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Limits of Criminal Law from Natural Law Theory Perspective. Can Mercy Be a Reason for a Lack of Penalization of Some Immoral Acts?

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Abstract: **Limits of Criminal Law from Natural Law Theory Perspective. Can Mercy Be a Reason for a Lack of Penalization of Some Immoral Acts?**
The question of which acts should be criminalized and which should not raises a lot of controversy in modern pluralistic societies. The theory of natural law understood as an ethical theory delineates a rather wide range of immoral acts compared to alternative directions, without assuming that the instrument for enforcing morality must be the criminal law. The author subjects Aquinas' premises for criminalization to a deeper analysis considering also the arguments about mercy, recently discussed in the context of criminal law. Can the legislator narrow the scope of criminalized acts because of mercy?

Keywords: Natural Law, Limits of Criminal Law, Criminal Justice, Mercy.

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Non omne quod licet honestum est[1].

1. Introduction

Accepting the claim of the existence of moral principles valid independently of human will, allows one to evaluate various legislative solutions as compatible or not with these moral principles. In this context, one speaks of just or unjust law, invokes the maxim *summum ius summa iniuria*, and reflects on whether such a law

[1] Paulus, D.50.17.144.

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can be considered valid at all. These are undoubtedly the oldest and the most important problems of the philosophy of law. However, it should be noted that the incompatibility of law and morality can take different forms. Two situations in particular should be distinguished. The first, when the law compels to immoral action and the second, when the law permits immoral action. In the first case, the state does not reckon with a person's conscience (e.g., forcing a doctor to perform euthanasia), while in the second, on the contrary, it values freedom of conscience (e.g., when it allows a suffering person to decide to undergo euthanasia). In cases of the second type – can we speak of unjust law too? Are there morally justifiable reasons for maintaining a law that allows evil? The subject of consideration are immoral situations when permission takes the form of the absence of criminal sanction[2].

Sometimes criminal law is given a very broad framework in the field of morality and ethics. Let's look at the following legal regulation:

> A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. (...) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years[3].

The following legal regulation is not from any Islamic theocracy or the moral legislation of Octavian Augustus, but from the American state of Georgia. It was in effect even 20 years ago. The *anti-sodomy* laws (it is worth noting that the cited legal regulation made no difference whether the perpetrators were homosexual or heterosexual) – in force in various US states – were repealed as a result of a Supreme Court ruling only in 2003[4]. This is a clear example of paternalism in criminal law, i.e. criminalization based on the belief that the state knows better what is good for the citizen. Other manifestations of paternalism, which are in force in many countries today, include the criminalization of possession of drugs for

[2] It has been aptly noted by H. Packer that the agelong debate on the relationship between law and morality too rarely takes into account the specifics of criminal law. H. Packer, "The Search for Limits. Law and Morals", in P. Robinson (ed.), *The Structure and Limits of Criminal Law*, Routledge, London, 2014, p. 261.

[3] Cited pursuant to the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986), which found it constitutional back in the 1980s.

[4] Lawrence v. Texas, 539 U.S. 558 (2003). In Europe, homosexual sexual intercourses were penalized the longest in Romania: until 1996 – all forms, and until 2001 – only public ones or those leading to public outrage. See D. Bunikowski, *Kontrowersje prawa i moralności w Europie Środkowowschodniej*, Wydawnictwo Państwowej Wyższej Szkoły Zawodowej we Włocławku, Włocławek, 2019, pp. 76-86.

personal use or driving without a helmet on a motorcycle or without a seat belt fastened in a car[5].

The other extreme is permissivism, i.e., the state's excessive tolerance of immoral behavior. In the 1980s, some deputies of the leftist party *Die Grünen* completely seriously articulated the demand for decriminalization of pedophilia[6]. Today, probably everyone, regardless of the preferred ethical, political or legal doctrine, will agree that this was a very bad idea. Other example of permissiveness on the part of criminal law is present in most countries of the so-called West, the lack of criminalization of abortion[7]. It is noteworthy that in recent years advocates of abortion permissivism increasingly view this act not in the category of evil, which for some reason should be tolerated, but as a reproductive right of a human being (woman)[8]. On the other hand, an example of permissivism criticized and defended because of very different ideological positions is the impunity of prostitution present in many countries (most countries of the European Union)[9].

So where is the line between the Scylla of paternalism and the Charybdis of permissiveness? Where we place the limits of criminal law depends on two factors. First, on how one views the function of criminal punishment. Second, on what is considered immoral and to what extent. Some argue that criminal law should be neutral to particular ethical doctrines[10]. Such a postulate, however, seems utopian. After all, human rights (which include, among other things, the rights to privacy, self-determination and freedom of belief – by means of which one justifies the

