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RESPONSIBILITY – AN ANTHROPOLOGICAL OUTLINE

Law – right or wrong, or even preposterous – for those who apply it, therefore, raises a compulsion of the will: obscuring or even replacing it.¹

1. PREFACE

The notion of crime, adopted in the Polish Penal Code of 1997 (further on referred to also by the Polish abbreviation KK) and often named as a five-adjective concept, differs from the classical one (respectively called three-adjective). According to the binding Code, a crime is defined as an (1) act which is jointly (2) punishable, (3) reprehensible, (4) culpable and (5) socially harmful. In the regular course of a lecture in criminal law, it is generally accepted that the five-adjective concept is indeed *five-graded*. Thus, the crime is seen as if it had a stepped structure. Climbing down from an individual act, we take further steps from (2) criminality to (5) social harmfulness. (This scheme of reasoning finds its basis e.g. in Article 1(2) of the Penal Code. It allows for the exclusion of criminal liability, although an act does meet the criteria of a crime, and in particular is both (3) reprehensible and (4) culpable, but its social harmfulness is negligible).

However, the five-graded understanding of crime, although justified, might be misleading, since the “grades” taken together create rather a polarized dialectic than a compatibility of concepts. Thus, we can say that the complex idea of crime resembles a musical composition made of counterpoints (from point 1 up to point 5).

Let us notice an important circumstance. Seemingly, in the assessment of criminality, the weightiness of guilt is inversely proportional to the weightiness of its

¹ G. Morselli, *Krótką rozprawą o samobójstwie*, „Literatura na Świecie” 2018, issue 1–2, p. 6.

social harm. Article 1(2) KK thus appears to deviate from the notion of responsibility classically based on the principle of guilt.² Gottlob Frege, a great logician and the author of the first formal system, considered concepts as functions (in strict analogy to the mathematical ones). Accordingly, the task of philosophy, one out of many, is to study their variation. Taking the notion of crime into consideration, one may notice its “complexity”, and, to be more clear, non-monotonicity.

2. AIM OF THE PAPER

In this paper, we are going to ponder the legal responsibility in two of its *genres*: criminal and administrative (vividly, but not sufficiently precisely referred to as the *subjective* and *objective* aspect of responsibility). As it has been rightly asserted, “there is no responsibility without freedom.” The more general theory of freedom is thus an introduction to considerations concerning responsibility. Reflections on freedom are supposed to bring us closer to an answer to two questions fundamental for all legal philosophy: (I) what justifies punishment as a social practice?, and (II) what exactly is the subject of criminal damnation?

Following the suggestion made by Professor Marcin Poręba, two preliminary conditions (understood as necessary conditions for its adequacy) should be imposed on each theory of freedom. First of all, it ought to (c1) determine whether exceptions from necessity are possible at all, and, secondly, (c2) ascertain whether these exceptions correspond to the colloquial understanding of freedom³ (in order to eventually prescribe the degree of their suitability). The Poręba Criterion, as we might call it, is not only limited to metaphysical considerations, but might be also extended, so that it includes the theory of criminal responsibility, as well.

² By the principle of guilt we mean here the formal assumption that punishment is supposed to be a function of guilt – e.g. that it should be directly proportional to it (as Kant claimed). The perpetrator’s guilt is both a sufficient and exclusive justification for the violence inflicted on them. “All of its preventive, educative and educational aims are indeterminate, and therefore they broaden the essence and function of punishment, thereby expanding the scope of penalisation, directing it to vaguely understood social relations, which should not be related to criminal punishment”, as G. Rejman notes. “The worst effect of such a broad delineation of the function of punishment is the possibility of transposition its implementation beyond the limits of justice transfer it to another administrative factor”. Deviations from the formal principle of guilt therefore erode the institution of punishment. The observation made above points to the conceptual symmetry of two quite different, it might seem, phenomena: the liberal striving to form a punishment against its retaliatory essence and the totalitarian practice of “entrusting in Poland in 1944–1956 matters related to the execution of the security and public order service”. See: G. Rejman, *Z rozważań o karze*, (in:) J. Utrat-Milecki (ed.), *Kara w nauce i kulturze*, Warszawa 2009, pp. 43–44.

³ Cf. M. Poręba, *Uwagi o wolności*, (in:) M. Poręba, *Wolność i metafizyka*, Warszawa 2017, p. 102.

Hereafter, I intend to take a step towards the proper theory of responsibility, which I suggest to call *proleptic*. The idea of *prolepsis* refers to Timothy Chappell, a contemporary American philosopher, who maintains that the idea of personhood has a proleptic nature and that its social application is rather *performative* than descriptive (both ideas are closely related).⁴ Chappell's findings, which are profound and of great importance, will serve as, let us say, a hand guide in further deliberations. Notice that the proleptic theory of responsibility is immersed in the general and the specific view on the person, the origins of which go back to the thought of Immanuel Kant. Following Kant, Chappell defines morality as ethics understood in terms of personhood.⁵ The ethical notion of responsibility (in both *moral* and *legal* sense) is thus one of the shoots growing from the root of the regulative idea of personhood. The mechanics of prolepsis hereby reveal the anthropological basis of the (*inter alia* criminal) punishment.

