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Protection of Christian values – penal populism or a rational decision on criminalization?

Ochrona wartości chrześcijańskich – populizm penalny czy racjonalna decyzja kryminalizacyjna?

Abstract: Arguments referring to natural law, (public) morality, religion or Christian values are regularly put forward in debates on existing or planned criminal law provisions that will criminalize specific behavior. A prohibition on behavior contrary to the scriptures or the teaching of the Church on pain of criminal penalty encompasses not only abortion, but also euthanasia, (paid) surrogate motherhood, paid donation of organs for transplantation, sterilization, contraception, prostitution and bigamy. The arguments presented for the protection of Christian values are often linked with the protection of human dignity. This article seeks to address the issue of whether such a "pre-legislative" measure (reliance on the protection of Christian values) is a form of penal populism. Parliamentary and non-parliamentary discussions conducted during work on specific provisions of the Criminal Code formed the basis for analysis, with particular emphasis placed on arguments in favor of criminalization of the behaviors mentioned above. The findings were challenged against the concept of legal interest in criminal law, and the concept of human dignity in the Polish legal system (and its place in repressive law). The identified "religious values" and the need to protect them were subjected to analysis conducted against this background, underpinned by the constitutional principle of proportionality of the limitation of human rights and freedoms. The operational tools were not only established definitions of populism, including penal populism, and Weber's ideal type, i.e. a set of empirically perceived properties of populist style and perspective, sometimes called "the populist syndrome." The ultimate objective of this article was to establish whether the cases under analysis involve religious populism or a rational decision on criminalization.

Keywords: criminalization, Christian values, natural law, dignity, moralism of the law

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Abstrakt: W toku debat nad istniejącymi lub projektowanymi przepisami prawa karnego, kryminalizującymi konkretne zachowania, niezmiernie często przywoływane są argumenty odwołujące się do prawa naturalnego, moralności (publicznej), religii czy wartości chrześcijańskich. Zabronienie pod groźbą kary zachowań sprzecznych z pismem świętym lub z nauczaniem Kościoła tyczy już nie tylko aborcji, ale też eutanazji, (odpłatnego) macierzyństwa zastępczego, odpłatnego dawstwa organów do transplantacji, sterylizacji, antykoncepcji, prostytucji, bigamii. Przywoływana przy tym argumentacja ochrony wartości chrześcijańskich jest często skorelowana z ochroną godności ludzkiej. W pracy podjęto próbę odpowiedzi na pytanie, czy taki zabieg „prelegislacyjny" (powoływanie się na ochronę wartości chrześcijańskich) jest formą populizmu penalnego. Podstawą analizy stanowiły dyskusje (parlamentarne i pozaparlamentarne) toczone w trakcie prac nad konkretnymi przepisami kodeksu karnego, ze szczególnym uwzględnieniem argumentacji na rzecz kryminalizacji przywołanych zachowań. Ustalenia te zostały skonfrontowane z jednej strony pojęciem dobra prawnego w prawie karnym, z drugiej – z pojęciem godności ludzkiej w polskim systemie prawa (i jego miejsca w prawie represyjnym). Na tym tle ulokowano tytułowe „wartości religijne" i potrzebę ich ochrony. Zaś fundamentem tych rozważań stała się konstytucyjna zasada proporcjonalności ograniczania praw i wolności człowieka. Narzędziami operacyjnymi były nie tylko wypracowane definicje populizmu, w tym populizmu penalnego, ale także pewien weberowski typ idealny, czyli zestaw empirycznie postrzegalnych właściwości stylu i perspektywy populistycznej, określany czasem mianem „syndromu populistycznego". W ostateczności, sformułowana została odpowiedź na pytanie – czy w omawianych przypadkach mamy do czynienia z religijnym populizmem czy racjonalną decyzją kryminalizacyjną.

Słowa kluczowe: kryminalizacja, wartości chrześcijańskie, prawo naturalne, godność, moralizm prawa

1. Preliminary assumptions

Some years ago Harold J. Berman wrote that as of the mid-twentieth century, the connection between law and religion in the West was so intimate that it was usually taken for granted. Even in the USA, where religious diversity was far greater than in most other Western countries, and where agnosticism and atheism were more tolerated, it was generally accepted that the legal system was rooted in Judaic and Christian religious and ethical beliefs. Speaking for a majority of the US Supreme Court in 1951, Justice William O. Douglas wrote that "We are a religious people whose institutions presuppose a Supreme Being." It was widely believed that not only law and legality in general, but many specific legal standards, principles and rules, were ultimately derived from the Bible and the history of the church. In the opinion of Harold J. Berman, the connection between the western legal tradition and the western religious tradition has been substantially broken in modern times (Berman 2015). It is hard to agree with the latter argument. Nowadays, the influence of religion on law-making and application is still strong not only in religious states. Despite the common assumption that the criminalization process should be a rational one, arguments derived from religious teaching are part of a substantiation of a legislative or court decision also in countries with a strongly

dominant denomination, and even in countries declaring religious neutrality (e.g. Idleman 1993). As Erwin Akhverdiev and Alexander Ponomarev argue, analysis shows that religious values and tenets are reflected in both the historical development of legal provisions and in modern society (Perry 2009; Akhverdiev, Ponomarev 2018). Moreover, it is increasingly recognized that in Europe and the United States, religion has become a significant component of the growing nationalist and supremacist political groups which contest the fundamental rights of religious, sexual or racial minorities in the name of the dominant religious identity. Outside western secular democracies, the rise of religious claims not only impinges on civil rights but also on the rule of law and democratic life in general (European Academy 2020). Although this article refers to Polish examples, they can serve as an illustration of the broader issue, with similar situations to be found in many other countries. For example, in Great Britain there is discussion over the problem of the prohibition of refusal to rent a hotel room to a gay couple due to the religious beliefs of the hotel owner (Chaplin 2011). Another interesting problem is criminal liability in faith healing (Cawley 1954).

Poland is a non-confessional state. The Polish Constitution lays down that public authorities shall be impartial in matters of personal beliefs, whether religious or philosophical, or in relation to outlooks on life (Art. 25 section 2). However, according to official figures, approximately 86% of Poles are Roman Catholics and the entities that make and apply law attach great importance to this fact. This has been increasingly noticeable since 2015, when the right-wing party, Law and Justice, won a majority of seats in Parliament.