[5] See i.a. H. Hurd, "Paternalism and the Criminal Law", in K. Grill, J. Hanna (eds.), *The Routledge Handbook of the Philosophy of Paternalism*, Routledge, London, 2018, pp. 277-292.
[6] See official report on the pedosexual lobby, and the practice of adopting children for pederasty: I. Hax, S. Reiß, *Programmatik und Wirken pädosexueller Netzwerke in Berlin - eine Recherche*, Unabhängige Kommission zur Aufarbeitung sexuellen Kindesmissbrauchs, Berlin, 2021.
[7] Which remains immoral except when there is a double effect act. Saving the life of the mother is the intended goal, and the death of the conceived child is the unintended effect. On abortion from the perspective of natural law ethics: i.a. R. George, P. Lee, "The Wrong of Abortion", in A. Cohen, C. Wellman (eds.), *Contemporary Debates in Applied Ethics*, Blackwell Publishing, Malden-Oxford-Carlton, 2013, pp. 33-50.
[8] See European Parliament, *Resolution on including the right to abortion in the EU Fundamental Rights Charter* 2024/2655 (RSP), 11th April 2024. It is worth noting that this demand is incompatible with the case law of the European Court of Human Rights, which leaves the issue of resolving between the right to life of the conceived child and the right to privacy of the mother to the margin of appreciation of individual states (Judgment of ECHR from 16/12/2010, no. 25579/05, A, B and C v. Ireland). Some, after extending the criminalization of performing abortion in Poland to situations where the conceived child is burdened with a serious and incurable defect, advocate narrowing the margin of appreciation in this matter. See J. Kapelańska-Pręgowska, "The Scales of the European Court of Human Rights Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation", in *Health and Human Rights Journal*, 2 (2021), pp. 213-224.
[9] See i.a. A. Mathieson, E. Branam, A. Noble, "Prostitution Policy. Legalization, Decriminalization and the Nordic Model", in *Seattle Journal for Social Justice*, 2 (2016), pp. 367-428.
[10] W. Sadurski, *Moral Pluralism and Legal Neutrality*, Springer, Dordrecht, 1990, pp. 149-165.

decriminalization of various morally questionable actions) are not ethically neutral. It would be difficult, for example, to justify human rights with the thought of Friedrich Nietzsche. The above-cited example of prostitution shows well that a given act in the context of morality and criminalization will be viewed differently by neoliberals along with liberal feminists, differently by religious conservatives, and still differently by radical feminists[11]. Neutral is also not the common contemporary understanding of rationality (which assumes alienation of the subject from own preferences, experiences and social or cultural context) – and rationality is the prism through which people evaluate particular legal, ethical or social ideas[12].

Our answer to the question of whether all immoral, indecent or unreasonable acts should be criminalized is negative. The purpose of this study is to identify the reasons why it is not reasonable to criminalize everything that is wrong. Since it is impossible, as stated above, to consider this issue from a neutral perspective, the authors refer to the natural law tradition in understanding good and evil and the purposes of punishment. Particular attention will be paid to the arguments of Thomas Aquinas, who devoted a separate issue of the *Summa Theologica* to the issue of the limits of criminal law[13]. In addition, will be verified the hypothesis according to which mercy can be considered the reason for the absence of criminalization. Before that, however, it is reasonable to outline the philosophy of punishment prevailing in modern liberal democracy.

2. Limits of Criminal Law in Liberal Democracy

The dominant modern liberal ethics sets a very narrow framework for criminal law. Western societies gave the palm of victory (considering the famous debate between Herbert Hart[14] and Patrick Devlin[15]) to Herbert Hart. It is worth remembering that its background was the decriminalization of prostitution and homosexual acts carried out in Britain in the late 1950s. Criminal law, according to Herbert Hart, is supposed to protect only individualistic freedom and not social order as Patrick Devlin believed. Herbert Hart's position is obviously rooted in Enlightenment

[11] See also R. Beegan, J. Moran, "Prostitution and Sex Work. Situating Ireland's New Law on Prostitution in the Radical and Liberal Feminist Paradigms", in *Irish Journal of Applied Social Studies*, 11 (2017), pp. 59-72.
[12] A. MacIntyre, *Whose Justice? Which Rationality?*, University of Notre Dame Press, Notre Dame (IN), 1988, pp. 3-4.
[13] Thomas Aquinas, *Summa Theologica*, I-II, q. 96, a. 2, transl. Fathers of the English Dominican Province, Benziger Bros, New York-Boston-Cincinnati-Chicago-San Francisco, 1947.
[14] H. Hart, *Law, Liberty and Morality*, Oxford University Press, Oxford, 1963. See also the work of his educatee: J. Raz, *The Morality of Freedom*, Clarendon Press, Oxford, 1986.
[15] P. Devlin, *The Enforcement of Morals*, Oxford University Press, Oxford, 1965.

philosophy. In particular, his position refers to the harm rule formulated in the 19th century by John Stuart Mill:

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant[16].

Thus, a citizen does not have to refrain from evil – only has to refrain from harming others. It is worth noting that who is an "other" is very problematic. This is evidenced by the disputes over abortion or the freezing of human embryos in connection with *in vitro* fertilization, but also by the controversy over the legal status of animals and the demand to grant legal personhood to rivers[17]. The implementation of harm rule by most Western legal systems is evidenced by the dizzying career of the right to privacy at the constitutional level that provides an argument for the legislature and a basis for constitutional courts to overturn legislation that interferes with the morality of citizens[18]. Paternalism in criminal law is generally impermissible, except in the case of individuals who, for objective reasons, cannot make rational decisions about self-determination, or when the costs connected with making a controversial decision would be too high for the general public (this may be the case, for example, with self-mutilation or drug addiction)[19].

The withdrawal of the state from the sphere of morality means that in this area one is left to rely on civil society, religion or art[20]. After all, liberal-democratic states, in order to survive, need people with honesty, sensitivity to suffering, dedicated patriots, and stable families to provide the right conditions for new generations to grow. However, if a liberal-democratic state forced citizens to adopt a certain value system, it would cease to be a liberal-democratic state. This is

[16] J.S. Mill, *On Liberty*, Batoche Books, Kitchener, 2001, p. 13.

