NOWA KODYFIKACJA PRAWA KARNEGO Tom LII
AUWr No 3952 Wrocław 2019
DOI: 10.19195/2084-5065.52.4

Anthropological foundations of Polish Penal Law in the light of the 1997 Constitution of the Republic of Poland

Filip Ciepły
ORCID: 0000-0002-1124-7389
Departament of Criminal Law
Faculty of Law, Canon Law and Administration
The John Paul II Catholic University of Lublin, Poland

Introduction

For some time, the methodology of legal sciences has been challenging positivist research approaches, such as determinism, scientism, naturalism, or instrumental rationalism. Unlike in the past, today's impact of empirical research results on jurisprudence has largely faded away. Also, the science of penal law tends to combine dogmatic analysis with axiological issues to a greater extent than before. When laying down the standards of penal law, the legislator rests on the moral system accepted by the sovereign, thus defining the normatively relevant social values which lay the foundations of the law and which are safeguarded by the law. In this sense, penal law cannot be axiologically neutral, since it implements a specific set of values in the legal domain. Moral standards recognised in the legislative process as underlying law-making decisions legitimate this law and act as its internal binder and a promise of fair application.

Nowa Kodyfikacja Prawa Karnego 52, 2019

The whole law is permeated with axiology, yet the Constitution seems to embody it to the greatest extent. The identification, analysis and argumentative value of the constitution-embedded values helps maintain the axiological coherence of the entire body of laws, including penal law. It is the constitutional axiology that determines the direction of development of penal standards and allows their critical analysis. Reliance on constitutional values saves penal law from being filled with just any normative content, both at the stage of law-making and interpretation. To reconstruct the system of values ingrained in the body of the Constitution is a fundamental task of the science of law, including the science of penal law.

I. Anthropological dilemmas of jurisprudence and penal sciences

In the science of law, and in penal sciences in particular, anthropological and axiological dilemmas are important enough to draw a dividing line between separate research paradigms. The analysis of the problem of crime and punishment calls for fundamental answers from the level of philosophical anthropology, the theory of cognition and the philosophy of morality. Crime, i.e. a human act subject to a penal response, is an external and socially relevant manifestation of human decision-making processes. Therefore, it is subject to analysis revolving around the concept of the person and the perception of the person in their cognitive, decision-making, moral, and social context.

The key paradigmatic problems, which, once settled, determine the development of a consistent system of penal law and a coherent criminological doctrine, as well as questions about the nature of a human being, are of a dichotomous nature. The axioms brought together take the form of a disjunctive alternative and demand settlement in order to arrive at the necessary coherence of both scientific theory and the normative system. The fact that, considering the theoretical level of penal sciences, there is neither a single, acknowledged approach to human nature nor a single concept of society, let alone a set of fundamental values, crime prevention or crime fighting methodologies, etc., does not mean that all paradigmatic

viewpoints, including anthropological ones, are equally justified from the perspective of the constitution-maker.

Looking at the literature on the subject, the fundamental axiomatic issue for the doctrine of penal law and criminology (with its pragmatic aspirations) has been the question about ontic status, human nature and, in particular, whether human actions are free or pre-determined. The concept of the person is the pivotal, though not always clearly articulated, foundation of penal law and criminology. Next to family law, penal law is linked to those areas of the legal system that touch upon anthropological and ethical issues: in penal law it chiefly refers to the clash between determinism and indeterminism.

The method of understanding human nature is governed by the metaprinciple of determination of penal liability. Although the problem of indeterminism and determinism is grounded in history, and therefore sometimes considered to be long buried, it keeps coming back every now and again in a more or less intense form, as has been the case in recent years. Certainly, there is an opinion that in relation to the legal basis of penal liability the clash between determinism and indeterminism is neutral and can, or even should be, ignored. Such a stance has been adopted by J. Makarewicz or C. Roxin. There are, however, dissenting voices that stress the importance of shaping the law and promoting criminology and penal sciences based on the indeterministic concept of the person.

It is worth noting that while the dispute about the determination of human will, discussed at length in the literature, was common in research pursuits in modernism, contemporary postmodern approaches go even further, that is, they deny the human ability to get to know reality. The category of subject as describing a human being is challenged. The postmodern vision of the person rejects the idea of subject and the possibility to cognise objective reality. The individual is seen as subject to such far-reaching pre-determinations of the world that he or she is not able to know reality by other means than collectively shaped narratives. So, a human being has nothing to do with the historical concept of a free, rational, self-forming subject. As a matter of fact, the individual is not a subject that cognises reality, but only an object thrown into various kinds of communication games. The so-called norm and the so-called subjectiv-

ity are only conventions accepted through collective persuasion. The acceptance of this kind of axiom as underpinning the research paradigm in criminology and penal law would have major implications for the understanding of penal liability.

