penal welfare state. Crime rates are falling down, the eagerness to criminalize more and punish more severely is rising. The problems of order and density of crime might have little in common. Robert P. Burns, professor at Law Faculty, Northeastern University (Evanston, Ill.), in his great book titled *Kafka's Law: "The Trial" and American Criminal Justice*, describes the odd centrality of issues of crime and punishment in American politics. No country is immune to tendencies to abuse power. The ideal way to prevent the abuse is risk awareness that it might happen. R. Burns finds many of the same characteristics of the law that Kafka satirized as marks of a system of pure dominance. The practice of controlling crime tries to adapt marginalized sections of the population to an insecure economy. R.P. Burn points out that a sovereign state is in fact incapable of controlling and preventing crime. It purports to do just that by expanding criminal law sanctions mostly towards marginalized section of the population. The more neoliberally oriented the state is, the more it is devoted to do less in the realm of social services and strive more towards a harsh criminal justice system. This is when incarceration reaches higher levels and calls for death penalty are welcome³⁶.

The category of crime is called upon when serving a political need, and invisible where that interest is gone. An approach to criminalize the so-called defamatory statement that World War II Poland was home to "Polish death camps" instead of "Nazi death camps" represents the first approach. Under a disguise of defending the truth and honor the proposed law is to mute the discussion of crimes for which Poles were responsible, such as the 1941 murder of Jews by their Polish neighbors in the village of Jedwabne. Although the crime is well documented by Polish authorities, Anna Zalewska, the education minister, in July 2016 shied away from an admission of Polish responsibility, saying it was "a historical truth in which there were many misunderstandings"³⁷. When, however, crime does not serve political needs; declining both the fact and existence of applicable law

³⁴ S. Pinker, *The Better Angels of our Nature. Why Violence has Declined*, New York 2011, pp. 108–110.

³⁵ *Ibidem*, pp. 129–188.

³⁶ R. P. Burns, *Kafka's Law: "The Trial" and American Criminal Justice*, Chicago 2014, pp. 76–87.

³⁷ C. Kroet, *Poland to prosecute for the phrase Polish Death Camp*, "Politico", August 17, 2016, at <http://www.politico.eu/article/poland-to-ban-phrase-polish-death-camps-nazi-germany/> (visited August 18, 2016).

is possible. In this connection, it is sufficient to invoke the official denying of the existence of a domestic violence problem in Poland and efforts to undermine and eliminate a rationale for an anti-violence convention³⁸.

With regard to philosophical roots of punishment, it shall be concluded that with human capacity for compassion growing, one should reinterpret the idea of “an eye for an eye” as an idea that limits sanctions rather than bolsters the abundance thereof.

Similarly, a reference to foreign cultures and terrorism should not be treated as an excuse or invitation to pass laws that under the disguise of threat of a terrorist air attack grossly curb civil liberties and human rights. Criminal law might have a positive impact when its scope is limited to basic unwanted behaviour. It fails to be effective when granted a role of solving major problems like cultural differences and explaining the reasons for a terrorist act. Criminal law is specific, and that is why it is to be treated as the last resort. If turned into the first port of call, undesirable consequences may ensue.

4. PRACTICAL LIMITS OF PUNISHMENT (WITH SPECIAL REGARD TO FOREIGN CULTURES AND TERRORISM)

In the Biblical story of the punishment inflicted on the sinners of Sodom God hears about its people's outrageous conduct. He does not, however, accept hearsay evidence of a serious crime. He decides to descend from the skies and check the evidence³⁹. Even with regard to God it is accepted that before making sense of what is happening its intentions must be discerned. Yet German and Polish legislators decided they can give up on this verification stage. A law passed at one point both in Germany and in Poland legalized shooting down of civil aircraft when hijacked by a terrorist. The law approved of killing innocent passengers just because they happened to be on the plane with a terrorist. In such circumstances, from an innocent passenger's point of view, mere buying of a plane ticket becomes evaluated as outrageous enough to shoot the airplane in case it is hijacked. When the word: “terrorist” springs into the picture, the passenger's fate and character diametrically changes.

Words matter. The word: “terrorist” raises fear and panic. To recognize someone as a human being you need to have a concept of a human being. To recognize someone as a fellow human being, you have to make sure not to strip the person of his/her human elements. Applying a scary label might dehumanize a person.

³⁸ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS 210, Istanbul May 11, 2015, in force in Poland from August 1, 2015.