[17] The question is whether we protect nature for the sake of human welfare or for its own sake. Thinking of rivers as subjects of law is characteristic for many indigenous cultures, such as the Aborigines. See i.a. A. Edirisinghe, S. Suchet-Pearso, "Nature as a sentient being. Can rivers be legal persons?", in *Review of European, Comparative & International Environmental Law Early View*, 1 (2024), pp. 1-12.

[18] Numerous examples from the case-law of many countries are cited: A. Jernow, "The Harm Principle Meets Morality Offenses. Human Rights, Criminal Law, and the Regulation of Sex and Gender", in A. Miller, M. Roseman (eds.), *Beyond Virtue and Vice. Rethinking Human Rights and Criminal Law*, Pennsylvania University Press, Philadelphia, 2019, pp. 54-74.

[19] For an extensive discussion of this topic see M. Rigopoulou, *Grenzen des Paternalismus im Strafrecht*, Duncker & Humblot, Berlin, 2013.

[20] It is pointed out that the development of *belles-lettres* has played a far greater role in spreading sensitivity to the suffering of others (and consequently, for example, the abolition of torture) than the treatises of philosophers (e.g., C. Beccaria): see L. Hunt, *Inventing Human Rights*, W.W. Norton & Company, New York-London, 2008.

because liberal democracy is based on values that it cannot reproduce on its own (Böckenförde *dictum*)[21].

Liberal political culture, by limiting the role of criminal law, thus gives individuals a huge mandate of trust. Immoral behaviors end up negatively affecting the social order[22]. Moreover, they also cause harm (only not necessarily directly), or the harm is not recognized by all as harm. While the moral evaluation of prostitution, abortion or euthanasia (and their social harm) remains the subject of acrimonious disputes, one can also find uncontroversial examples of bad behavior that are tolerated by liberal criminal law systems. Everyone also knows that smoking cigarettes harms those around you (the passive smoker effect). So why, in order to protect public health, not impose a total ban on the manufacture, sale and consumption of tobacco products? From the point of view of liberal axiology, restricting such phenomena can be pointwise at best (e.g., banning smoking in certain categories of public places). After all, criminal law is regarded as a measure of last resort (*ultima ratio*) finding its application only to more serious cases, when other means of influence are inadequate or ineffective in view of the harmfulness of the act in question. "Every punishment which does not arise from absolute necessity [...] is tyrannical" stated C. Beccaria[23] while pointing to Monteskius. The ultima ratio principle also argues that penalization should be avoided in situations where the costs of prosecution will outweigh the benefits[24]. Ineffective criminal law becomes a farce – alcohol abolition in the United States not only weakened the authority of the law, but also contributed to the development of serious problems, such as corruption and organized crime groups[25].

Many philosophers of law recognize the problems associated with the misuse of freedom by human beings, so they point out, for example, the inextricable link between freedom and responsibility[26] or the importance of human moral duties as

[21] E.W. Böckenförde, "The Rise of the State as a Process of Secularization", trans. T. Dunlap in M. Künkler, T. Stein (eds.), *Religion, Law, and Democracy. Selected Writings*, Oxford University Press, Oxford, 2020, pp. 152-167.

[22] On this subject, among others: R. George, *Making Men Moral. Civil Liberties and Public Morality*, Clarendon Press, Oxford, 1993.

[23] C. Beccaria, *An Essay on Crimes and Punishments*, H. Nicklin, Philadelphia, 1817, p. 17.

[24] N. Jareborg, "Criminalization as Last Resort (Ultima Ratio)", in *Ohio State Journal of Criminal Law*, 2 (2005), p. 530.

[25] The reason for the ineffectiveness of alcohol abolition laid in the fact that a far too radical solution was adopted. On the other hand, there is no convincing argument that the abolition as such is a bad solution. After all, it is possible to introduce more lenient restrictions, such as banning the sale of alcohol at night, or limiting the places where alcoholic beverages are sold. W. Hall, "What are the policy lessons of National Alcohol Prohibition in the United States, 1920-1933?", in *Addiction*, 7 (2010), pp. 1164-1173.

[26] M. Kilanowski, *The Rorty-Habermas Debate. Toward Freedom as Responsibility*, State University of New York Press, New York, 2022.

the equivalent of human rights[27]. More radical contemporary authors (following Patrick Devlin's cue) postulate a return to the old understanding of the role of criminal law (e.g. in the field of abortion, pornography)[28] thus gaining the label of "anti-liberals" who want to impose their own conception of a good, moral life on others. Ronald Dworkin – undeniably a representative of liberalism in the philosophy of law, stated that everyone basically agrees that life is an important (sacred) value, to conclude that the state cannot impose through criminal law one of the many interpretations of this value[29]. Rather, there is no doubt that, according to liberal axiology, penalization is possible only against such acts that are considered immoral by society as a whole, not by just a part of it.

3. Natural Law and Liberal Democracy. An Exotic Combination?

Invoking natural law, especially in a confessionally evocative Thomistic view (and nowadays, at least in public discourse, natural law is rarely discussed from another perspective), is "suspicious". It risks being suspected of religious fundamentalism or classifying the author as a "specimen" of an exotic illiberal philosophy of law. Don't those who invoke natural law want to violently impose their values on others, and thus violate individualistically understood freedom?

