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Unresolved Relations Between Mercy and Justice. An Introduction

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Quae est iustitia nisi misericordia? In the Criminal Canon Law of the Catholic Church, the principle of legality cannot be adequately understood without considering the principle of equity. This necessitates the consideration of mercy as well. It can be inferred that the "ecclesiastical criminal law" amalgamates generally disparate values, specifically justice (which requires just punishment) and mercy (which necessitates equity), resulting in more value-oriented criminal justice than its solely legal positivist aspect, as exemplified in the Latin phrase *Iustitia dulcore misericordiae temperata*[1]. It is about justice, which does not sacrifice the ideal of love or subordinate it, but which serves it.

Is it possible to implement a necessary connection between criminal justice and mercy under the criminal legal systems of contemporary states? Would the modern criminal law, founded on the application of legality and humanitarian ideas, preclude the implementation of merciful judgment? Would the application of mercy in criminal law threaten the established rights of crime victims and, more broadly, the rule of law and equality? Would the impact of mercy lead to a more compassionate and merciful criminal justice system, thereby elevating the humaneness of both criminal law and the administration of justice? What ideas from the value of mercy can be formulated for a modern criminal law systems and the concept of punishment in the context of human rights requirements and, above all, the requirements of criminal justice?

The urgency of these questions arises from the challenges that modern criminal law and its institutions are facing. The significance of these questions meets the problem of the universality of criminal punishment, its theories, and

[1] See e.g.: P.G. Caron, A. Ciani, G. Diurni, "Aequitas est iustitia dulcore misericordiae temperata (HOSTIENSIS, Summa Aurea, lib. 5, tit. De dispensationibus, n. 1)", in A. Ciani, G. Diurni (eds.), *Lex et iustitia nell'utrumque ius: radici antiche e prospettive attuali. 7° Colloquio internazionale romanistico-canonistico (dal 12 al 14 maggio 1988)*, Libreria Editrice della Pontificia Università Lateranense, Roma, 1989, pp. 281-297; M. Wiljems, "Salus animarum suprema lex: mercy as a legal principle in the application of canon law", in *Jurist*, 54 (1994), n. 2, pp. 560-590.

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justification[2]. The seriousness of these questions also addresses the issue of respect for human rights standards.

What notions does the philosophy of law provide on the relations between criminal law and the value of mercy? In the perspective of Karl Jaspers, mercy granted access to a form of justice that extended beyond the confines of law[3], whereas Gustav Radbruch considered mercy a value that lay outside the jurisdiction of law[4]. Could mercy be considered a virtue more integral to the legal system than external to it? A principle implied within legal theory but not explicitly articulated in current legislation?

Criminal law studies must consider the value of mercy (also in its constitutional aspects). The question, however, is whether it can expose it only exceptionally by allowing individual acts of mercy in judgment (that introduce non-legal values into the legal system) or treat them as a binding criminal justice principle (that shapes the whole system). Indeed, whether the law (legal system, including criminal law) and mercy belong to other normative orders? Is mercy really outside the law's jurisdiction? Is it possible to consider such a concept of law, or even the applicable legal system, in which mercy would be an inseparable internal element of considerable importance and not an external corrective element of the legal system or possibly an incidental extraordinary corrective mechanism under the current system? Should the value of mercy, as Robert L. Misner suggests[5], be considered in criminal law legislation? Would be mercy and its implications could be another "mesofacts" in the sense given by Antonio Incampo?[6]

The questions posed will only receive part of the answers in this introduction or even in the essays contained in this issue. Our answers are subject to the perspective adopted research and may need to be completed. Nonetheless, the role of philosophy appears to centre around posing pertinent inquiries and identifying the issues that necessitate resolution rather than providing straightforward and unambiguous responses[7]. In this context, it should be stressed that, in addressing the theme of mercy and its importance for criminal punishment, justice, and human

[2] About the universality of punishment from diverse perspectives of modern legal philosophy see e.g.: A. Incampo, W. Żełaniec (eds.), *Universality of Punishment*, Cacucci, Bari, 2015.
[3] K. Jaspers, *Problem winy. O politycznej odpowiedzialności Niemiec*, transl. J. Garewicz, Narodowe Centrum Kultury, Warszawa, 2018, p. 52.
[4] G. Radbruch, *Filozofia prawa*, transl. E. Nowak, Wydawnictwo Naukowe PWN, Warszawa, 2009, p. 188.
[5] See R.L. Misner, "A Strategy for Mercy", in *William & Mary Law Review*, 41 (2000), n. 4, pp. 1303-1400.
[6] See A. Incampo, "Don't Kill Cain: Towards a Theory of Mesofacts and Punishments", in A. Incampo, W. Żełaniec (eds.), *op. cit.*, pp. 263-276.
[7] Obviously, there are other kinds of philosophical advance which are important yet underrated, see E. Brake, "Making Philosophical Progress: The Big Questions, Applied Philosophy, and the Profession", in *Social Philosophy & Policy*, 34 (2017), n. 2, pp. 23-45.

rights, *L'Ircocervo* has become a part of the fascinating and evolving debate of contemporary philosophy of law[8].