³⁹ A. M. Dershowitz, *Abraham*, New York 2015, p. 12.

The word: “terrorist” connotes terror. David Livingston Smith has studied the causes of demeaning, enslaving and exterminating others and concluded that in order to be successful in such an endeavor there are three crucial factors that have to coincide⁴⁰.

It starts with authorization. When one is in a position of authority and endorses acts of violence, whilst another just does what he is told to do – a perpetrator of slander and abuse of others is less inclined to feel responsible. He therefore feels less guilty of performing any such acts. This is strongly supported by Stanley Milgram’s 1961 experiment on obedience to authority, proving that “the person with inner conviction, loathes stealing, killing and assault may find himself performing that acts with relative ease when commanded by the authority. Behaviour that is unthinkable in an individual who is acting on his own may be executed when carried out under orders”⁴¹.

Obedience paves the way to routinization. Doing what one is said to do becomes everyday reality. Even if it is breaking the law, torturing, killing. It becomes just workday activity, a job. It helps to overcome moral inhibitions. Following the rules eliminates the need for making awkward yet brave decisions and leaves no space for moral doubts. Single-minded focus on one’s job helps to hide the actual meaning of an action.

Passive submission requires overcoming moral resistance to break the law and spread violence. Here is where dehumanization matters. “Terrorist, “parasite”, and the one that carries protozoa⁴². It serves the purpose of moral disengagement; presenting a human as a filthy, loathsome and perilous object⁴³. Livingston does not see any other way to justify atrocities than by representing the intended victims as vermin, parasites, or diseased organisms that must be exterminated for the purpose of hygiene. Or to present that person as “terrorist”, or dangerous enough to contaminate the environment to the extent that justifies extermination, killing, murdering in fact innocent people⁴⁴.

This is not a theoretical exercise. We are talking about a law that was passed both in Germany and in Poland. A law amending the applicable aviation rules and permitting shooting down a hijacked civil plane with innocent passengers on board was passed in both parliaments. People’s representatives elected in democratic

⁴⁰ D. Livingston Smith, *Less than human. Why we demean, enslave and exterminate others*, New York 2011, p. 127.

⁴¹ S. Milgram, *Obedience to authority*, p. 6, at <http://www.shimer.edu/live/files/338-obediencemilgrampdf> (visited August 18, 2016).

⁴² See J. Kaczynski’s statements concerning refugees. His comments caused an immediate stir, with some of his political rivals saying Kaczyński’s language smacked of the terms Nazis used to describe Jews: J. Cienski, *Migrants carry “parasites and protozoa”, warns Polish opposition leader*, “Politico”, October 14, 2015. Available at <http://www.politico.eu/article/migrants-asylum-poland-kaczynski-election/> (visited August 18, 2016).

⁴³ D. Livingston Smith, *Less than human...*, pp. 127–130.

⁴⁴ *Ibidem*, p. 130.

elections to represent their interests voted to kill them if by chance they happened to be on a plane hijacked by a terrorist. It was § 14.3 of the German Aviation Security Act of January 11, 2005 that permitted shooting down of so-called renegade planes, which are civil aircraft that have been taken command of by people who intended to abuse them as weapons for targeted crash. Once an aircraft has been classified as renegade – be it by NATO or by the national Air Security Center itself – responsibility for the measures required to avert the danger in the German air space rested with the competent authorities of the Federal Republic of Germany⁴⁵. The term “competent authorities” has a dual meaning. First, it denotes authority as prescribed by the law. Second, it denotes authority that has competences to make an adequate decision, namely that they have know-how and are aware of the costs of their decision. A law that authorizes shooting down, by direct use of armed force, of hijacked aircraft with innocent civilians on board when the aircraft is suspected to be used as a weapon in crimes against humanity, is intrinsically wrong and in a sense incompetent, yet created by people claiming competence. A similar regulation was adopted in Poland. It was article 122a of the Aviation Act of July 3, 2002. The law regulated the permissibility of shooting down a civil aircraft with innocent civilians on board when used for unlawful acts, in particular as a means of a terrorist attack. The two laws emerged in the aftermath of September 11, 2001 when terrorist hijackers attacked the World Trade Center in New York, with one of the planes crashing into Pentagon, home of the Department of Defense of the United States. The crash of the fourth plane that did not hit the White House occurred following an intervention of the passengers on board which resulted in a change of the plane’s course. More than 3,000 people died in the area of the World Trade Center and in the Pentagon as a consequence of the attack. There is however one distinct circumstance – for the crashes were caused by hijackers, not by an order of “competent authorities”. It took a year in Germany and four years in Poland to strike down the law enabling and authorizing the killing of innocent people that would happen to be on a hijacked plane. In Germany, it was declared contrary to art. 1(1) of the German Constitution, with the Constitutional Court remarking that “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”. Article 2(2) protects the right to life and personal integrity, and freedom of the person shall be inviolable and interfered with only pursuant to the law.