Moreover, Marcin Kilanowski is right and notes that:

> it is not necessary to live in uncertainty or to accept it in order to refrain from violence (...). For there is nothing wrong in being certain, as long as our certainty or uncertainty is accompanied by a readiness to meet the other, learn

[27] In 2000, a Charter of Human Duties was proclaimed in Gdańsk on the initiative of the city's mayor (city's president) Paweł Adamowicz. It was signed by people from the world of culture and science representing different world views. Among other things, the Charter mentions that "The basic duty of all people is to serve life, strengthening, multiplying and perfecting all its natural forms. Any interference in the sphere of life should be characterized by respect for its sacredness", and "the duty of the father and mother is not only to transmit life and take care of its development from the moment of conception, but also to maintain family dignity and responsibility for the fate of the nation, ethnic group and the entire human family". Unfortunately, the literature on this interesting initiative is only in Polish. See T. Snarski, "Gdańska koncepcja praw człowieka. Szkic z filozofii praw człowieka wokół treści Karty Powinności Człowieka proklamowanej 2 września 2000 r. w Gdańsku", in *Rocznik Gdański*, 80 (2020), pp. 142-162.

[28] E.g. G. Bradley, "The Role of Criminal Law in Regulating Pornography", in A. Masferrer (ed.), *Criminal Law and Morality in the Age of Consent. Interdisciplinary Perspectives*, Springer, Cham, 2020, pp. 323-346.

[29] R. Dworkin, *Life's Dominion. An Argument about Abortion, Euthanasia, and Individual Freedom*, Alfred A. Knopf, New York, 1993, pp. 157.

> about and verify other opinions and their use, as this is what our attitude should be[30].

It is good to add that already Thomas Aquinas recognized the necessity of being faithful to one's conscience, even if it wanders[31] – which corresponds, as William Hoye argues[32], to the requirements of democratic freedom of conscience. Aquinas, as a proponent of a mixed government system, was also no stranger to the belief that the people should have a say in deciding what affects everyone[33]. Jacques Maritain has already clearly expressed that the people have a natural right to self-determination[34].

It seems reasonable to look at liberal democracy through the lens of three principles. Public authority in a liberal democracy 1) respects human rights, 2) acts within the boundaries of the law that is an expression of the will of the people, and 3) guards against discrimination in both – the content of the law and the process of applying it. If one puts aside the issue that Aquinas lived in a world when freedom was understood communally rather than individualistically[35], does one not see a correlation between the aforementioned three principles of liberal democracy and the three types of injustice of the law due to human good that Aquinas distinguished? He distinguished the following:

> 1) when an authority imposes on its subjects burdensome laws, conducive, not to the common good, but rather to its own cupidity or vainglory.
> 2) in respect of the author, as when a man makes a law that goes beyond the power committed to him.
> 3) in respect of the form, as when burdens are imposed unequally on the community[36].

Of course, the indicated parallel between the core axiology of the liberal-democratic state and Aquinas' thought is very general. The more specific the issues, the more controversial. Nevertheless, the indicated parallel provides an argument for not labeling those who cite Thomas Aquinas as anti-liberals.

John Finnis goes so far as to make a claim that must sound perverse to all those who are superficially familiar with Thomas Aquinas, and have been fed

[30] M. Kilanowski, "Abandoning Truth Is Not a Solution. A Discussion with Richard Rorty", in *Diametros*, 61 (2019), p. 47.
[31] *Quaestiones de quolibet* III, q. 12, a. 2.
[32] W. Hoye, *Demokratie und Christentum. Die christliche Verantwortung für demokratische Prinzipien*, Aschendorff Verlag, Münster, 1999. The authors only had access to the Polish edition: *Demokracja a chrześcijaństwo*, WAM, Kraków, 2003, pp. 351-374 (chapt. V. 4-5).
[33] *S. Th.*, I-II, q. 105, a. 1.
[34] See J. Maritain, *Man and the State*, University of Chicago Press, Chicago, 1951, p. 100.
[35] See Q. Skinner, *Liberty before Liberalism*, Cambridge University Press, Cambridge, 2012.
[36] *S. Th.*, I-II, q. 96, a. 4.

through years of education a vision of the Middle Ages as a "dark" age during which the Church wanted to limit the freedom of all people as far as possible. Well, the Australian researcher notes that Thomas Aquinas's position on the limited role of the state is not really different from John Stuart Mill's views expressed in his treatise *On Liberty*[37]. Specifically, the point is that any vices of citizens that do not have a significant connection with peace or justice should not be the concern of the state and the law[38]. While every immoral act of a person violates some good (*bonum*), it will not always be the common good (*bonum communae*). Meanwhile, law is, according to Aquinas' definition, an ordinance of reason issued not for the sake of any good, but precisely for the sake of the common good[39]. And sometimes considerations of peace require giving legal protection to immoral acts. St. Thomas gives the example of the acquisition of property through usucaption in bad faith[40].