The present article consists of two parts, with each of them again being divided into two subsections. In the first part, which initiates our considerations, (i) I present a well-known argument which has been often raised in the historical dispute on determinism. Subsequently, (ii) I discuss the very notion of free will, trying to lay out several aspects relevant to criminal law. To do this, I refer further to the anthropology of Peter Abelard, a great philosopher of the scholastic era. In the second part, on the other hand, (iii) I will attempt to specify the concept of possibility, thus closing the philosophical reflections over freedom. The conclusions will finally render it possible (iv) to outline the concept of the person – which is supported by the properly understood freedom of will. At the end of the investigation, it is necessary to answer whether the proleptic theory satisfies the Poręba Criterion (i.e. the condition for its accuracy). Merely fulfilling it does not guarantee that the outlined theory is adequate. However, it is – I believe – a promising beginning.

3. QUANDARY OF DETERMINISM

Ad rem. “There are two labyrinths within the human mind”, Leibniz says emphatically, “one is related to the notion of continuity and the other to the nature of freedom”.⁶ Let us then try to follow at least a path in the Leibnizian labyrinth.

⁴ T. Chappell, *On the Very Idea of Personhood*, “The Southern Journal of Philosophy”, March 2011.

⁵ O. Höffe, *Immanuel Kant*, trans. M. Kaniowski, Warszawa 1995, p. 175.

⁶ “... and their source lies in the same notion of infinity”, as Leibniz continues. Quoted after: M. R. Antognazza, *Leibniz. Biografia intelektualna*, transl. Z., Ł. Lamżowie, Kraków 2018. See also: B. Wolniewicz, *Z aksjologii Elzenberga*, (in:) B. Wolniewicz, *Filozofia i wartości*, Warszawa 1993, p. 146.

As has been noticed already, there is no responsibility without freedom. Nevertheless, determinism can be pointed out as one of the most serious threats to the freedom of will. In this paper, philosophical considerations on determinism will play a primarily heuristic role, illustrating in a *pars pro toto* manner the theoretical significance of the problem. What exactly does determinism claim? Its position is frequently perceived fallaciously, and its clear presentation causes considerable difficulties.⁷

Determinism requires to be expressed in causal terms. Following Poręba's (c2) recommendation, we can take a well-known proverb as our theoretical material: "man proposes, God disposes". It accurately reflects the determinist thesis: when I write these words, the future of my article (e.g. whether it *will or will not be* completed) is a foregone state of affairs. A determinist believes that the future is strictly determined by a *certain* event preceding it⁸ (whereas the totality of events creates a sequence causally connected in a timeline), although it is not both resolved and independent from a causal relation (as a fatalist may claim). The future event is here an element of the following alternative: the bullet will hit the target or fail. Whatever happens, however, is determined by the necessity of a causal relation. The main question is therefore: are acts of will fully determined by events?

The subject of our interest is thus a quandary of determinism understood in this manner.⁹ Does it exclude free will? Philosophers who deny it sometimes present the following reasoning.¹⁰ Without rejecting the freedom of will, they notice, we can agree that the future is determined and the logical values of future contingents are – at the same time – already fixed. Let us assume, just for the purpose of the example, that in the future, humans will populate the planet Mars. This means, consequently, that whatever I or anyone else will do *now*, Mars will be populated *in the future*. Yet such a statement does not imply that populating Mars is independent of our actions! The current state of the world indeed determines the fact that Mars will be populated; but if the present state of the world were different, then...¹¹

⁷ Let us show just one of them as an example. The deterministic view is often not sufficiently distinguished from the fatalistic position. The thesis of fatalism can be expressed in the form of implication: if it is true that it will be as it is said, it has always been the case as it is said. Determinism is a naturalistic view, fatalism – a magical one. By the by, we can note that the theses of determinism and fatalism logically exclude each other.

⁸ Or following after it.

⁹ If the future is clearly determined by the present event, then judgments about the future have a fixed logical value. For the sake of simplicity, we accept this *quasi*-Aristotelian explication of the deterministic thesis.

¹⁰ K. Miller, *Presentism, Eternalism, and the Growing Block Theory*, (in:) H. Dyke, A. Barndon (eds.), *A Companion to the Philosophy of Time*, Malden 2016, p. 351.

¹¹ *Ibidem*.

The answer presented above refers to the classical argument raised particularly by George E. Moore, who also tried to show that determinism does not exclude responsibility. The argument has the following structure: (I) *A* is equivalent to *B*, (II) *B* is consistent with determinism, therefore (III) *A* is consistent with determinism, where the variables are interpreted as: *A* = “*S* could have done otherwise”, *B* = “if *S* had chosen to do otherwise, then he would have done otherwise.”¹² Notice that sentence *B* is wholly consistent with the thesis that “all *S*’s actions are causally determined”. Hence, *A* – in virtue of assuming the equivalence (I) – remains consistent with causal determinism.

As Roderick M. Chisholm has shown, the conclusiveness of Moore’s argument strictly depends on the enthymematic premise *C*. The premise *C* states that “*S* could have chosen to do otherwise.”¹³ The conviction that determinism is consistent with responsibility is therefore valid only when the premise *C* is accurate. If we are then forced to reject it – although still having good reason to accept *B* – there are no good reasons to admit *A*. An agent who could not decide that they would act otherwise – says knowingly Chisholm – would not have acted differently regardless of the veracity of *B*, that is: even if *S* had decided that they would do otherwise, then *S* would have acted differently.¹⁴ Moore’s argument seems to fall like dominoes.