In the course of debates over existing or planned criminal law provisions that criminalize specific behaviors, arguments referring to natural law, (public) morality or religion are frequently invoked. The prohibition of behavior contrary to the Bible or the Church teachings, on pain of a penalty, concerns not only abortion, but also other behaviors. Arguments of this type are in general referred to in this article as arguments relating to "Christian values", although it must be borne in mind that "the ambiguity, vagueness and strong contextual nature of the concept of Christian values require that it should be used with caution and awareness of the dangers related to its use" (Bronk 1993). It is most often assumed that the concept of Christian values consists of three principles: the affirmation of the human person, hierarchy of values and tradition (Frączek 2017: 165).

This analysis is based on discussions, both parliamentary and extra-parliamentary (in the scientific world, but also in the media), conducted in the course of work on selected existing or proposed provisions of criminal law, with particular emphasis on arguments for the criminalization of behaviors under investigation. Those discussions are then compared with the basic principles and mechanisms of criminal legislation, including the negative phenomena occurring in that area. Importantly, criminalization or calls for the criminalization of behavior under discussion have been controversial in many countries worldwide. The arguments

put forward will be compared with the basic principles and mechanisms of criminal legislation, as well as with the negative phenomena in that area.

The conclusions address the issue of whether the cases under investigation are penal populism generally, a specific variety, or a rational decision on criminalization. Rational criminalization is – in my opinion – the decision to criminalize a specific behavior based on scientific and logical premises, at the same time being well planned, taking into account the balance of profit and loss for society and individuals.

The methodology adopted in this article consists primarily of an analysis of legal texts, legislative assumptions and draft legislation, as well as a cultural analysis of statements made in the public sphere by politicians and those dealing with criminal law.

2. Abortion

The strongest reference to the values specific to Christianity is surely visible at present in drafts concerning the prohibition of abortion (ideas around strengthening anti-abortion laws have certainly not only arisen in Poland – this may be illustrated by US press reports on a draft law that envisages the death penalty for a woman who terminates her own pregnancy) (Gstalter 2019). The issue of the influence of Christianity on legal regulations has been repeatedly taken up in the literature. Criminal law expert Krzysztof Wiak argues that, regardless of the assumption that abortion is a mortal sin, moral condemnation expressed by the Catholic Church has exerted an impact on secular law, which began to view abortion as the murder of a human person (Wiak 2001: 29, 81). Apart from taking the life of a conceived child, the arguments for the introduction of criminalization of abortion relate to the violation of certain values and wounding a woman spiritually and physically (Krajewski 2004: 73–74). Many scholars and politicians hold the view that current regulations are too liberal in that regard, and new proposals to tighten up abortion law are brought forward on a regular basis.

Proponents of various amendments to abortion law are very eager to make use of the rhetoric of the sanctity of life, dignity and broadly understood values. Note must be taken of a detailed analysis of one such proposal conducted in 2016 by Ewa Plebanek (Plebanek 2017: 15–52), which shows the particular essential features of populism used to justify the draft. The submitted citizens' draft is of interest because at least four statements by John Paul II were used as the (official) motto (sejm.gov.pl).

Priest Professor Tadeusz Guz (2020) calls for tougher abortion law. In his opinion, the current concept of not holding a mother liable for killing her child by undergoing an abortion is a serious misunderstanding and "whoever repeats that

misunderstanding in a conscious and voluntary manner is an evident depraver of the legal and moral reality of the Republic of Poland." It is therefore necessary to remove the three situations under which abortion is permitted pursuant to the 1993 abortion Act, and introduce adequate statutory criminal sanctions for the commission of that act, also with respect to a mother who murders her child. The issue under discussion should thus not be the very existence of a penalty for the crime of abortion, but only its severity. Tadeusz Guz indicates that the concept of not holding liable a mother who commits that crime runs counter to the rule of law and our legal culture. He argues that natural law requires that the act of murdering a conceived child should give rise to a penalty. This argument is underpinned by one of the main truths of the Roman Catholic faith and jurisprudence of a universal nature, i.e. that any violation of law must result in a penalty. Departure from this principle must lead to the relativism of law. He considers that the legislator may not refrain from imposing a criminal sanction because both law and punishment must stem from care for the human person, and the purpose of law and the purpose of punishment is the good of the human person (Zakaz aborcji 2020).

Natural law is a frequent point of reference in discussions on the prohibition of abortion. By way of example, the Commissioner for Children's Rights Mikołaj Pawlak, while presenting his view before the Constitutional Tribunal on the constitutionality (or in fact lack thereof) of one of the prerequisites for legal abortion, concluded that "the hierarchy of rights deriving from natural law and positive law obliges all persons of good will to be on the side of the full protection of the right to life of every child from the moment of conception, without any exceptions" (Position of the Commissioner 2020).

Given the above, it is appropriate to recall the dissenting opinion expressed in that matter by a Constitutional Tribunal judge, professor of criminal law Jarosław Wyrembak, who agreed with the argument that the challenged provision is unconstitutional, yet submitted his *votum separatum* as to the substantiation:

> In my opinion, one cannot deny the fact that among all the factors shaping in our cultural and civilizational circle the basic axiological context of the system of positive law – which gives the final meaning to the norms that form this normative system – is Christianity, in particular: the concept of man and the concept of human dignity based on the Decalogue. Having profoundly influenced the legal tradition and culture for several centuries, this factor promotes a specific understanding of the inherent, inalienable and inviolable dignity of a human person and his fundamental rights – in particular, the right to life, including the right to life of the sick and handicapped, especially conceived children. It should be stressed that this cultural heritage is approved not only by persons declaring faith in God – not only by persons following various religious practices in everyday life. It is symptomatic that the terms 'Decalogue' or 'Christianity' do not even appear in the substantiation of the judgement that I call into question – as

> if they were forbidden terms, or as if they were realities completely inadequate and useless for the analysis of the problem of depriving conceived children of life; as if they were categories or realities completely useless and inadequate or strictly forbidden in the language used by the Constitutional Tribunal to build the content of its judgments and substantiations – even though the preamble to the Constitution of the Republic of Poland makes a direct reference to God 'as the source of truth, justice, good and beauty' and to 'the Christian heritage of the Nation'. In this regard in particular, for a Constitutional Tribunal judge, regardless of his personal axiological preferences – also for the whole Tribunal – it should not be irrelevant whether something essential for the always valid and necessary enquiries into the axiological foundations of the Constitution and the entire legal system must follow from the fact that the contents of the preamble to the Constitution of the Republic of Poland explicitly define God 'as the source of truth, justice, good and beauty' and explicitly affirm 'culture rooted in the Christian heritage of the Nation and in universal human values' or, alternatively, this does not imply anything. (Constitutional Tribunal Judgement 2021)

There are calls in the criminal law literature for also extending criminal liability to the pregnant woman, and the arguments advanced (beyond historical reasons) also include the regulations of canon law (Krajewski 2004: 93). Igor Zgoliński has no doubts as to the relation between religion and criminal law provisions on abortion when he claims that "The scope of criminalization is the subject of disputes, controversies and discussions, mainly influenced by religious and ideological issues." Interestingly, he argues that the legislative omissions in the matter of the postulated extension of the criminalization of the termination of pregnancy[1] are due to political populism, and withdrawal of the planned restrictions should be explained to the public (Zgoliński 2018: 141–143).