4. Natural Law as an Ethical Doctrine

What is natural law? An ethical doctrine whose basic principle is "good is to be done and pursued, and evil is to be avoided"[41]. Man should pursue what he has natural inclinations to[42]. This requires the integration of reason, emotion, desire and will. All the principles of natural law follow from the above maxim. However, Thomas Aquinas himself nowhere described a method of formulating (based on the principle of doing good and avoiding evil) more concrete moral principles[43]. Jacques Maritain stresses that it is not a matter of logical operations (as wanted in the modern era, e.g. Hugo Grotius), but of listening to the "inner melody"[44]. Goods are independent of time and place, but the degree of recognition of individual principles is not perfect depending on time and place[45]. The stated contextuality can manifest itself in two ways. On the one hand, one may not perceive that something is immoral – such as corporal punishment. On the other hand, one can perceive immorality where it is essentially absent – such as in lending money at interest. Of course, it should be remembered that our modern perspective is also contextual.

[37] J. Finnis, *Aquinas. Moral, Political, and Legal Theory*, Oxford University Press, Oxford, 1998. The authors had access only to the Polish edition: *Tomasz z Akwinu. Filozofia moralności, polityki prawa*, Teologia Polityczna, Warszawa, 2022, p. 421 (chapt.VII.2).
[38] *S. Th.*I-II, q. 96, a. 3. These issues are addressed in the entire section VII.2 in: J. Finnis, *op. cit.*
[39] See Aquinas's definition of law: *S. Th.*, I-II, q. 90, a. 4.
[40] *Quaestiones de quolibet*, XII, q. 15, a. 2 and 3, as cited in J. Finnis, *op. cit.*, p. 421 (chapt. VII.2).
[41] *S. Th.*, I-II, q. 94 a. 2.
[42] An accurate and straightforward discussion about these issues: J. Finnis, *op. cit.*, chapt. III.5, 6 and 7.
[43] *Ivi*, chapter V.2.
[44] J. Maritain, *op. cit.*, pp. 89-94.
[45] *Ibidem*, pp. 89-94.

Much controversy surrounds the concept of nature. This is because it is not about what biologists or physicists will tell us. Biology, psychology and cognitive science allow us to understand how the human organism, including the mind, works, but we can't draw conclusions from them about how we should act. It has been discovered that there is a correlation between brain structure and upbringing (the latter is less surprising) and the moral evaluation of certain behavior, which is the aftermath of an emotion, e.g. disgust[46]. The idea of criminalizing the practice of certain types of sex can be linked with this exact emotion. However, a certain degree of limitation of human cognitive powers does not mean that the concept of right and wrong is subjective. The structure of the brain or the context in which someone lives cannot be a measure of human behavior. The awareness that we are limited should further motivate a person to transcend these limitations.

There are, of course, those inclinations of man that he shares with all beings (such as preserving his own life), with all animals – the inclination of man and woman to unite and raise offspring[47]. It follows that there are two basic goods: life and marriage. However, man has a peculiar nature associated with the possession of reason, so animals (such as bonobos) can't determine the measure of his (a man's) behavior. Such goods that only man can know are the good of knowledge or the good of living in community[48]. Participation in social life differs from animal herdiness, just as human sexuality differs from animal sexuality (among other things – people have voluntariness and reflection[49]). So, since life is a basic good, it is a moral evil to violate it for the sake of a lower value good, e.g. comfort, material prosperity. If raising a child in stable circumstances is a good, then situations in which children are conceived in unstable circumstances, i.e. outside of marriage, should be avoided. If sociability is a good, then work and life balance should be provided for employees.

5. When and Why Should Evil Not Be Punished? Reflections on the Thought of Thomas Aquinas

Among other things, St. Thomas Aquinas considers as a precept of natural law that "the evil-doer should be punished"[50]. It is worth mentioning that he identifies

[46] See J. Haidt, *The Righteous Mind. Why Good People are Divided by Politics and Religion*, Pantheon Books, New York, 2012.
[47] *S. Th.*, I-II, q. 94, a. 2. See J. Finnis, *op. cit.*, chapt. III.5.
[48] J. Finnis, *op. cit.*, chapt. III.5.
[49] On marriage as an asset (a good): R. Anderson, R. George, *What Is Marriage? Man and Woman. A Defense*, Encounter Books, New York, 2012.
[50] *S. Th.*, I-II, q. 95. a. 2.

precisely the need for the state to exercise *ius puniendi* as the reason why human law is needed:

> But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous.[51] .

It is clear from the above quote that punishment has two purposes. First, to prevent evil and ensure the safety of others. And second, to correct the perpetrator himself, to make him virtuous[52]. But should punishment be a reaction to every "evil deed"? The citation alone suggests not. After all, not everyone is depraved (and everyone happens to do bad things). If one is prone to exercise virtue, admonishments will suffice. Moreover, Aquinas, who is well acquainted with the human disposition, states in the same passage from which the above quote is taken, that in the case of "men who are well disposed" admonishments not only suffice, but are actually more effective than coercion.