This difficulty led Chisholm to present another concept of free will. Remember that causality is a relation between states of affairs. However, personal responsibility, as we read, is based on the circumstance that a certain event or set of events is caused not by other events or states of affairs, but by the acting agent themselves.¹⁵ The uniqueness of causality, then – that in accordance with the scholastic tradition Chisholm called *immanent* – consists in the fact that an act of will, although it has no *cause* in the world of events, has certain *effects* in it (which naturally contradicts determinism). In the next section, I will try to refer these remarks to the main problem of our paper, which is legal responsibility.

4. STRUGGLING WITH GUILT

Guilt is a penal reflection of freedom. Assume that condition *B*, presented above, is an adequate explication of responsibility. According to *B*, *S* is responsi-

¹² R. M. Chisholm, *Freedom and The Self*. Cf. <https://kuscholarworks.ku.edu/bitstream/handle/1808/12380/Human%20Freedom%20and%20the%20Self-1964.pdf;sequence=1> (accessed: 3.08.2018). Cf. also: R. M. Chisholm, „*Ja*” a wolność człowieka, (in:) J. Górnicka-Kalinowska (ed.), *Filozofia podmiotu*, trans. J. Golińska, Warszawa 2001, pp. 352–353.

¹³ *Ibidem*.

¹⁴ *Ibidem*, p. 353.

¹⁵ *Ibidem*, p. 354.

ble for their actions only if they could have done otherwise (than they in fact did). This premise (claiming that “they could have acted differently”) simply means, in pursuance of *B*, that if *S* had decided that they would do otherwise, then they would have acted differently. The notion of free will is therefore complex and breaks into two simpler conceptual substrates: the *subjective* decision and the *objective* possibility. The first one is characterized by the metaphysical concept of will, the second – contrarily – by purely empirical terms (notable is the circumstance that they correspond respectively to the *definition* and the *criterion* of a free action).

Thus, it is necessary to distinguish the definition of the notion from its criteria (ascertaining that a certain action is free indeed).¹⁶ Defining a concept is merely a logical task. We may reasonably ask: what does it mean, then, that *S* chose they would do *so-and-so*? What sense should be attached to the intention – so important in considerations on guilt? To answer the questions above, I will resort to the useful conceptual tools provided by Abelard. Let us shortly review his anthropology of the tact, leaving for now the specific problem of the criteria on the margin (I will return to it in the next section).

As research material, we will take the initial paragraphs of Abelard’s *Ethics*, his foremost opus created in 1135/1136.¹⁷ Let us firstly note that “the roman-canonical conception of guilt was finally formed in 1191–1196 and found its expression in the Papal Bull, and then was transposed to canon law in the form expressed in the famous principle: *versanti in re illicitae impantur omnia sequuntur ex delicto*.”¹⁸ Abelard’s idea is sometimes overlooked in historical reflections on criminal law. Therefore, it is worth trying to even roughly describe its grounds (also in order to deepen understanding of the historical development of the institution of guilt). However, an introductory reservation should be made now. Above all, it has to be noticed that the subject of Abelard’s *tractatus* is the essence of sin, not of crime. He does make some remarks about crime, as well (claiming e.g. – as it

¹⁶ This distinction comes from R. Swinburne. Swinburne notes that the notorious confusion of the definition of a concept with the criteria for its affirmation is a mistake of the empiricist theory in the discussion on personal identity. The naturalistic tendency to combine both problems applies more broadly to the issue of personal responsibility; according to Swinburne, we can say that the core reason for that is the original sin committed in the personal identity theory. Cf. R. Swinburne, *Personal Identity: The Dualist Theory*, (in:) S. Shoemaker, R. Swinburne, *Personal Identity: Great Debates in Philosophy*, Oxford 1984, pp. 317–318.

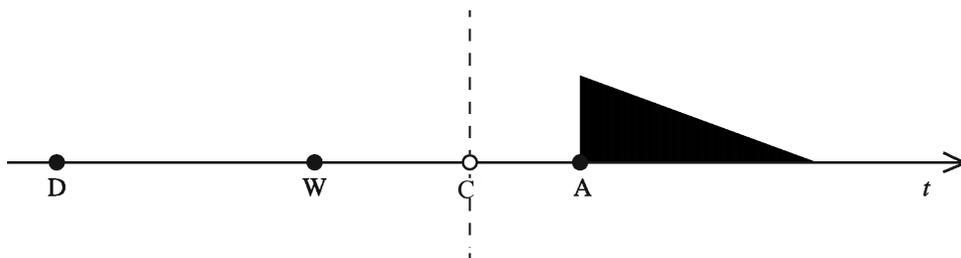
¹⁷ P. Abelard, *Etyka, czyli Poznaj samego siebie*, (in:) P. Abelard, *Rozprawy*, transl. L. Joachimowicz, Warszawa 1969. Fragments of Abelard’s *Ethics* are referred to in a translation based on the Polish translation of L. Joachimowicz. However, we allow for a significant modernization of terminology, following in this unpublished translation prepared by participants of the Latin translatory in the Institute of Philosophy of the University of Warsaw in the academic years 2014/2015 and 2015/2016.