[1] Including, among others, the introduction of Art. 162 a –

"§ 1. The provisions providing for criminal liability for acts against human life and health also apply to acts against the life and health of a conceived child capable of living independently outside the mother›s body.

§ 2. The mother of a conceived child capable of living independently outside her body does not commit a crime for a prohibited act directed against the life or health of the child, with the exception of the prohibited act referred to in Art. 149a.

§ 3. Whoever persuades the mother of a conceived child capable of living independently outside her body to commit the prohibited act referred to in § 1 or grants her assistance to do so, shall be liable for incitement or assistance within the limits specified in Art. 19." The proposal of the Criminal Law Codification Commission for the Ministry of Justice in the 2009-2013 term, expressed in the draft the amendment to the Criminal Code of November 5, 2013, witch was finally not adopted.

3. Voluntary sterilization

Ethical doubts of a similar nature are invoked (though not so intensely) in the case of voluntary sterilization which results in infertility and therefore no reproduction. The legal issue of regulating voluntary sterilization has been resolved in many countries (Cook, Dickens 2000; Committee Opinion 2017), and ethical and moral concerns exist only over the issue of sterilization of disadvantaged persons, inter alia, mentally retarded individuals (Biesaart 2001).

The literature on the subject identifies the individual motives behind sterilization – voluntary sterilization may stem from "eugenic reasons" (to prevent the conception or bearing of children burdened with hereditary diseases), social reasons (difficult living conditions of a woman or a man that would prevent the exercise of parental functions), "convenience" (a man or a woman wishes to lead a carefree sexual life without the fear of becoming a father or a mother, which entails various types of obligations, burdens, restrictions), a principled stance (contribution to curbing the population growth in the world) (Wąsek 1992: 5). There is no doubt that the motives may be far more complex – a mother of several children does not want to have more children and instead, like a person in a stable relationship, wants to focus on her own growth. One can hardly call such positions taking the easy way out. There is also the separate issue of sterilization due to gender reassignment surgery (also falling under the concept of voluntary sterilization).

The reasons set out for voluntary sterilization are that it is the most effective contraceptive method (besides sexual abstinence), does not cause any side effects and, at the same time, is "convenient" to use and cheap (in the long run). Another argument concerns respect for human rights – autonomy in the area of reproductive rights.

Opponents of legalizing sterilization argue that it is an irreversible method, socially harmful, in particular on a larger scale (a demographic argument). Małgorzata Świderska is of the opinion that undergoing sterilization "contains an element of autodestruction" and is "a form of mutilating a patient at his own request." (Świderska 2007: 330). Renowned Polish lawyers have held the view that consent to violation of health has no legal relevance (although it was noticed over a hundred years ago that the views on that subject are dependent on culture) (Makarewicz 1914: 178). Several decades later, it was declared that "the consent to grievous bodily injury is not legally relevant because effects of that type depreciate the social value of a human person" (Buchała, Wolter 1971: 184). There are also opinions that sterilization leads to a dissolute life (Karczewska 2011: 57–58). Further, the teaching of the Catholic Church is opposed to sterilization (Święta Kongregacja n.d.) – viewing it as morally unacceptable (Para. 2399 of the Catechism of the Catholic Church) because it violates the dignity and inviolability of the human person (Fryś 2009: 185). The Church expressly teaches that all contraceptive techniques are morally wicked and unacceptable. They violate the moral order

established by God and are an expression of opposition to God (Pawłowicz 2011). Christian anthropology considers fertility a blessing that must not be resisted or treated as a threat (Kieniewicz 2013: 117).

4. Surrogacy and *in vitro*

Similarly, the issue of defining the scope of criminalization of (commercial) surrogacy is a current legislative and scientific problem in many countries worldwide (Behm 1999), with only India, Ukraine and California viewing commercial surrogacy as legal behavior (Saxena, Mishra, Malik 2012).

Advocate Paulina Witczak-Bruś began her monograph on the legal (including criminal) aspects of surrogacy with a telling quote from "The Sociology of Religion": "Morality, as well as the pathology of marital and family life, have their roots in forbidden interpersonal relationships" (Witczak-Bruś 2021: 19). She also quotes the words of Tomasz P Terlikowski who argued that the boundaries of what is moral and immoral in the opinion of opponents of *in vitro* fertilization are derived from the broadly understood natural law, whereas the contemporary debate makes use of noble words, behind which lurk primitive human instincts (Witczak-Bruś 2021: 37).

A review of the British and US legal literature shows that surrogacy is one of the most controversial procedures related to assisted reproduction (Jadva et al. 2003: 2196). This is due to the fact that the phenomenon under investigation departs from the model of reproduction commonly accepted in society and deeply rooted in human consciousness. At present, it is possible to separate the individual stages of this process spatially, individually and temporarily. One of the main criticisms directed towards surrogacy is the claim that this procedure undermines human dignity (Żukowski 2013: 312) in connection with the objectification and commercialization of the human person. Feminists criticize surrogate motherhood for objectifying women – women are treated as living incubators (Soniewicka 2010: 106). Another criticism leveled in the doctrine at the phenomenon under investigation is the assumption of the devaluation of the institution of motherhood. This may lead to the exacerbation of gender inequality and promotion of a paternalistic stereotype where women are reduced to the function of childbearing for men seeking to extend their lineage (Żukowski 2013: 312). With respect to the regulation of surrogate motherhood, there are calls for prohibiting these procedures and imposing a ban on intermediation for consideration in concluding surrogate motherhood contracts, which should be considered illegal. The given argument is that surrogate motherhood leads to questioning of the hitherto existing concept of motherhood, undermines the parental relationship, and deprives procreation of its ethical dimension of responsibility (Nesterowicz 2006: 15). Hence the formulation

of calls in the Polish scientific debate for a legal ban on surrogacy (Krajewski 2004: 118). Paulina Witczak-Bruś points to the violation of the dignity of the woman as a justification for the introduction of criminalization of commercial surrogacy, recognizing that it is an act contrary to nature, comparable to slavery. She holds the view that the woman's decision to use her own body for consideration (by giving birth to someone else's child) is the use of one's own body as a commodity, which is inconsistent with the universal and absolutely binding imperative of reason – Kant's categorical imperative (Witczak-Bruś 2021: 280).