In contemporary anthropological analyses, also across legal sciences, so-called post-humanist and anti-humanist trends play a role in opposing anthropocentrism rooted in the legal system. The naturalistic and bio-centric stream of post-humanism attempts to lift the boundary, also a legal one, between a human being and animal. The aim is to overthrow "humanist prejudices," "species chauvinism," "the colonisation of the social sciences by natural sciences" and based on that, re-design the legal system. On the normative level, the dogmatic opposition is between a human being (person, subject of law) and an animal (a living creature protected by law). The consequence of the new approach would be to recognise an animal as a person and to grant it basic subjective rights. This approach was behind the 2008 parliamentary debate in Spain on the granting of subjective rights to life, personal freedom, freedom from torture and ill-treatment to primates (apes).

In turn, another trend of post-humanism, known as trans-humanism, assumes that traditional humanism can be surpassed by accepting the proposal of the emancipation of subjectivity from the natural element. In other words, a human being may transcend themselves by becoming a "trans-human." This design involves the emergence of human hybridisation whereby the human being will transform into a semi-technical being combined with artificial intelligence. Robotisation is expected to evolve not only through the installation of various organs in the human body but also aims to "virtualise" a human being by making them totally independent from the body. It is expected that by around 2045 the human species is to achieve a status in which the common limitations of human beings are to be transcended and a new biological and technological quality is to emerge. In legal terms, trans-humanism proposes that artificial intelligence be made a subject of law. This trend is already behind the corner: in May 2017, the mayor of the city of Hasselt, Belgium, Nadja Vananroye, conferred Belgian citizenship on a robot. The machine was issued a formal birth certificate with the full name and indication of its parents.

According to post-humanist concepts, subjective rights, for example, the right to prosperity, would be afforded to all "rational beings" in artificial, human, and animal forms.

If such cultural trends were endorsed by society and law-making bodies, this would entail profound changes to the axiological foundations of the legal system. A far-reaching consequence would be the removal, or at least a deep revision, of the principle of human dignity from the legal system. In penal sciences, attempts to integrate post-humanist concepts with the legal order would necessitate the exploration of completely new research areas. Just as determinism and behaviourism attempted to remodel the penal law system based on natural sciences, post-humanism in penal sciences would mean the rejection of classical subjectivity and liability and tackle the question of legal reaction of trans-humans, animals, robots and hybrids that have been made subjects of law to "prohibited acts."

Though somewhat bizarre, the anthropological trends discussed above have been highlighted in order to emphasise — across the variety of the theoretical concepts of the human being in the contemporary "free market of ideas" — the importance of anthropological decisions of the constitution-maker embedded in the normative domain and constituting a measurable point of reference in the process of penal policy-making by the creation and interpretation of penal law standards in the statutory dimension.

II. Anthropological assumptions of the constitution-maker

The essential inspiration when designing the content of legal norms is always some idea of a human being. The Polish constitution-maker has also selected their anthropological concept to rest the legal order on. It is underlined that the vision of the person is the central value of the legal system and was expressed in the Constitution, not only by enumerating some fundamental values and principles but by making that vision ingrained deeply in its overall construction of basic law. To investigate the anthropological assumptions behind the Constitution of the Republic of Poland, attention should be drawn to Article 30, which highlights the principle of human dignity. Human dignity is the original value that sanctions all the constitutional values as well as being the final test of their relevance.

It defines the axiological goal for the whole legal system and forces such normative solutions that lead or should lead to the achievement of this goal in an optimum way. The reconstruction of the concept of a human being recognised by the constitution-maker based on Article 30 must not ignore the social context, including the established objective assessment of what is a threat or violation of human dignity, along with the entire axiology and tradition of the system. The anthropological content of the notion of human dignity should also allow for the historical experience of a cultural community.

The concept of human dignity is central to European culture and is thought to originate in Greek philosophy, Judaism, and Christianity. In ancient philosophy, the idea of dignity meant that human beings had the power to rise beyond their nature and shape their humanity. Christianity, with its theology, has reinforced the subjectivity of every human being in the European moral tradition. It sees a person created in the image and likeness of God as endowed with innate and inalienable dignity. In its description of human dignity, Christian personalism emphasises "a person" as a special ontological category. According to Christian philosophy and theology, the essence of a person is rationality and freedom and, consequently, the ability to act internally and externally. A person is the subject of action, morality, and law. Although "nature" is also at work, a person is the proper and final author: the subject of their own decisions and actions. A free decision and free action taken after getting to know reality is the only domain of the entire human activity that separates them from nature and sets them in opposition to it. Thanks to the power of self-determination, that is, free will, human beings are not animals but masters of themselves and of their actions; they decide their actions themselves and assume the ensuing responsibility.