¹⁸ G. Rejman, *Zasady odpowiedzialności karnej*, Warszawa 2009, p. 38.

seems – that *mens rea* of the crime and sin do not differ significantly),¹⁹ but they are but a peripheral topic of his *Ethics*.

Consider an important circumstance. The penal problem of responsibility intersects with the question of freedom in exactly two points: either in (1) act or in (4) fault. In the first case, it is relatively simple and amounts to distinguishing *vis compulsiva* from *vis absoluta*. The real theoretical difficulties arise in view of the problem of guilt, i.e. personal culpability for the deed. All difficulties thus concern the subjective side of a deed. The “tuning” of Abelard’s ethics – in order to adjust it to legal, not moral, theory – depends, therefore, on the conceptual calibration of intention. Ultimately, it is convenient to assume that the theoretical scaffolding is taken from Abelard, but it is our task to “renew” the whole construction.

At the beginning let us introduce several needed terms, which are foremost: disposition (D), desire (W), *consensus* (C), act and its consequences (A). They are the successive border posts in the genealogy of crime: from the culpable disposition (ingrained already in the nature of the perpetrator, given them at the very point of conception) to the distant consequences of the act (see e.g. result crimes). Their temporal order can be seen on the following timeline; with the highlighted area of action and its consequences:²⁰



Following Abelard’s thought, we distinguish two types of disposition: *spiritual* and other (which might be called *bodily*). Spiritual dispositions are latterly divided into morally positive (i.e. *virtues*) and morally negative (i.e. *defects*). The first make us willing to do good, and the other – to act wrongfully. (In order to preserve neatness, we list the main definitions and statements below).

[T1] The defect of the soul is the tendency to do evil (for example, although not exclusively, the tendency to evil will).²¹

¹⁹ Abelard assumes that both sin and crime at the source correspond to the ambivalence of will. Regardless of the material content of ethical codes (moral and legal), without detriment to the precision of consideration, we can agree that (moral) sin and (legal) crime are formally indistinguishable from the subjective perspective. The difference between them applies to jurisdiction (divine and human, respectively) and, accordingly, to punishment.

²⁰ The concept of deed applies also to the initial forms of the offence.

²¹ There is also a third set of morally ambivalent dispositions (it is not that the lack of virtues is always a morally relevant defect). The above division is therefore a trichotomy.

“To have an attribute of anger”, says Abelard, “means to be tempted... to anger, that is to have a defect that inclines the soul to violent and unreasonable deeds, which are wicked to do. This defect is rooted in the soul therefore, namely, it is prone to anger, although in fact it does not rise up in anger”.²² However, if particular deeds of an agent do not embody defects of their soul (conveniently understood in dispositional terms), the agent themselves yet could not be called ‘evil’.²³ On the contrary, the innate contamination of the soul can be seen as an invitation to gain a moral merit, “if [a man – *S. J.*] fights ... struggling not so much with people as with his defects ... not to force him to agree to a bad deed”.²⁴ The totality of so understood (*inter alia* moral) dispositions adds up to an individual character.

Later, Abelard directs his attention towards desire.²⁵ There are two “species” of will, as he calls the power of desire, the first and the second order will. Abelard consciously observes that “there are also those who feel disgusted before agreeing to lust or bowing to bad will, but the weakness of the body forces them to want it, although they would rather not want to”.²⁶ Speaking of the first order will, he notices that – just like inborn propensities – it lies in the nature of the agent. The first order desire or – as Schopenhauer would say – the “first inclinations” are thus not within the range of the will power, despite being its creations. The will power consists in the fact that its dictate, regarding what is or is not the object of one’s desire, is substantially autonomous. Thus, recalling the famous metaphor presented in Plato’s *Gorgias*, the freedom of will resembles the mastery of a tyrant (and is, as Socrates and Abelard concurrently taught, a certain form of slavery). It turns out, therefore, that, in a sense which is significant in the light of our deliberations on responsibility, the will – at first glance paradoxically – is not free. However, as Abelard maintains, as every sin is voluntary, the will of the first order cannot be sinful at all and, therefore, felonious. In conclusion, a so defined will contaminated by evil could not be recognized as guilty.

[T2] Turning of the will to a certain object is not the result of a free choice.

Character and will, says Abelard, are therefore equally determined. This fact implies consequently that:

[T3] Guilt does not lie in the culpable will.

Such a statement is justified by their logical independency: neither is guilt necessarily followed by a culpable will nor *vice versa*. The circumstance just underlined clarifies Abelard’s assent to the theorem claiming that guilt is always an echo, albeit a very distant one, of a free choice.

²² P. Abelard, *Etyka, czyli Poznaj samego siebie...*, p. 166.

²³ Let us assume for the sake of simplicity that evil is understood axiologically as a negative value. This can occur in two aspects: sin and crime.

²⁴ P. Abelard, *Etyka, czyli Poznaj samego siebie...*, p. 167.

²⁵ In the system of his ethics, “desire” is a primal notion, that is it is not defined.

²⁶ P. Abelard, *Etyka, czyli Poznaj samego siebie...*, p. 176.