The Commissioner for Children's Rights has a negative view of the process of surrogacy, claiming that the child's rights to biological parents are violated in the process. He claims that it is dehumanization, an offense, and a crime that he will fight as long as he holds the office.

In the light of the teachings of John Paul II, the moral assessment of the phenomenon of homologous *in vitro* fertilization is negative, due to the detachment of procreation from the truly human context of the marital act, which implies the subordination of procreation to technique and technology. It is indicated that in this case it is difficult to ignore the fact of manipulation of the human person at the very moment of entry into existence. The manipulation of the human person is a sufficient negative criterion for the rejection of the entire process in the name of human dignity. For the sake of objectivity it should be noted that this argument calls for the recognition of certain principled and otherwise extremely consistent anthropological assumptions such as: the fundamental unity of the human person, the dignity of the person showing his/her subjective character, the exclusivity of the marriage act as the only one worthy of conceiving a new human being (Wielka Encyklopedia 2014). The President of the Ordo Iuris Institute for Legal Culture stresses that "The practice of *in vitro* fertilization makes a human person a product of a specific laboratory procedure that is subsequently subject to a quality assessment, selection, sometimes maintenance, etc., that is procedures that involve a completely instrumental treatment of the human person at the embryonic stage of development" (Stępkowski 2015). The Catechism of the Catholic Church clearly teaches that the deliberate conception of a child outside marriage is a mortal sin: "Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' right to become a father and a mother only through each other" (Catechism n.d.: 2376).

5. Bigamy

Under Polish criminal law, it is a crime to enter into a marriage while already being married. That regulation is in force in many countries worldwide (Ross 2011). Justification for the criminalization of bigamy is also still being sought (e.g. in Australia, by trying to demonstrate that the religious justification for the criminalization of bigamy – comparable to blasphemy – is incompatible with the secular nature of a democratic liberal state) (Bennet 2019). As given by S. Hypś, the prohibition on bigamy laid down in the Criminal Code aims to protect the family. He argues that it may be concluded that protection of the constitutive feature of marriage, i.e. monogamy, is at the same time the protection of the family itself, in particular its structure. Sławomir Hypś is of the opinion that it is not neutral for the legislator to ignore which interpersonal relationships form the foundation for families as the basic social unit. He is convinced that a monogamous relationship is the most beneficial form of marriage from the point of view of social good. At the same time, he does not share the view expressed in the Polish doctrine that the provision of Art. 206 of the Criminal Code is directed at the statutory form of marriage or the authority of the judicial act of entering into marriage. He claims that the argument which makes it possible to question the above theses is that criminal law does not penalize other acts directed against the statutory form of entry into marriage (e.g. submission of a declaration of intent to enter into marriage by two persons of the same sex) (Hypś 2017: 994–995). It must be recalled that since 1932, i.e. the time of the enactment of the first criminal code in independent Poland, the legislator has not criminalized the other behaviors that threaten marital permanence – adultery or marital infidelity. This means that the subject of protection is not so much marital permanence as the "traditional" form of marriage. In the opinion of Lech Gardocki, the criminalization of bigamy is a relic of the old approach to it as a violation of the sacrament of marriage, and there is no sufficient justification for it in modern times. He claims it would be enough to apply the provisions of the Family and Guardianship Code on the annulment of a bigamous marriage, and in cases involving forgery of a civil status document or matrimonial fraud, the provisions of the Criminal Code on the forgery of a document and fraud should apply (Gardocki 2015: 282).

Maria Szewczyk notes that in modern times, Catholic teaching defines the monogamous nature of marriage. She further recalls that the subject of protection of the provision of Art. 206 of the Criminal Code is the family, and within it a monogamous marriage is defined as a union between a woman and a man in compliance with the Polish cultural and legal tradition (Szewczyk 2016: 952, 959).

There has not been much discussion on the significance of the family and the need to protect the monogamous family model but, it should be assumed, only because there is no ongoing debate in Poland on the introduction of polygamous relationships into the legal system. What the argumentation looks like in a similar

area can be seen from the discussion on the regulation of same-sex partnerships. There, the family model established by God of a union of one woman and one man comes into the fore. Criminal law expert Alicja Grześkowiak regrets that modern criminal law no longer treats families founded on a marriage between a woman and a man as a value deserving protection, although such indications invariably stem from morality. She holds the view that the teachings of John Paul II makes it possible to reconstruct a coherent system of moral values that should form the basis for the entire law, including criminal law (Grześkowiak 2006: 11). Priest Mirosław Sitarz notes that it is unfortunate that there is currently a dispute over the fact that every family is based on the marriage as a union of a man and a woman (Kędracka 2020: 220). The Ordo Iuris organization remains so strongly attached to the model family in the form of a union between one woman and one man that it treats various advantages for single parents raising a child (e.g. tax preferences, preferences for enrolling a child in a kindergarten) as discrimination against "traditional marriage", calling for appropriate amendments to the law (Założenia projektu ustawy n.d.). References have often been made in the debate to a judgment of the Constitutional Tribunal (Judgment of the Constitutional Tribunal of 12 April 2011) pursuant to which, "the protection of the family carried out by public authorities must take into account the vision of the family adopted in the Constitution as a permanent union of a man and a woman focused on motherhood and responsible parenthood (see Art. 18 of the Constitution). The aim of the constitutional regulations relating to the status of the family is to impose on the state, in particular the legislator, an obligation to undertake such actions that 'strengthen the ties between the persons that form the family, and in particular the ties existing between parents and children and between spouses' (...) However, these measures cannot result, even indirectly, in undermining the permanence of family ties by such solutions that would favor bringing up children only by one of the parents or even by both of them but without entering into marriage."