What is it that precisely relates to mercy for punishment, justice, and human rights? We intuitively associate compassion or empathy with mercy. In the vernacular of the legal profession, to grant mercy is often equated to extend a pardon. However, the importance and significance of mercy extend to a greater scope. In view of the nuanced meaning of mercy it is imperative to determine the particular sense we are adopting in our discussions.

From the Christian modern personalistic concept of mercy[9], it is both a form of love and a necessary complement to justice. It is a value that permeates justice and requires justice. Is it, therefore, feasible to combine mercy and justice in legal philosophy as well? The amalgamation of mercy and justice effectively disseminates all conventional notions of justice. It is a distinct concept that defies conventional preconditions. But this point of view is constantly accompanied by the conviction that justice and mercy complement each other and even condition each other. The Christian value of mercy in the context of the axiology of criminal law reminds us we punish to condemn wrongdoings, not wrongdoers.

Notably, Christianity associates mercy with justice and inherent human dignity, but its manifestations can also be observed in other religions and, in principles, in all cultures or traditions[10]. However, it is possible to see the value of mercy from an entirely secular perspective, including the philosophy of law. Nowadays, for instance, Linda Ross Meyer asserts that mercy constitutes the foundation of justice in her notion of "the justice of mercy"[11]. As Martha C. Nussbaum does, one could argue that the mercy is close to the Senecas' *clementia* and necessitates a "narrative-medical" approach in criminal judgment[12]. Therefore, it is possible and even very likely that the value of mercy for modern criminal law can be described as universal. Uncertain as we are about the specifics of mercy, we cannot deny its relevance.

[8] Kristen Bell enumerates numerous recent studies in English, including monographs and articles, on the subject of mercy and its implications for the legal system; see K. Bell, "Critical Mercy in Criminal Law", in *Law and Philosophy*, 42 (2023), n. 4, p. 353.

[9] See John Paul II, *Dives in misericordia*, in *John Paul II-Encyclicals*. Retrieved from https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia.html [Accessed: 08/12/2024].

[10] See e.g.: S.J. Levine, "Looking Beyond the Mercy/Justice Dichotomy: Reflections on the Complementary Roles of Mercy and Justice in Jewish Law and Tradition", in *Journal of Catholic Legal Studies*, (45) 2006, n. 2, pp. 464-466; L.F. Alarid, H.M. Wang, "Mercy and Punishment: Buddhism and the Death Penalty", in *Social Justice*, 28 (2001), n. 1, pp. 231-247; D. Ansorge, "Mercy as a Theological Problem", in V. Cottini, F. Körner, D.R. Sarrió Cucarella (eds.), *Raḥma. Muslim and Christian Studies in Mercy*, Pontificio Istituto di Studi Arabi e d'Islamistica, Roma, 2018, pp. 165-177.

[11] See L.R. Meyer, *The Justice of Mercy*, The University of Michigan Press, Ann Arbor, 2010, pp. 254.

[12] See M. Nussbaum, "Equity and Mercy", in *Philosophy & Public Affairs*, 22 (1993), n. 2, pp. 83-125.

Finally, let's focus on remark related to the aesthetics of law[13]. *Themis*, a universally acknowledged representation of justice, and a motif appearing in art as well, is not always presented alone. In the courtyard of the Cumberland School of Law at Samford University in Birmingham (US), one can find a statue of "Justice and Mercy"[14]. The traditional sculpture of *Themis* is seen in the arms of the *Angel of Mercy*. This distinctive sculpture is mentioned by Terry A. Veling, who comments:

> [...] mercy is not simply a countermeasure or complement to justice; rather mercy "watches over justice" – not to thwart or deny justice's rightful claims, but to ensure that our practices of justice are never conducted solely according to calculation and measurement, but are also weighed or motivated by mercy and love[15].

The essays collected in this *L'Ircocervo* issue could be found as a scientific attempt to explain unresolved mutual relations between *Themis* and the *Angel of Mercy*.

[13] More about the paradigms of aesthetics of law in contemporary philosophy of law see K. Zeidler, *Aesthetics of Law*, Gdańsk University Press/ Wolters Kluwer, Gdańsk/Warsaw, 2020.
[14] Statue "Justice and Mercy", also referred to as "Justice Tempered by Mercy", "Angel of Mercy and Lady of Justice Statue"; See: Statue "Justice and Mercy", in *Samford University Photographs Collection*. Retrieved from https://digitalcollections.samford.edu/Documents/Detail/statue-justice-and-mercy/23478 [Accessed: 08/12/2024]; "Virtual Tour, Angel of Mercy and Lady of Justice Statue", in *Samford University Cumberland School of Law*, https://www.samford.edu/law/virtual-tour/ [Accessed: 08/12/2024]; T. Dixon, "Justice Tempered by Mercy", an on-line recording, https://www.youtube.com/watch?v=35ZjchTbTJY [Accessed: 08/12/2024].
[15] T.A. Velling, *Beatitude of Mercy. Love Watches over Justice*, Wipf and Stock Publishers, Eugene, Oregon, 2015, p. 10.



A photograph of the “Justice and Mercy” statue at the Cumberland School of Law, Samford University in Birmingham (US). The statue was dedicated in 1995 and was created by Lytton Glynn Acree (1927–2019) from Roswell, Georgia (US). Source: Public Domain.