A deed is the external manifestation of an intention (which is internal). Moreover, Abelard maintains that an act, like every disposition and like the will itself, is neither culpable nor sinful. “And if we consider this matter accurately”, he argues, “we will find out that where the deeds are commanded or prohibited, there is a command and prohibition more related to the will or *consensus* to act than to a deed. Otherwise nothing that is related to merits would be dictated by an order, and the less a thing can be ordered, the less it depends on our capabilities. There are many things that cannot be made by us, but when it comes to will and *consensus* – both always belong to our free decision”.²⁷ The outlined argument is clear enough: deeds, as we affirm, are *per se* morally colourless. What we condemn (morally or legally) is not the action itself, but the culpable consensus that has been merely revealed in it.

[T4] A deed itself cannot be called “culpable”. Guilt does not lie within an act.

As Abelard says: “It is not a sin to murder a man, nor is it adultery with another’s wife, which can be done without sin”.²⁸ The moral tinge of a deed is strictly connected with guilt, with a *consensus* – i.e. the creation of will. For if guilt blames the soul, it must lie inside it, not in a purely external action.

[T5] The substance of guilt is the act of culpable agreement. What, however, does such an act rely on?

In the premise B, it was characterized by a very vague phrase; part of the reason for this might be that “decision” is uttered there. Anthropologically, guilt (based on a free act of will) is located “between” the first order desire and the act. George H. von Wright described the act of will as follows: “it would not be right I think to call acts a kind or species of events. An act *is* not a change in the world. But many acts may quite appropriately be described as the bringing about or *effecting* (‘at will’) of a change. To act is in a sense to *interfere* with ‘the course of nature’”.²⁹ Such an act is thus neither a psychological phenomenon nor an event – nor even *any* state of affairs (it also has no temporal extent, as indicated in the Figure). As Chisholm accurately expressed, it has an effect, although it has no cause. Its freedom lies in the fact that it is not precisely determined by external circumstances, or by will (in the meaning of the first order) and character; free simply means *independent* from the situation, which includes an internal state of consciousness, as well.³⁰

²⁷ *Ibidem*, p. 183.

²⁸ *Ibidem*. As an example of adultery that is not a sin Abelard describes, among others, a deed committed as the result of an error (the adulterer mistakenly thinks of a person who is not in fact his wife as his wife).

²⁹ G. H. von Wright, *Norm and Action: A Logical Enquiry*, London 1963, p. 36. Quoted after: B. Wolniewicz, *Hedonizm teoretyczny i prawo Ehrenfelsa*, (in:) B. Wolniewicz, *Filozofia i wartości III*, Warszawa 2003, p. 31.

³⁰ B. Wolniewicz, *Determinizm i odpowiedzialność*, (in:) B. Wolniewicz, *Filozofia i wartości III*, p. 113.

Abelard reduces guilt to the culpable consent *tout court*. He defines it in two ways, introducing the notion of sin. According to his beliefs, (I) it is a sin to agree to do what we think we should not do or to give up on what we think we should do.³¹ At the same time, (II) sin is contempt for God and an insult to him. The only harm that a man is capable of doing to God (resp. to *law*) is contempt for him. Let us introduce some symbols: S = sin, C = consent, to do what we think..., and I = contempt for God. Now note that between the ranges of the terms S , C and I the following relationships occur: (i) $S = C$, (ii) $S = I$, i.e. (iii) $C = I$. Therefore, we should assume that their semantic ranges are equal. Without detriment to the accuracy of the considerations, we can assume that sin (in Abelard's understanding, and *resp.* a crime) is the same as guilt.³² Abelard emphasizes the fact that the act does not increase guilt – it only reveals it. Punishment is thus a legal result of guilt, not of the act itself.

According to Abelard, we are tempted to utter the essence of the rule of law which is distinctly reflected in the words of Morselli, already quoted as the motto: “law... for those who apply it, raises a compulsion of the will: obscuring or even replacing it”.

5. STRUGGLING WITH POSSIBILITY

We have already outlined a certain picture of the metaphysical concept of will and its freedom. The previous considerations were supposed to fulfil the function of Wittgenstein's ladder. Having climbed it, we have obtained the required theoretical perspective. Duns Scotus once said that philosophy is the art of distinguishing what is difficult to distinguish; our considerations pertaining to a theory of law, however, do not demand a metaphysical lancet. Therefore, according to Wittgenstein's notable recommendation, one is now to supposed to “throw away the ladder after [one] has climbed up it”.³³ Hitherto we have been moving across the labyrinth of freedom. The task of legal philosophy is now to provide a conceptual tool that, like Ariadne's thread, will allow us to find the way out of this conceptual labyrinth.

As could be recalled, condition B characterizes the concept of free will by two components – the subjective decision and the objective possibility. The first

³¹ It is necessary to distinguish between the subjective and the objective element of sin (guilt). The most suitable solution is to accept that “to judge” in the above paraphrase means simply “to know”.

³² Then, from the outlined concept of guilt (understood as a consent), two of its aspects ought to be derived: the *intentional* and the *unintentional* one.

³³ L. Wittgenstein, *Tractatus logico-philosophicus*, trans. C. K. Ogden, London 1981, numerous: 6.54.

one is assessed individually, the second one – generally. We have already agreed to identify guilt with culpable consent, expressed (at least) in volitional ambivalence to the law. It was an important step, but one that leads still deeper into the labyrinth. The concept of possibility (formally established by Wolniewicz and referred to as *pseudo-Diodorian*) will now turn out to be the Ariadne's thread we have sought.

