



Contents lists available at ScienceDirect

## International Journal of Law, Crime and Justice

journal homepage: [www.elsevier.com/locate/ijlcrj](http://www.elsevier.com/locate/ijlcrj)

INTERNATIONAL
JOURNAL OF
LAW
CRIME
AND
JUSTICE

Ethical legitimacy of criminal law<sup>☆</sup>Krzysztof Szczucki<sup>1</sup>

Warsaw University, Poland

## 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.<sup>2</sup> 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

<sup>☆</sup> The article was written as part of the project "Impact of the principle of human dignity on the concepts of liability in criminal law" financed by National Science Centre, Poland, project number: 2015/19/D/HS5/00526. An earlier draft was presented and discussed at the Theorizing Criminal Law Reform conference organized by Rutgers University (April 2017). I wish to thank all the participants, in particular prof. Tatjana Hörnle, prof. R.A. Duff, prof. Vera Bergelson, prof. Douglas Husak, prof. Alec Walen and prof. Stuart Green. I wish to express my gratitude also to prof. Sandra Marshall, prof. Miriam Gur-Arye, prof. Alon Harel and prof. Amit Pundik, for their comments and constant readiness to discuss my ideas.

*E-mail address:* [k.szczucki@wpia.uw.edu.pl](mailto:k.szczucki@wpia.uw.edu.pl).

<sup>1</sup> Supported by the Foundation of Polish Science (FNP).

<sup>2</sup> 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.

<https://doi.org/10.1016/j.ijlcrj.2018.03.002>

Received 19 October 2017; Received in revised form 16 January 2018; Accepted 7 March 2018

1756-0616/ © 2018 The Author. Published by Elsevier Ltd. This is an open access article under the CC BY-NC-ND license (<http://creativecommons.org/licenses/by-nc-nd/4.0/>).

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,<sup>3</sup> 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.<sup>4</sup> The court extraordinarily mitigated A.'s sentence and stated it at 12 years.<sup>5</sup>

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

<sup>3</sup> 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).

<sup>4</sup> 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.

<sup>5</sup> "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.

متن کامل مقاله

دریافت فوری ←

**ISI**Articles

مرجع مقالات تخصصی ایران

- ✓ امکان دانلود نسخه تمام متن مقالات انگلیسی
- ✓ امکان دانلود نسخه ترجمه شده مقالات
- ✓ پذیرش سفارش ترجمه تخصصی
- ✓ امکان جستجو در آرشیو جامعی از صدها موضوع و هزاران مقاله
- ✓ امکان دانلود رایگان ۲ صفحه اول هر مقاله
- ✓ امکان پرداخت اینترنتی با کلیه کارت های عضو شتاب
- ✓ دانلود فوری مقاله پس از پرداخت آنلاین
- ✓ پشتیبانی کامل خرید با بهره مندی از سیستم هوشمند رهگیری سفارشات