Although the intellectual currents of the Enlightenment challenged the theological justification of human dignity, the very notion of dignity understood as the source of freedom and human rights has been preserved in philosophy and jurisprudence. Despite the impact of Christian theology and philosophy having dwindled in modern times, European culture has largely retained classical, Christian, personalistic anthropology as the basis of the legal order. Despite the serious philosophical and legal crisis in the early 20th century and the spread of dehumanising racist and Bol-

shevik ideas, the idea of human dignity has endured in such a harsh environment and has saved the status of a governing principle in Europe.

Also, the secular interpretation of the concept of dignity emphasises the qualitative distinctiveness of a human being, in particular the superiority of people over dead matter and the entire living world, devoid of consciousness, reason, or freedom of action. Because of their freedom, including the ability to reason, a human being enjoys the special status of a person. To be a person, also in secular terms, means to have a rank or category that is beyond reach to non-rational beings. Human dignity is a quality that stems from the being and personal structure due to the fact that it exists in itself and for itself as a goal and never as a means of human action. Recognition of human dignity is the recognition that the person can change and control their life. Human nature has given a person the inherent ability of surpassing themselves. Recognition of human dignity as the foundation and superior value of the moral and legal system, without having recourse to theological sources, is known as the principle of humanism. When asking whether a moral or legal doctrine deserves to be termed humanistic, the question needs to be asked whether it acknowledges that a human being is capable of reaching for moral perfection, or at least striving to bring it to a high level, all by themselves.

Pursuant to the Constitution of the Republic of Poland, and according to the interpretation of the Constitutional Tribunal, human dignity is at the heart of the values that determine the subjective position of an individual in society and which are behind respect due to each person as well as determining the individual's position in society, their relation to other people and public authority.[1] To violate human dignity means to doubt their subjective quality. The tribunal confirms that the concept of human dignity assumes the existence of an inviolable sphere of individual autonomy, or, the right to decide.[2] On the basis of Article 30 of the Constitution, human subjectivity is an indispensable component of the normative

[1] See Decision of the Constitutional Tribunal of 5 March 2003, K 7/01, *OTK-A* 3(2003), item 19; Decision of the Constitutional Tribunal of 14 July 2003, SK 42/01, *OTK-A* 6(2003), item 63; Decision of the Constitutional Tribunal of 6 November 2007, U 8/05, *OTK-A* 10(2007), item 121.

[2] Decision of the Constitutional Tribunal of 8 November 2001, K 6/01, *OTK* 8(2001), item 248.

system. Subjectivity is a quality of beings who enjoy rights as well as assuming duties and responsibilities in the normative system.

Another normative argument for the identification of the anthropological assumptions of the Polish constitution-maker is Article 1 of the Constitution of the Republic of Poland laying down the principle of common good. The tradition that is behind the fundamental context of understanding of this principle in the constitutional order is the tradition of classical philosophy and Catholic social science resting on the personalist and indeterministic concept of a human being. Adoption of the subjective concept of a human being also provides the axiological basis for other constitutional provisions. Article 31 sets out the principle of respect and protection of freedom and the obligation to respect the freedom of others while Article 41 guarantees personal inviolability and liberty. It is worth noting that the principle of protection of ownership and the right of succession in Article 21 can be justified by the high position in the system of values of the right to freely dispose of one's property. The axiological assumptions incorporated in the Constitution of the Republic of Poland foster the idea of subjective autonomy (internal freedom) and link it to negative freedom (external freedom) that conditions the realisation of the moral subject.

The Constitution of the Republic of Poland alludes not only to dignity and freedom but also to liability and sanctions for culpable violation of the law (Articles 42, 72, 86, 105, 198). The axiom of free will is a normative justification for making people responsible and liable for their acts. The constitution-maker recognises human subjectivity and free will and assumes that human behaviour can be influenced by the legal system containing rights and obligations, injunctions and prohibitions related to behaviours as well as establishing sanctions for culpable violation of legal norms.