Aquinas devoted a separate issue to the problem of leaving vices without punishment (q 96 a. 2). To the question formulated "whether it belongs to the human law to repress all vices" Aquinas answers in the negative. He notes that "laws imposed on men should also be in keeping with their condition"[53]. Since most people are not sufficiently armed with virtue they cannot be expected to abstain from everything immoral. This would be counterproductive: people would become "unable to bear such precepts, would break out into yet greater evils"[54]. Early Christian writers, like medieval scholars, allowed the state to tolerate the existence of brothels. They explained their position precisely by the actual moral condition of society and the need to prevent greater evils – rape, incest, seduction of virtuous girls or even children[55]. Paradoxically, it was the secular authority's taking custody of the tabernacles of the bawdyhouses that made it possible to minimize evil. After

[51] *Ivi*, q. 95, a. 1.
[52] According to M. Kaveny Thomistic, "viewing law as a teacher of virtue is that it provides helpful guidance for judging whether the tools of criminal law are inappropriate or unlikely to be effective. The proper concern for law's pedagogical function forces us critically to examineour sanguine beliefs that the penal code affords ample protection to fragile human life". M. Kaveny, "The Limits of Ordinary Virtue. The Limits of the Criminal Law in Implementing Ewangelium Vitae", in K. Wildes, A. Mitchell (eds.), *Choosing Life. A Dialogue on Ewangelium Vitae*, Georgetown University Press, Washington, 1997, p. 146.
[53] *S. Th.*, I-II, q. 96 a. 2.
[54] *Ivi*, q. 96 a. 2.
[55] I.a.: *Augustine* of Hippo, *De ordine*, II, 4, 12.

all, it was better for prostitutes to have a stable and secure existence[56]. Thus, tolerating the "lesser evil" to prevent the greater one does not necessarily involve adopting the ethics of utilitarianism.

So what, according to Aquinas, should be absolutely criminalized? "Only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained"[57]. The concept of a grievous act involves its fulfillment of three conditions: 1) the ability of the majority of people to refrain from committing them; 2) hurt of others; 3) serious destabilization of society. Aquinas favors the last two (*chiefly does*). It seems that in many cases they will not harmonize with each other. After all, many acts hurt others, even talking to someone with an unkind tone or recalling unpleasant past events. Does this mean that leaving them outside the interest of criminal law leads to the disintegration of society? The last premise is met by far more human does than the first and second. One can consider in this context the example of the very serious 'hurt of others' that is abortion. Its moral evil comes from the fact of depriving an innocent human being of the basic good life. However, modern societies that have adopted permissive legislation in this area are not seen to disintegrate. Medical personnel and the mother of the conceived child do not threaten anyone except the specific child. No one perceives them as a potential threat to society at large – like a burglar or a rapist prowling the neighborhood. Thus, the virtue of justice is violated (radically), but nevertheless peace in the social dimension remains intact. Meanwhile, in today's 'sexually liberated' societies, precisely the attempts to criminalize abortion cause a serious breach of peace (e.g., street riots in Poland in the fall of 2020,) – intensifying moral defects within a large part of society on the basis of the "law of unintended consequences" (instead of curing them)[58]. The analogy is in the case of prostitution – if its scale does not exceed a certain measure and does not expose outsiders to

[56] This is what the Dominican scholar Johannes Falkenberg (among others) stated when responding in 1405 to a question from the Cracow City Council whether the city can 'build public houses (and fill them with prostitutes) for annual rent or without it,' as cited in A. Pawlina, "Problem prostytucji w średniowiecznym Krakowie. Jana Falkenberga Iudicium de aedificandis domis pro meretricibus", in *Folia Historica Cracoviensia*, 18 (2022), p. 85.

[57] *S. Th.*, I-II, q. 96 a. 2.

[58] For this reason, among others, the ruling of the Polish Constitutional Tribunal (what should be emphasized – improperly staffed) dated October 22, 2020, Reg. case number K 1/20, declaring the lack of criminalization of the doctor's act of performing an abortion in a situation of serious fetal damage to be unconstitutional, was met with skepticism by, for example, a prominent Thomist, theologian of the Pontificalis Domus: W. Giertych (2020), "Kompromis prawny to nie kompromis etyczny", in *Więź*, Retrieved from https://wiez.pl/2020/12/11/kompromis-prawny-to-nie-kompromis-etyczny-redaktorowi-christianitas-ku-rozwadze/, [Accessed: 12/06/2024]; as well as a penalist known for his anti-abortion views: M. Królikowski (2021), "Okołoaborcyjna Gra w szachy", in *Więź*, Retrieved from https://wiez.pl/2021/02/03/okoloaborcyjna-gra-w-szachy/, [Accessed: 12/06/2024].

umbrage, one can say that, although it is unjust, it does not violate social peace to such an extent that it must be criminalized.

The above remarks lead to the conclusion that a given act must jointly meet the three conditions indicated by Aquinas in order to speak of an absolute obligation to criminalize. However, it is one thing to have an obligation and another to be able to criminalize. The will to minimize evil in the social dimension (since the non-social dimension remains outside the boundary of the state's interest, as said above) should encourage those in power to take steps that contribute to its reduction. After all, such acts as abortion or prostitution, even as they do not disturb the peace, nevertheless violate the social order. Thus, if punishment in a given social reality seems a good means to an end, it is worth introducing into the legal system, even if the last premise is not fulfilled. It is important to note that there are other, often more effective, and sometimes the only ones that can be implemented without provoking serious social unrests, means to eliminate evil (education, health care, psychological support for those potentially interested in morally evil "services" – such as women with unwanted pregnancies)[59].

Besides, it should not be forgotten that one of the manifestations of the injustice of human law is a situation in which "a man makes a law that goes beyond the power committed to him"[60]. Thus, if a democratic system is considered to be in accordance with the requirements of the common good, it is easy to imagine a situation in which public authority has a limited mandate from the public in terms of *ius puniendi*. This is precisely the case in democracies that are described as liberal. From the democratic legislator's need to reckon with the opinion of the majority and the subjectivity of the recipients of the law, comes the practical impossibility of imposing certain solutions that are motivated by noble motives, if they meet with strong disapproval from broad sectors of society.