Let us go back to the main question: how to understand responsibility? The answer has been already prepared. The freedom of will, a necessary condition of responsibility, is defined, as we claim following Wolniewicz, by the formula: "S is responsible for their actions if, and only if, they could have acted otherwise".³⁴ Its further characterization is based on the clarification of the meaning of the phrase "they could have acted otherwise", which also appears in condition B, that is the point of our interest. The concept of possibility is polychromatic. The success of a pragmatic solution depends on whether we can give it (a) an empirical sense, which – at the same time – (b) corresponds to modal contexts in legal reasoning. Wolniewicz argued that *pseudo-Diodorian* modality fulfils both the foregoing conditions. We will now proceed to explicate it.

"The question whether an individual S could have acted otherwise in a given situation is, from point of view of the philosophy of law, equivalent to the question whether in fact every normal human being, put in this situation, acts as the other person has acted", Wolniewicz maintains. "The latter is in turn equivalent to the third one: has it ever happened that someone acted differently in this situation? If it has happened, it means that in this case, the action of S was not an absolute species norm. And that is just what one means by saying that someone could have done otherwise. They could have, because others could; and they could, because they did. It does not matter whether the metaphysical freedom of will [expressed in an individual act – S.J.] is attributed to an agent".³⁵ In other words, S's action was free if S could have acted otherwise. This in turn means that someone – assuming the identity of the situation³⁶ – actually did so. The metaphysics of freedom is hereby reduced to an empirical solution. The accomplishment of the interpretation depends, however, on the adequate wording of the identity criterion – and this task has to be left to the jurisprudential practice.

We do not intend to deliver the formal explication of the notion of *pseudo-Diodorian* modality; it can be easily found in subject literature.³⁷ Let us instead point to a straight fact. Namely, the consistent transition from the statement that "O decided so that p" to the formula "S decided so that p" depends on the acceptance that S and O – and all human beings – are free to an equal extent. This

³⁴ See: B. Wolniewicz, *Determinizm i odpowiedzialność...*, p. 114.

³⁵ *Ibidem*.

³⁶ *Ibidem*, p. 117.

³⁷ Cf. B. Wolniewicz, *Krytyka teodycei u Bayle'a*, (in:) B. Wolniewicz, *Filozofia i wartości II*, Warszawa 1998, p. 100 and following.

circumstance reflects the fact that the relation of equivalence defined on the set of humans is that of *congruence*. This means that “if both [i.e. the entities *S* and *O – S.J.*] are equally free, what could have been decided by one, could also be decided by the other one”.³⁸ This *datum* highlights the laws of dynamics governing the above-mentioned concept of possibility. Let us try to bring them out, noting the anthropological basis of punishment, which is inherent for the evolutionary emergence of personhood.

6. A PROLEPTIC VIEW

The concept of pseudo-Diodorian modality might be considered as a part of a wider picture, which is the proleptic view on personhood. In this section, I will try to outline it. It has become a milestone in the history of logical development of personhood, being at the same time a handy tool for the philosophy of law. The free will, discussed in the previous paragraphs, is a definitional component of the person. Following Saint Bonaventure, we can say that persons are special creatures capable of free acts of will – clearly distinctive against the background of the causally determined world of phenomena (i.e. the whole nature).

The legal concept of the person, we claim, is *proleptic*. One could now be tempted to finally ask: what does this mean? In order to illustrate this circumstance, Chappell reaches for penology. We punish recidivists while striving to create conditions for their improvement. Although resocialization turns out to be statistically ineffective, we do not abandon it: some criminals do live lawfully after serving their sentences. According to Chappell, the mechanics of the concept of the person make us expect each one to improve, if only some of them improved (it vaguely resembles the induction scheme). At least we assume – admittedly *contra factum* – that each individual person has the opportunity to improve.

The reasoning sketched above – modelled, according to Chappell, after the concept of the person (which shapes our conscience) – is based on the *pseudo-Diodoric* concept of possibility. If, following Wolniewicz’s example, two perpetrators have an equally free will, then whatever one of them could have decided, could also be decided by the other one. So, *mutatis mutandis*, if some of the perpetrators undergo resocialization – and everyone is equally a person – then our ethical attitude implies the possibility of improvement in all individual cases; the opposite solution would be excluded *a limine* by the proleptic nature of personhood as unjust.

The philosophical recognition of the proleptic nature of personhood is an important step on the way to self-knowledge of a certain philosophical tradition,

³⁸ B. Wolniewicz, *Determinizm i odpowiedzialność...*, p. 116.

dated at least two hundred and fifty years ago. Its sources should be seen in Kantian metaphysics of morality. Kant limited his reflections on ethics to the personal aspect of practice, making the concept of the person the nerve of his ethics. He then memorably divided it into morality and legality (i.e. law). Morality is understood as ethics referred to a person, while legality refers to the mutual coexistence of people in a community.³⁹ Kant's lasting achievement was to include each human being in the circle of persons. The profound humanism of his metaphysics of morality is expressed in the acceptance of the following axiom: "S is a person if and only if S is a human being". The left-sided implication simply means that every human is a person, i.e. a moral subject, and therefore shares the fullness of rights (and is subject to the correlated duties). Exceptions are unacceptable, and treating human beings differently than through a personal prism would also undermine one of the categorical imperative formulae. The right-directed implication states that, apart from all human beings, there are no moral subjects (thus, according to Kant, care for animals expressed in terms of rights would be a metaphysical travesty). Ethical concepts are therefore tailored to the human measure. All transhumanistic claims should be treated as no more than fairy tales.