Attention is also drawn to the axiological content of the Preamble to the Constitution of the Republic of Poland which invokes not only dignity and freedom but also the cultural values rooted in the Christian heritage of the Nation. The Christian heritage of the Nation is not only material but also axiological. The heritage of the Nation, as a constitutional value, covers, but not only, the tradition of Christian morality anchored in anthropological foundations. The Christian, meaning personalistic and in-

deterministic, vision of a human being, which embraces the principle of human dignity central to the legal system, is given the status of a system paradigm and thus, on the legal level, must be accepted by those who do not adhere to the Christian outlook as a heteronomous value of Polish constitutional law.

Besides, considering the universal nature of the fundamental values raised in the preamble (truth, justice, good, and beauty), it can be inferred that for the constitution-maker human moral cognition and the valuation of human behaviours are objective (universalistic), which is crucial for resolving certain paradigmatic dilemmas. Moreover, regarding the vision of society, the constitution-maker points to the value of solidarity as an important element of constitutional axiology, thereby discarding the idea of class struggle, which, in turn, can mean a paradigmatic marginalisation of the assumed confrontational nature of social relations.

Summary

When making penal law regulations, the legislator is faced with axiological choices of tremendous impact, hence it should take into consideration the moral conditions that are inherent to the specific civilisation and culture, particularly interpreted from constitutional axiology. In the doctrine of penal law and penal sciences that aspire to influence the content of penal legislation, the perspective of constitutional values, principles and norms should always be taken into account. However, the constitutional context does not only offer strict and express legal rules, precisely formulated guarantees, imperatives and prohibitions, constitutional or competence-related provisions but also generally worded optimising norms and, often only implicit preferences, assumptions and axiological views of the author, among them the vision of human nature. The specific anthropological concept that the constitution-maker has assumed as the axiological basis of its law-making decisions proves to be heterogeneous and becomes a necessary reference point for various law-making and law-applying bodies, all recipients of legal norms, and also the representatives of scientific disciplines recommending changes to the law.

The anthropological stance adopted in the Constitution can be inferred primarily from the principle of human dignity as well as from the foremost position of the personal freedom of the individual in the hierarchy of constitutional values or from the interpretation of the constitutional concept of common good. The principle of human dignity entails the axiomatisation of the normative content of the Constitution. The Constitution of the Republic of Poland, in its Article 30, does not aspire to re-invent the concept of the human being or prioritise specific rights and freedoms but only confirms that they exist and obliges public bodies to respect and protect them. The analysis of the content

of the Constitution of the Republic of Poland reveals that it is founded on the personalistic concept of a human being. This indeterministic concept implies that the individual takes rational and free choices and socially relevant decisions manifested in their actions and is subject to liability, including penal liability, based on these actions. This is relevant to the definition of the paradigm of expert assessments of penal law and to the legislative effort.

Under effective constitutional law, it is impossible to develop a system of penal-law response based on such anthropological concepts as behaviourism, determinism, post-humanism, anti-humanism, trans-humanism, biotechnology, trans-species approaches, etc. The idea of the rejection of the subjective nature of a human being and departure from the classic rules of penal liability based on the perpetrator's actions and guilt are out of the question. These notions should be interpreted in the light of personalistic anthropology. Any concepts that rationalise penal sanctions exclusively on the grounds of protection of public safety or crime prevention which make penal liability instrumental and objectify perpetrators are in conflict with constitutional axiology. Moreover, constitutional anthropology cannot endorse solutions that implement a strictly behavioural vision of crime response, that is, one in which the application of penal sanctions is understood as a kind of social engineering or correctional tool separated from liability. The perpetrator of a prohibited act cannot be subject to interventions regarded as forced therapy or psychotechnical correction of non-conformist attitudes and pathological personality. It is also unacceptable to attempt to treat animals or artificial intelligence as subjects of law or making them fall under penal liability.

All in all, due to the hierarchical structure of the sources of law, any proposals and conclusions in the field of penal law-making and interpretation must be aligned not only with the norms but also with the axiology of the Constitution of the Republic of Poland. If criminology and other penal sciences do not want to turn into purely theoretical science, detached from the axiological, legal and social reality of combating crime, and if their findings are to be taken into account in practical state policy, they must follow a paradigm consistent with the context of the fundamental values and norms embedded in the Constitution. From the perspective of constitutional anthropology, the paradigm of penal sciences that corresponds to the axiological assumptions behind the existing political system is the classical paradigm in which a human being is perceived as a rational, self-determining and free being, creating and responsible for their own actions. The property of scientific pursuits within the classical paradigm also confirms the repeated references of the constitution-maker to the concept of justice and the treatment of justice as the fundamental and universal value of the legal system.

Keywords: axiology of criminal law, paradigms of penal sciences, constitutional anthropology, ethical assumptions of legal order, schools in criminology