6. Mercy and Criminal Justice

It is a truism to say that the category of justice is fundamental to natural law. The role of statutory law is to detail this idea in particularistic conditions, at a particular time and place[61]. Criminal law allows the realization of justice in situations of serious violation of the common good by an individual. The basic tool of justice in these cases is a sanction referred to as punishment. Its severity has to be adequate to the magnitude of the wrong done and to the degree of guilt (retribution), but also

[59] "It is therefore necessary for us to be gradual and careful in selecting the strategy to achieve the goal" (M. Królikowski, *op. cit.*).
[60] *S. Th.*, I-II, q. 96, a. 4.
[61] On the Derivedness of Statutory Law from Natural Law see *Ivi*, I-II, q. 95 a.2.

to fulfill additional functions, such as the preventive function[62]. When the perpetrator, instead of punishment, is affected by endless brutal revenge exacted by private individuals or, on the contrary, when the perpetrator is met with leniency – justice will not be realized.

In the context of criminal (and not only criminal) law, the idea of mercy is sometimes mentioned alongside justice[63]. In ancient culture mercy, like pardon, was understood as emotional weakness, unworthy of a man guided by reason and virtue – for example, Seneca, while opposing excessive cruelty and severity of punishment, warned against falling into the other extreme, i.e. mercy[64]. In accordance with the Stoic ethos of moderation was clemency (involved avoiding both extremes – cruelty on one side and mercy on the other). Christian culture strongly values mercy[65]. After all, God, who is Love, is not only gentle but also forgives people all their sins and grants them mercy. Christians are called to do likewise towards their trespassers and debtors. The Fathers of the Church also understood mercy, among other things, as benevolence toward fellow human beings[66] and sympathizing in sorrow with the unfortunate[67].

If mercy involves compassion then its addressee is, on the one hand, the victim of the crime, and on the other hand, the perpetrator. However, mercy cannot be reduced to an emotional dimension only, but needs to take into account the requirements of prudence – the good of both the victim and the perpetrator must be understood objectively[68]. Thus, under the guise of mercy, one cannot ignore the evil that has been done. As Thomas Aquinas noted, "Justice and mercy are so united, that the one ought to be mingled with the other; justice without mercy is cruelty; mercy without justice, profusion"[69]. Mercy towards the perpetrator consists in the

[62] On the rationalization of criminal punishment from the perspective of natural law theory: G. Bradley, "Retribution and the Secondary Aims of Punishment", *The American Journal of Jurisprudence*, 44 (1999), pp. 105-123.

[63] See i.a.: R.A. Duff, "Mercy", in J. Deigh, R. Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law*, Oxford University Press, Oxford, 2011, pp. 467-492.

[64] Seneca, *De Clementia*, S. Braund (ed. and trans.), Oxford University Press, Oxford, 2011.

[65] On the implications of mercy in criminal law from a Christian perspective i.a. J. Murphy, "Christian Love and Criminal Punishment", in R.F. Cochran Jr, Z.R. Calo (eds.), *Agape, Justice, and Love. How Might Christian Love Shape Law?*, Cambridge University Press, Cambridge, 2017, pp. 151-165

[66] "So greatly is God pleased with our feelings of benevolence towards all men, that He will bestow His own mercy only on the merciful" Hilary, as cited in Thomas Aquinas, *Catena Aurea. Commentary on the Four Gospels Collected Out of the Works of the Fathers*, John Parker, Oxford-J. Rivington, London, 1841, Matthew 5:7.

[67] "The merciful (misericors) is he who has a sad heart; he counts others' misery his own and is sad at their grief as at his own". Remigius, as cited in *Ibidem*.

[68] G. Maroń, "Kategoria miłosierdzia w polskiej nauce prawa karnego", in *Prokuratura i Prawo*, 11 (2022), p. 32.

[69] Thomas Aquinas, *Catena Aurea*, cit., Matthew 5:7.

fact that one should refrain not only from the temptation of vengeance beyond measure manifested in excessive severity and cruelty (which Seneca called for, among others, under the notion of clemency), but renounce vengeance in general. It is therefore necessary to see a perpetrator as a man who is lost and in need of help, and it is this help that must be given. Punishment can no longer be retribution, the restoration of an abstract balance (violated by an evil) in the world, but a cure. The cure, on the other hand, is not for the satisfaction of outsiders, but for the improvement of the patient.

Adopting such a perspective does not reject the mercy shown to the victim, since the satisfaction felt from the ailment inflicted on the perpetrator is not the best, and certainly not the only means to heal the wounds caused by the crime. Nor does it mean indulging in evil and thus annihilating justice. After all, subjecting a sick person to appropriate treatment does not constitute a disregard for the disease – on the contrary. Therefore, it seems justifiable to speak of "merciful justice" as "a more perfect form of justice" – taking into account both the religious heritage and the secular philosophy of humanitarianism[70]. As one of the Church Fathers noted: "true justice feels compassion, false justice scorn"[71]. As manifestations of such merciful justice can be considered in criminal law: the principle of humanitarianism, the avoidance of too long incarceration, the preference in favor of non-custodial sentences, the adjudication alongside or even security and probation measures instead of sentences; and in addition the realization of the idea of resocialization and respect for the security of proceedings of the accused – headed by the presumption of innocence and the right to a defense (fair trial).