The idea introduced by Kant has been recently developed by Timothy Chappell. He claims that our understanding of ethics is owed to the regulative idea of personhood belonging in fact to our *Lebensform* (it thus implies putting away metaphysical discourse on morality and directs philosophical attention to the empirical area). Legal discourse likewise occurs in common language, and therefore it holds for the common notion of personhood. Chappell, like Kant, identified the moral subject with the person. The extension of this term is accordingly a class of creatures that equally enjoy the full range of rights and privileges; a class which he called distinctly "the primary moral constituency"⁴⁰ (PMC). The *personalistic* approach to ethics led to the conclusion that its scope is set by the limits of the applicability of personhood. Every creature to which we refer personally belongs at the same time to the moral circle (that is to PMC). Whenever we speak of persons, moral (and thus also legal) terms are involved.

The proleptic standpoint is opposed to the family of theories jointly called by Chappell *critical*. The adherents of criticalism characterize the concept of personhood by means of the necessary or sufficient conditions of being a person. Therefore, an individual is a member of the moral circle if they meet the criteria of being a person, i.e. they actually have the properties that are necessary and sufficient to obtain membership in PMC. "Criticalists", as Chappell says aptly, "can make personhood sound rather exclusive; it can seem as hard to qualify for

³⁹ Cf. O. Höffe, *Immanuel Kant...*, p. 175. It is worth noting that according to Kant, the connection between law and morality is based on axiomatic theory, and all attempts to relate them to a simpler set theory relation he considers naïve.

⁴⁰ T. Chappell, *On the Very Idea...*, s. 4.

personhood as it is to make membership of the country club”.⁴¹ As a representative example of criterialism, he indicates the utilitarian concept of Peter Singer. According to the Australian philosopher, the aim of moral philosophy is to draw up a list of the constitutive features of a person.

Nonetheless, Chappell responds, treating each of them as a necessary condition for being a person involves various difficulties; here I will point out only one of them. Chappell illustrates it with an example taken from developmental psychology and language learning: “Do I possess the capacity to communicate only when I have learned a language? Or just when I have learned to sign, or to get others to read my thoughts and feeling? Or do I have the capacity to communicate all along, just in virtue of being a member of a species that communicates, linguistically and in other ways?”.⁴² The mechanics of personhood is not as simple as Singer’s analogy misleadingly suggests. Turning a marker of personhood – such as self-awareness, rationality or ability to feel second-order desires – into a strict criterion of being a person does not allow us to include in the moral circle individuals who we actually consider persons.

Such properties, although not treated as any criteria, form a significant part of the definition. Similarly, the colloquial (and therefore legal) concept of the person includes rationality, self-awareness, etc. Furthermore, these are the features that determine the moral status of a person. However, criterialism suggests that before we consider a being a person – and thus will treat them like any other person – we examine whether they meet the intended criterion. The recognition of an individual as a person would be then preceded by an inherent, say, “personality test”. Chappell, on the other hand, noticed that the markers which philosophers are inclined to simplify as personality criteria do not function as the criteria in practical reasoning. On the contrary, they constitute a linguistic interpretation of human attitudes towards creatures that have been recognized as persons. The practical reason does not look for personality criteria on the basis of which it grants the individual the status of a person. The attitude towards a person is what precedes empirically acquired testimonies. Only the recognition of a person in an individual subject entails the expectation that they exhibit personal features, the ones that people usually do.

Let us observe the personal stance – a notion closely related to the “intentional stance”, a term invoked by Chappell and introduced to the philosophical discussion by Daniel C. Dennett. Intentional stance, as Dennett persuades, is a tactic of prediction. It is a strategy of behavioural interpretation of another being (which could be a person or an animal, an object and anything else) as if it were a rational subject that follows its “choices” and regards its “action” through considerations,

⁴¹ *Ibidem.*

⁴² *Ibidem.*

and also takes into account its own “beliefs” and “desires”.⁴³ The inverted commas indicate that the system, though interpreted intentionally, does not really lead a mental life. Nonetheless, an intentional attitude is of great importance in predicting its behaviour and allows us to expect the system to “behave” in a certain way.

Chappell motivates his position pragmatically, offering an analysis of empirical material. As an example of applying the concept of the person to entities that do not meet the pre-set requirements based on Singer’s personality criteria, he uses the phenomenon of parenthood. From the moment of birth, parents treat children fully subjectively while remaining aware of the degree of their psychological development. According to Chappell, parents who act properly demonstrate “a systematic *refusal* to treat the child in a way that is proportionate to its qualities and aptitudes”.⁴⁴ In the behaviour of the parent, as in the lens, the essence of moral reasoning is revealed, which conforms to the proleptic concept of the person. “By years of treating her children as creatures who ‘have the personal properties’ – in the sense that interests the criterialist – [mother] makes it true that they *are* creatures who have the personal properties in just that sense”.⁴⁵ And this practice is leading, as Chappell remarks, “in the light of the ideal of personhood”. The application of the idea of the person thus bears the hallmark of a performative act of speech. Referring to an individual as a person, we make them a person, and people make each other moral subjects through this very inherent socio-linguistic practice. In the light of the proleptic view, punishment appears as a recognition of individual responsibility, or personality and – simultaneously, according to Kant – *dignity*.