6. Commercialization of the trade in organs for transplantation

It must be noted that initially the Catholic Church was negatively disposed towards the very fact of transplantation. Pope Pius XI (1922–1939) recalls in his encyclical *Casti connubii* (1930) that it is unacceptable that a human being could change the natural purpose of the human body and its individual parts. Pope Pius XII (1939–1958) discussed the issue of transplantation during the First International Congress of Histopathology of the Nervous System in 1952. The Pope did not support the use of that practice and stated in his address that "As for the patient, he is not absolute master of himself, of his body or of his soul." He held the view

that donation is impermissible, consequently, transplants from a living donor should not be performed. In turn, in his address to physicians in 1953 he stated that "The patient, the individual himself, has the right to dispose of his person, the integrity of his body, individual organs and their capacity to function, only to the extent that the general wellbeing of the whole organism demands it." Notably, Pope Pius XII approved of transplantation from a deceased donor as long as it did not entail a remuneration (Picewicz 2015: 100).

It is true that the greatest dilemmas in this regard arise from the issue of the commercialization of the trade in organs for transplantation. The general assessment of remuneration for activities related to organ transplantation and the legalization of organ trade varies in Poland and throughout the world (Friedman, Friedman 2006: 960–962). Lawyer Ewa M. Guzik-Makaruk views the call for freeing the organ market as a remedy for the lack of necessary transplants as "a bizarre solution," indicating that this stance is not isolated. She strongly stresses that the inherent and inalienable dignity of the human person stands in direct contradiction to the possibility of treating a human person as a living or dead "spare parts warehouse" for others (Guzik-Makaruk 2008: 58). Among others, Gabriel M. Danovitch and Fancis L. Delmonico support the need to keep the prohibition on human organ trade, arguing that the "regulated" market of organs poses a threat to both donors and recipients, and the thesis of free will is a myth (Danovitch, Delmonico 2008: 386–394). The prohibition on commercialization is based on the belief that the only basis for transplantation should be altruistic behavior (an organ is to be a gift) (Nowacka 2013: 229) and its commercialization results in an erosion of altruism (Kowal 2011: 147). It is also indicated that the prohibition was imposed due to the fear of an increase in criminal behavior and the fear of abuse carried out by doctors (Kowal 2011: 153). An argument of utmost importance for supporters of the ban on commercialization is the respect for human dignity (Rzepliński 2002: 61). Criminal law expert Wojciech Radecki indicates that the criminalized behavior may harm human health and freedom or undermine the principles of public morality that impose a prohibition on receiving remuneration for someone else's cells, tissues or organs (Bojarski, Radecki 1998: 216).

Physician Wojciech Rowiński expresses considerable caution as regards paid donation and takes the view that "the expansion of the circle of living donors in the world is inevitably accompanied or will be accompanied by the introduction of specific compensations and eventually fees" (Lasocik, Wiśniewski 2007: 98). Ethicist and philosopher Jan Hartman holds a similar view (Hartman 2009: 118). Anthony P. Monaco proposes the introduction of a system of rewards for donating an organ for transplantation in order to avoid classic commercial transactions (including price bargaining) (Monaco 2006: 955–957). Another proposed solution consists of allowing the conclusion of organ sale contracts in the event of death – the donor gets the remuneration during his/her lifetime, but the organ is collected upon his/her death (Zimny 2013: 234). Many authors have expressed the need to refrain

from prosecuting donors who sell their organs, as they should instead be treated as victims rather than perpetrators of a criminal act (Lasocik 2011: 83).

Lawyer and Former President of the Constitutional Tribunal Andrzej Rzepliński, notes that the prohibition of profit and trade in products of human origin is not absolute – the sale of human hair and nails is not inconsistent with human dignity (Rzepliński 2002: 61). Importantly, in Poland, until the year 2017, a rare blood donor was entitled to a cash equivalent (Art. 11 of the Law on the Public Blood Service; Journal of Laws of 2017, pos. 1371). As of 1 January 2017, the aforementioned persons are entitled (instead of the equivalent) to financial compensation "for the inconvenience related to the necessity to appear at every request of the organizational unit of the public blood service." Financial compensation is not envisaged for all blood donors but, among others, for those with a rare blood type and is independent from reimbursement of travel expenses and lost earnings. Moreover, the law does not criminalize similar behavior connected with the commercialization of blood donation. The question thus arises of whether, given the exception to the principle of unpaid and voluntary blood donation made for rare blood donors, such an exception should also be made for more valuable human organs. Consideration should also be given to the issue of paid clinical trials, provided for in Polish law (see Art. 37e of the Pharmaceutical Law of 6 September 2001, Journal of Laws of 2001, No. 126, pos. 1381) – trials of new drugs are conducted on volunteers in return for consideration. In 2020, the SARS-CoV-2 pandemic prompted a search for 24 volunteers who would agree to contract the virus in exchange for £3,500 in order to help develop a vaccine (Coronavirus Vaccine 2020).

7. Physical punishment of children

Given the above, the issue of physical punishment of children seems intriguing. In contrast to the punitive views referred to above, in this case, in the opinion of many adherents to natural law and Christian morality, the beating (physical disciplining) of children should not be criminalized.

These views are presented by, for instance, lawyer and Minister of National Education P. Czarnek when he quotes ancient maxims on disciplining children, arguing that the ancients can hardly be accused of having an unrealistic vision of man (Czarnek 2018: 15). This is as if science, including psychology and the concept of human rights, has not made any progress for several thousand years. Interestingly, he makes references to natural law and constructs the principles of physical punishment of children by directly referring to Catholic educational ethics (Czarnek 2018: 390–391). He expresses the view that the absolute prohibition on a so-called "educational smack" introduced by the amendment to the Act on the

Prevention of Violence in the Family "runs the risk of being in contravention with the provision of Art. 48 of the Constitution" (Czarnek 2018: 18).

One may find books in Polish bookshops and libraries on bringing up children with telling tips: "Nothing can replace corporal punishment. Parents may want a more 'human' or 'easier' way, but corporal punishment is in fact the easiest way. Corporal punishment is not only 'human', but it comes from God. Corporal punishment is God's method by which parents may establish and maintain control of their children" and "Parents are commanded to use corporal punishment with their child early in life while there is still hope that the child will be receptive to instruction. (...) The rod to be used for corporal punishment has specific characteristics. It can cause welts (thin marks similar to those left by a whip), but it is small enough not to cause permanent harm, even if used vigorously" (Fugate 2008: 134). Words of caution are also offered: "You have no right to spank a child in a situation other than a biblically sanctioned punishment" (Tripp 2016). Catholic pedagogics makes occasional references to the Bible, including, among others: "because the LORD disciplines those he loves, as a father the son he delights in" (Proverbs 3: 12), or "Whoever spares the rod hates their children, but the one that loves their children is careful to discipline them" (Proverbs 13: 24).