The above-mentioned manifestations of the consideration of mercy in criminal justice are quite common today. Of more concern is mercy understood no longer only through the prism of prudent compassion – but condonation, forgiveness of guilt. For it is one thing to have a mild and humane punishment, linked to rehabilitation, administered after a fair trial, and quite another to have one's punishment forgiven – whether by a court in cases provided for by law or by the monarch or president (Pardon power). Such an act of mercy can easily be perceived as tolerating evil. After all, "forgiveness does not cancel out the objective requirements of justice"[72]. Thus, it is rightly argued that the necessary condition for showing mercy understood in this way is the appropriate attitude of the offender –

[70] T. Snarski, "*Merciful Justice" and the Challenges of Posthumanism in Legal Philosophy. Some Comments on the Criterion for Evaluating Technological Progress in the Criminal Justice System,* in *L'Ircocervo*, 23 (2024), n. 1, p. 280.

[71] Gregory, as cited in Thomas Aquinas, *Catena Aure*a, *cit.*, Lucas 15:1–7.

[72] John Paul II, *Encyclical Letter 'Dives in Misericordia'*, n. 14, https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia.html, [Accessed: 13/11/2024]. Likewise: Francis, Encyclical Letter *Fratelli Tutti*, n. 241, https://www.vatican.va, [Accessed: 13/11/2024].

repentance, willingness to improve and to make reparation[73]. The attitude of the victim should also play a large role here – mercy, unlike justice, is not something that is due, but a gift, and to make a gift – no one can be forced. The fact that the victim had the courage to give such a gift should be a circumstance that is taken into account significantly by the court administering the punishment, or by the head of state, who is entitled to the right of Pardon power.

7. Mercy and Limits of Criminal Law

When considering the implementation of the idea of mercy on the grounds of criminal law, it should be noted that it always remains secondary to the committed act. One cannot talk about saving the perpetrator's humanity if one does not deal with the perpetrator at all. One cannot consider the appropriate method of treatment if one considers someone to be sane. One can't forgive or mitigate someone's punishment if there is no basis to impose it. The assessment of whether a particular act (in a specific place and time) should be prohibited under the threat of penalty or not – remains a matter of practical reason, not of mercy. An attitude of mercy (or the lack thereof) constituting a person's disposition that is revealed to specific persons in specific situations – cannot affect the assessment of whether a given abstractly understood category of acts (abandonments) fulfills it. Thus, the legislation may therefore not so much implement mercy as create solutions that allow for mercy to be considered within the justice system – while keeping in mind that by its very nature, mercy is a gift, and thus something that cannot be enforced by force either on the victim or on society.

However, even if one were to accept that mercy can also be manifested in legislative activity through the decriminalization of certain acts, the following circumstance should be noted. It was mentioned above that the condition for mercy understood through the prism of remission or mitigating penalty is repentance, willingness to improve and to make reparation. Let's look at the example of abortion. Those who call for its decriminalization usually do so not because they see better means of preventing this evil or are concerned about the negative consequences – but because they do not see it as a moral evil at all. Since they don't see evil, they can't talk about mercy either, which is secondary to evil, a reaction to it. In fact, they don't invoke this idea, but rather individualistically understood freedom, the right to privacy, intimacy, self-determination. Thus, recognizing from

[73] F. Ciepły, *Sprawiedliwościowa racjonalizacja wymiaru kary kryminalnej wobec współczesnych tendencji polityki kryminalnej w Polsce*, Wydawnictwo Katolickiego Uniwersytetu Lubelskiego, Lublin, 2017, p. 285, as cited in G. Maroń, *op. cit.*, p. 19.

the perspective of natural law ethics the evil in abortion, one must take into account that the other side of this dispute is not ready to accept mercy.

8. Summary

The dispute over which acts should be criminalized and which should not has caused and will continue to cause much controversy in modern societies divided over values. From the perspective of natural law theory (relativized to the position of Thomas Aquinas), the decision to criminalize requires two assessments. First, whether a given category of human acts (abandonments) is directed against the common good – after all, there are plenty of acts that violate only the individual goods of particular individuals. Second, it meets the three presumptions discussed earlier, i.e., the ability of the majority of people to refrain from committing them; 2) hurt of others; 3) serious destabilization of society. According to John Finnis, Aquinas's thought is not different (in this respect) from the harm rule later formulated by John Stuart Mill, and which today constitutes a dogma for liberal criminal law philosophy.

The legislator, when recognizing certain acts as prohibited, views them *in abstracto*. Without dealing with specific circumstances and, above all, with the person of the perpetrator, it is impossible to speak of being merciful or not. Indeed, mercy is a gift that can be voluntarily given to a person. Criminal law providing for the principle of humanity, lenient punishments, the possibility of renouncement of inflicting punishments, fair trial or promoting resocialization makes it possible to realize the idea of mercy in specific cases. However, assuming a priori that all perpetrators of a given act deserve mercy in the form of decriminalization of the act – which, according to prudent assessment, should be criminalized – would thwart the idea of justice. In order to make justice "more perfect" (by taking into account the perspective of mercy), one must first take care of its essentials. These essentials are the proper evaluation of the act in question. There are no further floors without a solid foundation. Otherwise, the entire edifice of justice will be annihilated.