The German Constitutional Court recognized that a reading of the Aviation Act authorizing the killing of innocent people on hijacked aircraft is contrary

⁴⁵ See *Aviation Security Case, Federal Constitutional Court (Germany) Judgment of the First Senate of 15 February 2006* in the proceeding on the constitutional complaint against § 14.3 of the Aviation Security Act of January 11, 2005, p. 2. Available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html (visited May 15, 2016).

to German law. German Armed Forces can be employed to save people's lives and not kill them on purpose.

The Polish Constitutional Court found there was a violation of the principles of "democratic state ruled by law" and human dignity as read in conjunction with the principle of protection of human rights. Wojciech Sadurski is right in pointing that in this case the Court was clearly inspired by the similar judgment of the German Constitutional Court of February 15, 2006⁴⁶.

Both courts stated that the legislature might not, by establishing a statutory authorization for intervention, give authority to operations of the nature regulated in the appealed laws against people who are not participants in a terrorist crime.

No crew member nor passenger boarding the aircraft in question was ever asked if they accept to be shot down and killed, in the case of the aircraft being hijacked by a terrorist. No passenger was informed that between 2004–2008 in Poland, while boarding an airplane, they were under a threat of losing their lives, a threat buttressed with relevant authority. This is the same authority that adores deliberation on the sanctity of life, especially when it comes to depriving people of their reproductive rights⁴⁷.

The laws, as well as the decisions of the Polish and German Constitutional Courts, have been subjects of much commentary⁴⁸. Therefore, I would like to concentrate on the technique used by a "competent authority" to overcome moral doubts and separate the license to kill innocent from philosophical roots of punishment and the "you shall not kill" commandment. As already mentioned, David Livingston Smith pointed out that in order to demean, enslave and kill others dehumanization is required. The legislature, in enacting the laws discussed above,

⁴⁶ W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, New York 2014, p. 181.

⁴⁷ Vide efforts of the Polish Parliament to criminalize access to reproductive rights: J. Mishtal, *The Politics of Morality: The Church, the State and the Reproductive Rights in Postsocialist Poland*, Athens, Ohio 2015.

⁴⁸ See J. Kulesza, *Czy państwo może mordować własnych obywateli? Zestrzelenie samolotu typu renegade w świetle prawa karnego – zarys problemu*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2009, Year XIII, Vol. 3, pp. 5–33; M. Bainczyk, *Ochrona przyrodzonej godności człowieka, a ustawy "antyterrorystyczne" (na przykładzie wyroków FTK i TK w sprawie zestrzelenia samolotów typu renegade)*, "Państwo i Społeczeństwo" 2008, Vol. VIII, No. 3, pp. 7–21; P. Szczepański, *Trybunał Konstytucyjny a terroryzm – analiza wybranych tez z uzasadnienia wyroku TK 44/07*, "Acta Universitatis Lodziensis, Folia Iuridica" 2012, issue 71, pp. 113–124; M. Beltran de Felipe, J. M. Rodriguez de Santiago, *Shooting Down Hijacked Airplanes? Sorry, We're Humanist. A Comment in the German Constitutional Court Decision of 2.15.2006, Regarding the Luftsicherheitsgesetz (2005 Air Security Act)*, "ExpressO Preprint Series" 2007, pp. 1–25; O. Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorist Provision in the New Air-transport Security Act*, "German Law Journal" 2006, Vol. 7, issue 9, pp. 761–776; R. A. Miller, *Balancing Security and Liberty in Germany*, "Journal of National Security Law and Policy" 2010, Vol. 4, pp. 369–396.

must have assessed that a person on board of a hijacked plane is lost anyhow and turns into an assault weapon. The legislature deprives such a civilian of their human status and not simply objectifies them but in addition turns them into a dangerous object – a weapon⁴⁹. Were the members of the Parliament conscious of that process? I do not know. But I know that acting under pressure and believing that they deal with a beast helped to pass the law – that is how symbolical deprivation of human character works. It is not a human being anymore – it is a beast. And the beast is to be annihilated at any cost; even at the cost of some victims. Yet they are not victims anymore, but “tools” in the beast’s hands. It helped to stay indifferent to the disparity between the enacted act that legitimizes killing innocent people that happened to be on the hijacked plane and the principles of human dignity and sanctity of life. This cannot be reconciled, as the German Constitutional Tribunal observed, with basic concepts of human rights – the right to preserve dignity, life and the idea of a human being as a creature whose nature it is to exercise self-determination in freedom, and who therefore may not be made a mere object of state action⁵⁰.