The highlighted examples are not isolated extreme views. A debate on the withdrawal from the Istanbul Convention (Convention on preventing and combating violence against women and domestic violence) ratified by Poland is now underway in the Polish media and politics. Deputy Minister of Justice Marcin Romanowski turned to Twitter to comment on the issue: "The Istanbul Convention speaks of religion as the cause of violence against women. We want to withdraw from this gender mumbo-jumbo (...). We are not interested in the opinion of foreign countries. A sovereign nation-state is fundamental to us" (Romanowski 2020). In the opinion of Dr. Jolanta Hajdasz, the Istanbul Convention undermines the foundations of a civilization based on family and traditional values, civilization based on the traditional roles of a woman and a man. The effect of this assumption is an assault on the family which is presented by gender ideologues as a space where violence unfolds and its members experience oppression. For years, Polish bishops have persistently opposed the solutions set out in the Istanbul Convention (Hajdasz 2021).

Polish criminologist B. Hołyst is of the opinion that still (despite the amended law) "the use of physical violence against children – beating, tugging, kicking, etc. is in fact almost permissible in our country inasmuch as it does not satisfy the elements of regular maltreatment prosecuted under Art. 207 of the Criminal Code. From a legal point of view, as long as a child is punished emotionlessly and moderately and where it does not exceed the child's ability to endure the punishment enforced with an appropriate tool, corporal punishment of children is allowed in Poland" (Hołyst 2011: 431).

Joanna Szafran argues that "the long-established model of exercising parental authority by means of corporal punishment that is sanctioned by

moral standards is still practised in Poland. There are still many of us for whom spanking children is part of 'the traditional model of child-raising' in which the aspect of obedience pursued through commands, prohibitions and punishments prevails (Szafran 2017: 68). This statement takes on a particular meaning in the light of the interpretative declaration submitted by Poland to the Convention on the Rights of the Child (Journal of Laws of 1991, No. 120, pos. 526) – "The Republic of Poland considers that a child's rights as defined in the Convention, in particular the rights defined in articles 12 to 16 (the right to freedom of thought, conscience and religion, as well as the expression of own views by the child and to act in matters concerning the child in administrative and judicial proceedings), shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family."

8. Synthesis of the phenomenon under investigation

All the examples above do not constitute an exhaustive list of acts where decisions on criminalization are based on Christian values or other aspects of Catholic religion. A similar line of argument may be put forward for the criminalization of abortion, euthanasia, incest between adults, insulting the cadaver, but also violating funeral regulations, etc. In contrast, for the very same reasons, domestic violence, the need to vaccinate, and combating hate speech are confronted by intense lobbying for decriminalization. The above typifications give a view of the issue under investigation and allow for further discussion.

It appears that a recurring pattern can be identified in the presented arguments (although it uses different wording). It is pointed out that the behavior that is to be prohibited violates certain general values such as life or health but, most of all, it violates natural laws and human dignity. By way of illustration, "Marriage – a monogamous and indissoluble union of a man and a woman that is an institution of natural law," (Wielka Encyklopedia 2014) or a recurring phrase that, for instance, is used to show that surrogacy or the commercialization of trade in organs for transplantation violate human dignity. At the same time, these terms are given meaning (frequently in the further part of reasoning) compliant only with the Christian teaching – "Dignity is the inviolability of life from conception to natural death combined with bodily integrity" or "Natural law is the participation of rational beings in God's eternal law. It is universal, unchanging, and indispensable. (…) Moral norms along with the concept of man's purpose and a set of values constitute the moral order whose ultimate creator and guarantor is God" (Wielka Encyklopedia 2014). "'Human dignity' guaranteed by modern laws is understandable only on the basis of the words of Scripture stating that man was

created in the image and likeness of God" (Wielgus 2006). Moreover, statements appear that the Catholic Church is called by the Lord to guard natural law and give its binding interpretation (Kucharczyk 2018).

This state of affairs of may be specifically confirmed by a collective scientific publication titled "Criminal Law Issues in the Context of the Teaching of John Paul II" which recalls at the outset the Pope's words: "A legal culture, a State governed by law, a democracy worthy of the name, are therefore characterized not only by the effective structuring of their legal systems, but especially by their relationship to the demands of the common good and of the universal moral principles inscribed by God in the human heart." Further, criminal law expert A. Grześkowiak argues that the principles underlying criminal law are indicated above all by morality which derives them from natural law. She reproaches common criminal law for secularizing and holds that the teaching of John Paul II makes it possible to construct a coherent system of moral values that should form the foundation for the entire law, including criminal law, and it should be a source of doctrinal inspiration, support and help in the search for the meaning of criminal law (Grześkowiak 2006: 7–11).

The Polish media space accommodates statements (made by, among others, persons responsible for the formation and application of law) that directly refer to the need to take into account Christian values in the activities of the state and lawmaking. For instance, Deputy Minister of Justice Marcin Romanowski said in an interview on TV Trwam that "The Ministry of Justice under the direction of the Minister of Justice Zbigniew Ziobro is a place where traditional values are defended very strongly and on a practical level: marriage as a union of a man and a woman, the permanence of such marriage. (…) We defend values, we defend tradition, we defend Christian values on which our legal system is built" (M. Romanowski 2019). In turn, MP and presidential candidate Krzysztof Bosak developed the following program for Poland: "Christian culture has been the core of the functioning of Poland as a political community since the creation of our state. This is a fact independent from the religious nature of individual Poles. It is therefore a natural necessity to establish a just institutional framework that at the same time fits in with the Polish community and is based on the norms arising from Christianity. The principles of Roman law, natural law derived from classical philosophy, Christian ethics, and the original Polish ideological and legal tradition form a civilizational foundation for the creation of legal norms. If the law, institutions and culture of the new order are based on these values, it will be possible to remove the worst features of the present disorder: the instability of law, uncertainty as to the direction of its evolution and ideological conflicts that disrupt almost every area of the life of the state and society" (Bosak 2020: 19).

The phrase frequently recurring in the public space is that in the Polish culture, the attitude to Christian values can be described as a test of the actual approach to the national culture. It also appears in scientific publications (Frączek 2017: 165). The deep rooting of Christian values in the tradition and culture of Polish society, regardless of the attitude of a particular individual to religion, was confirmed by

the Constitutional Tribunal by way of judgment in 1994 (Judgment of the Constitutional Tribunal of 7 June 1994).