7. CONCLUSION

Let us recall the questions posed at the outset: “what justifies punishment as a social practice?” and “what exactly is the subject of criminal stigma?” The answer has already been given. The punishment justifies the perpetrator’s guilt. The object of stigma, on the other hand, is their contempt for law – revealed by the criminal act.⁴⁶

⁴³ See: D. Dennett, *Dźwignie wyobraźni i inne narzędzia do myślenia*, transl. T. Kwiatek, Kraków 2015, p. 112.

⁴⁴ T. Chappell, *On the Very Idea...*, p. 8. Chappell repeats this expression after Alasdair McIntyre.

⁴⁵ *Ibidem*, pp. 8–9.

⁴⁶ And already present in guilt, if the act took place. The complex logic of responsibility is based on counterfactual conditionals.

Following Abelard, we define guilt classically as evil (*differentia specifica*) consent (*genus proximum*). We also presented – after Wolniewicz – an empirical criterion of guilt based on the pseudo-Diodorian concept of possibility. Thus, we are allowed to limit the metaphysical adjustment within legal reasoning to the heuristic function, and pave way for the reality of the phenomena. The proleptic view belongs to the anthropological structure of the human being; along with it, it belongs to the very concept of punishment, i.e. the legal effect of guilt. It might be seen at once that the presented concept of guilt motivates a theory of punishment. Clearly, the ideal of personhood calibrates ethical intuitions, and this observation seems to have a great philosophical significance.

By using the concept of person, we subordinate our practice, including its penal and penitentiary aspects, to a certain ideal, which we design posteriorly for each of us. In this model, punishment becomes a shadow inseparable from responsibility. It is not necessarily an evil, but – to recall a famous Socratic metaphor – it is rather the medicine of the soul. In *Gorgias*, Socrates turned to one of his interlocutors with the words: “Happy is he who has never committed injustice, and happy in the second degree he who has been healed by punishment. And therefore the criminal should himself go to the judge as he would to the physician, and purge away his crime. Rhetoric will enable him to display his guilt in proper colours, and to sustain himself and others in enduring the necessary penalty. And similarly if a man has an enemy, he will desire no to punish him, but that he shall go unpunished and become worse and worse, taking care only that he does no injury to himself”.⁴⁷ Moreover, this statement should be strengthened. Since the punishment is not only the means (to heal a soul of a criminal), but also an end: it is a value in itself (the fact that the culpable act did not remain unpunished is good).⁴⁸

Therefore, the legal sense enforces this understanding of punishment. In other words (remembering the empirical criterion of guilt): there is no unpunished guilt, and punishment itself has to be its function. We can now see the difficulty of repressive responsibility in legal theory. Criminal and administrative sanctions are imposed by state coercion; there is no penalty without jurisdiction.⁴⁹ In the latter case, the principle of guilt is sublimated and dispersed in the fog of state coercion, that is in a form of (state) violence. This does not mean that an administrative sanction is evil *ex natura sua*. Its boundary should be marked as narrowly as the limits of all state violence. It rather points out that the boundary of criminal punishment runs elsewhere, marked out by guilt. Focusing on pure

⁴⁷ *Gorgias* 472 e. Cf. Plato, *Plato in Twelve Volumes*, Vol. 3, transl. W. R. M. Lamb. Cf. <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0178%3Atext%3D-Gorg.%3Asection%3D472c> (accessed: 3.08.2018).

⁴⁸ B. Wolniewicz, *Sens kary podług Kanta*, (in:) B. Wolniewicz, *Filozofia i wartości IV*, Warszawa 2016, pp. 180–181, 185.

⁴⁹ *Ibidem*, p. 187.

repression, instead, we face an alternative: the object of stigmatization is the disposition lying either in the perpetrator or in the act itself; it is not the guilt, which is never the subject of concern.

Finally, let us return to the Poręba criterion. We agreed that the theory of freedom (which also characterizes legal responsibility) should: firstly, (c1) decide whether exceptions are possible at all, and secondly, (c2) determine the extent to which these exceptions correspond to the colloquial understanding of freedom. It seems that the concept presented by us meets the given criterion. Moreover, the condition (c2) was fulfilled *a fortiori* – since I considered the concept of freedom of will as a component of personhood. This in turn derives genetically from language and a social practice that is our form of life, and its scope is therefore determined by common practice and understanding.

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RESPONSIBILITY – AN ANTHROPOLOGICAL OUTLINE

Summary

In the article, I try to present an outline of the theory of responsibility. Its double root – based on the logical distinction between criterion and testimony – is derived from Abelard's anthropology of action and the theory of personhood developed by Timothy Chappell. Initially, I discuss the metaphysical difficulties related to the problem of freedom (especially linked with determinism). Afterwards, following Abelard, I try to indicate an anthropological justification of punishment based on guilt. The last part of the paper is devoted to the attempt to enter the free will into a broader view of Chappell's theory. The aim of the work is to prepare the ground for future studies on the *proleptic* notion of personhood and its further application within the philosophy of law.

KEYWORDS

proleptic view on personhood, responsibility, pseudo-Diodorian modality, freedom of will, consensus, guilt

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proleptyczna koncepcja osoby, odpowiedzialność, modalność pseudo-Diodorowa, consensus, wina