It does not matter the law was never put into action and civilian air craft was not shot down and people murdered, otherwise than in Ferdinand von Schirach’s theater play “Terror” built upon the text and the consequences of the law⁵¹. It is worth recognizing how easy it was to cross the line Milgram and Livingston pointed out.

When authority is open to using dehumanization techniques in the name of security, innocent people are facing the danger of being deprived of humanity, turned into objects and killed in the name of necessity and state interest. Association of foreign cultures as well as Islam with terrorism has the effect of narrowing the focus and depleting the perspective. Prevention is always better than punishment, which always comes too late, after atrocities have already happened. Prevention rarely goes hand in hand with criminal law and punishment. When it comes to foreign cultures, understanding and respect do better than mockery, scorn and disgust. A broader perspective helps and two accounts are available to an academic eye. Saskia Lutzinger in her qualitative studies on the biographies of extremists and terrorists looks for the other side of the story, as she puts it. In her study, she sheds light on social and personal circumstances that lead to extremist and terrorist behaviour. Yet another side of the story is to reckon that when terror is at stake it is not limited to foreign cultures and religions. It is also part of what “our” culture and “our” religion are, considering the roots thereof⁵².

⁴⁹ D. Edmonds, *Would You Kill the Fat Man?*, Princeton 2014, pp. 94–124; T. Cathart, *Dylemat wagonika*, translated K. Bażyńska-Chojnacka, Warszawa 2013, pp. 45–72.

⁵⁰ *Aviation Security Case...*, p. 6.

⁵¹ F. von Schirach, *Terror*, available at <http://www.zeit.de/2015/41/ferdinand-von-schirach-terror-deutsches-theater> (visited May 12, 2016).

⁵² S. Lützinger, *The other side of the story*, “BKA series” 2010, Vol. 40, p. 6.

Chris Hani, a South African freedom activist and one of the political leaders of the African National Congress (ANC), was assassinated in 1993 by Janusz Waluś, a Pole (born in 1953 in Zakopane), who in 1981 immigrated to South Africa to join his father and brother. Waluś also planned to kill Nelson Mandela and other opponents of apartheid. Waluś, a devoted Catholic, perceived ANC activists as communists who were on the way to squandering all that was built by Whites. He combined hate and racism with Catholicism. Christian values and the “do not kill” commandment are of solemn character as they produce a feeling of superiority over other people and cultures, which often do not universally approve of them.

78 people were killed in 2011 in Norway by Anders Behring Breivik, a Norwegian, another devout Christian and a defender of white race and fascism.

Yet when talking about terrorists we rarely have in mind “our own” people. We tend to identify “others” from foreign cultures and distant religions. The study of Lutzinger is also concentrated on those whom we tend to perceive as “the other” and who are foreign to the European mainstream religious background. Lutzinger tries to understand the role of foreign cultures and foreign religion behind terrorist attacks. It is valuable work. Understanding the underlying social processes conduces to strengthened prevention better than expanded criminal measures. Yet the first necessary step to prevent atrocities is to understand that we are not immune from committing them. Atrocities are not limited and restricted to foreign cultures and foreigners.

Summary

The article deals with three main ideas. (1) The philosophical roots of punishment in modern criminal law are the same in countries that very much differ among each other as far as the level of severity of their systems is concerned. It is therefore something else than just philosophical roots that have an impact on criminal and penal policy of a country. Those other possible elements are then discussed. (2) The philosophical roots of punishment in modern criminal law often refer to the Hammurabi rule: “eye for an eye”, and are read as a justification for severe punishment. The article questions this assumption and proposes an interpretation which seems to be much closer to Hammurabi’s original idea. (3) Countries with differences in criminal and penal policy might introduce equally wrong laws abridging the core human rights when they resort to dehumanization practices and moral disengagement. It is especially possible when fear of foreign cultures and terrorism prevails. An example of such legislation, an aviation law in German and Poland, is discussed.

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