A transnational dimension may be attributed to the words of Priest J. Krukowski, who claims that the European Union, being a supranational structure based on a system of positive law, is now in the grip of a sharp cultural crisis directed by a large part of its political elite adhering to an extremely liberal ideology. This is particularly evidenced by the new regulations enacted especially by way of directives of the European Commission or European Parliament committees, which require member states to adopt regulations that are in conflict with the respect for fundamental human values – relating to the protection of human life, freedom of conscience, freedom of expression, protection of marriage as a union of a man and a woman, and respect for parents' right to raise children in compliance with their beliefs in public education. The situation is becoming intense due to the conflict between positive law and the system of universal ethical values rooted in natural law. It should thus be borne in mind that Christians, being fellow citizens of the European Union, may not be treated only as passive observers of the elimination of Christian values from public life by means of law established by the organs of the European Union (Krukowski 2015: 73–74).

9. Concept and types of populism

The concept of populism and penal populism has been thoroughly researched and described, both in Polish and world literature (Brass, Peasants 2000; Kaltwasser et al. 2017). Suffice to say, one of the conventions of the Departments of Criminal Law was entirely devoted to this phenomenon (Sienkiewicz, Kokot 2009). At this point, only those statements that are necessary for further discussion will be referred to.

Wojciech Zalewski notes that a definition of populism constructed at a certain level of generalization may indicate that it is a description of the functioning of democratic mechanisms (Zalewski 2009: 13). Yet he highlights that populism is the reverse side of the representative democracy. It comes from within it and feeds on its mechanisms. It is a dangerous mutation of democracy, "a systemic virus" difficult to combat using democratic methods (Filipowicz 2017: 137).

Cas Mudde defined populism "as an ideology that considers society to be ultimately separated into two homogenous and antagonistic groups: 'the pure people' versus 'the corrupt elite'" (Wysocka 2008). Olga Wysocka argues that the above definition is relevant mainly because it shows the essence of the phenomenon which in its concept is based on a special split between people of exceptional, even supernatural significance, and depraved elites, that are in a sense identified by populists with unclean forces. This dichotomous division between good and evil is the ideological backbone of populism (Wysocka 2008).

Drawing on Cas Mudde, Paweł Przyłęcki distinguishes the following types of populism: agrarian, political and economic. Notably, this author identifies references to Christian values in the programs of political parties as an element of political populism (Przyłęcki 2012: 15; Szafrańska 2015: 27–28). A different typology was developed by Pierre-André Taguieff – protest populism and identity populism. The first is based on a conflict between the (political, economic and cultural) elite and the people. The second is a conflict between the nation (ethnic community) and the alien. Identity populism feeds on national resentments and aims to consolidate and mobilize the public to fight an external enemy that threatens the well-being of the national community (Taguieff 2010: 77–98).

The following four elements may be deemed to be constitutive for populist discourse: 1) the central location of a "mythically" understood people in the created vision of the world; 2) location of "the people" always in opposition to "non-people" (e.g. elites or aliens); 3) simplification of the linguistic image of the social world, combined with a high level of intelligibility of the message addressed to the largest number of recipients; 4) the presence of a leader who performs the function (real or self-proclaimed) of *vox populi*. All the above elements form the populist syndrome, yet their intensity and the manner in which they combine with elements not specific to populism are different and depend primarily on the populist leader himself (Kołodziejczak, Wrześniewska-Pietrzak 2017: 30).

Within populism, as defined above, penal populism can be singled out. In the opinion of Tomasz Kaczmarek, it consists of a socio-technical, purely instrumental manner of using the right to gain or perpetuate public power (Kaczmarek 2009: 35). Reference should also be made to the view put forward by M. Szafrańska that penal populism is a political tactic oriented towards repressive penal policy. It manifests itself in three tendencies – offering simple, immediate solutions, promotion of the offered solutions in mass media, and manifestation of disregard for expert knowledge. Political rhetoric is thus marked by praise for the wisdom of the people, creation of social antinomy, development of a special bond with the people, dichotomy between the public debate on crime and criminal policy, discrediting political opponents and representatives of institutions that "disregard the will of the people", arousing strong emotions or appealing to social effects or resentments and affirmation of a repressive penal policy (Szafrańska 2015: 39–64).

Maciej Gajos holds the view that penal populism is shaped by two basic factors. The first factor relates to the communication of courts with the public and some specific instances of negligence on the part of representatives of the judiciary that affect the manner in which citizens view the system of justice. The second factor relates to mass media as the main source of information from which Poles obtain information on the operation of courts (Gajos 2019).

10. Christian penal populism?

In the literature it has been shown that in a broader context populism and religion are related. The issue is not the ideological aspect, but the presence of certain common features. Juraj Buzalka notes that populism and religion are combined by three main social features: dominance and defense of the patriarchal family and strict moral order, complicated "obsession" relating to the nation or other "elementary" group and, lastly, the role of the people and their tradition. Further, he holds that in post-communist countries, in many cases due to institutional changes, the Catholic Church obtained "a special position within the state". Against this background, religion (not only Catholic) seeks to maintain its position in the state, and this is the grounds for the relationship between populism and religion which, in the opinion of Juraj Buzalka, may be called "religious populism" (Wysocka 2008). This view is opposed by Olga Wysocka who argues that "first, it would mean that populism is religious, which is not true. Its relation with religion is purely instrumental. Second, the features of populism referred to above allow for the identification of some similarities it shares with religion. However, their mere existence is no basis for the creation of a relation of dependency between the phenomena in question that may be indicated by the use of the term 'religious populism'. Finally, I believe that it is politics that binds religion and populism. The question remains open whether populism needs religion or whether religion needs populism, but not whether it is an issue of religious populism or a populist religion" (Wysocka 2008).

At this point, I wish to adopt a slightly different approach to the relationship between populism and religion (on the basis of the Christian religion). I share Olga Wysocka's view that "whoever stands up for Catholic values and on behalf of the people is not necessarily a populist. It takes the one who, in the name of Catholic values, creates an enemy and, in defense of the oppressed people, manipulates their fear using political tools" (Wysocka 2008). The latter conduct may be deemed to be Christian populism (analogous to political populism). The former may well comprise statements from representatives of the Catholic Church and believers in the Catholic world order. It also encompasses passages from the Catechism of the Catholic Church on the relationship between natural and civil law.[2] In contrast, the group of Christian populists may include, for instance, Priest prof. Tadeusz Guz, who uses extreme comparisons even when speaking of natural law[3]

[2] "The inalienable rights of the person should be recognized and respected by civil society and political power. These human rights are not dependent on individuals or parents, and are not a privilege derived from society or the state. They are inherent in human nature and are closely related to the person by virtue of the creative act from which the person has its origin" (Catechism n.d. No 2273).

[3] "Law is the soul of the state, natural law is the fundamental law in the sphere of form, and it was created by God. There is a serious substantive error in the Polish Constitution that the nation is the sovereign, a cardinal error that requires correction, only God is the sovereign

(Guz 2020). Others argue for the need to criminalize abortion using the following words: "Before anyone expresses their opinion on abortion, I would like them to see how a pregnancy is terminated, piece by piece" (Krajewski 2004: 76). These warriors for the Christian world order use tools specific to (political) populism. This approach may be aptly illustrated by a view expressed by Przemysław Czarnek in a scientific publication that "the calls for 'the right to abortion' for eugenic reasons are (…) in the light of the Act [on the Commissioner for Children's Rights; Journal of Laws of 2017 r., pos. 922 – note of OS] a cry for the right to kill children simply because they are ill. Apart from being utterly barbaric, it in fact means spreading anarchy" (Czarnek 2018: 11). Populism as understood in this sense has a long list of features typical of political populism. It also includes folk religiosity, idealization and mythologization of the past, including the role of the Church, a critical attitude to integration with the European Union, idealization of the patriarchal family, criticism of liberal democracy and reliance on conspiracy theories (Kutyło 2010: 209–210).

The above view put forth by Olga Wysocka does not fully reflect the phenomenon under investigation. There are politicians or lawyers who make use of religion and its principles from a pragmatic point of view, applying almost all the instruments seen as specific to populism. To be precise, this practice is based on two non-conflicting approaches.

First, given that Christianity is the highly dominant religion in Poland, voters are predominantly Catholic. Consequently, making references to Christian values is (politically) profitable. Taking into account that penal populism is an element of the political game and electoral games, it is not surprising that there are calls for tightening up the law to protect religion, dignity, and morality (understood in accordance with the teaching of the Church), life "from conception to natural death," a phrase that was to be included in the Polish Constitution. This Christian activity became so apparent that it has grown difficult to be accepted and is viewed as hypocrisy even in extreme right-wing Christian circles. Even the profoundly Christian *Polonia Christiana* openly pointed out the propagandistic nature of references to Catholic ethics when it ran a headline that read, "Defense of 'Christian values'. An electoral magnet for a Catholic" (Augustyn 2019).

I hold the view that in this case, politicians resorting to populism use religion as a tool to achieve their own goals. Criminal law becomes a method for the implementation of politics and, consequently, is affected by religion. I endorse the view of Priest Tomáš Halik who noted that "If right-wing politicians, especially in post-communist countries such as Hungary or Poland, call for a return to Christian values, and at the same time promote the fear of migrants and Muslims, these are just empty words serving as a cover for the populists' pursuit of power and their

in the strict sense of the word, the nation is a collaborator. Given the above, where politicians say that the law comes from society, you must know that this is the thesis previously put forward by men such as Marx with Engels, Hegel, or Rousseau and other precursors of the revolution that prepared only crimes for us" (Guz 2020).

efforts to replace parliamentary democracy with autocratic systems." He further added that "Today, in many places in Europe, we are witnessing the replacement of God with the nation, replacement of the Christian faith with the dangerous fetishization of xenophobia and populism" (Halik 2019). John Pratt indicates that populism represents the sentiment and emotions of specific groups of society (Pratt 2007: 10). It appears that religious feelings and attachment to the values relevant to a given religion fit in with such sentiments and emotions.

The second approach to using religion in politics, and also in criminal policy, consists of giving the public a simple, constant, universal formula for the perception and construction of the world that allows no exceptions. It is an attractive form of constructing a whole world around a single system of values. This may be illustrated by the issue of bigamy and statements on the family. In the modern world, marriages break up, there are betrayals and permanent informal bigamous relationships. We are instead offered a world of happy, stable spousal relationships consisting of a woman and a man. Surrogacy generates numerous problems, for it is far from clear who is "the real" mother and who is "the real" father. The prohibition on surrogacy is a return to the old rule *mater semper certa est, pater uero is est, quem nuptiae demonstrant.* This perspective is wholly consistent with a view that there is also the constitutional possibility of establishing provisions that will not be observed in practice but will "enable the effective implementation of other goals justifying the restriction of an individual's freedom, such as the confirmation of the validity of a given social norm" (Tarapata 2016: 61).

Anna Siewierska-Chmaj may indeed be right in claiming that the modern globalized world does not give people a sense of certainty, neither within a political order legitimized from above, nor within the framework of a generally accepted axiological order. Drawing on political scientists Vittorio Possenti or Giles Kepel, she indicates that religion may permeate the political sphere to a greater extent than in the past. A phenomenon of "making religion non-private" is emerging. Interestingly, the Polish Solidarity movement is cited as an example of this "third wave of democratization". Siewierska-Chmaj argues recalling Leszek Kołakowski that a secularization of Christian values occurred in the Western civilization and Christianity will never run ahead of political ideologies in making promises of temporal happiness (Siewierska-Chmaj 2013: 115–117). It may be presumed that a simple, clear, legible and (relatively) constant picture of the world, its relations and mutual obligations is becoming a convenient and useful political tool. Along the same lines, José P. Zúquete puts forward the notion of "the enchanted world" (Zúquete 2017) and Peter Berger proposes the term of desecularization (Berger 1999).

These two approaches may be called Christian penal populism, although the motivation for resorting to the argument of "religious values" is slightly different in each. It must be borne in mind that these two approaches are frequently jointly adopted. They carry almost all the features of populism – a conflict between the (religious) people and a (liberal) elite, perceived as a conflict between the civili-

zation of life and the civilization of death and a simplification of the world image. Drawing on the aforementioned distinction of populism carried out by Pierre-André Taguieff, it may be assumed that the issue in this case is identity populism (or a specific form of it). There is no doubt as to the role of the media in such activities. Reference must be made here to not only Catholic media (along with Radio Maryja, itself a phenomenon of populism (Kutyło 2010: 204–215) and Television Trwam), but also extending to the public media, which are required to respect Christian values and which recently concluded an agreement with the Secretariat of the Polish Episcopal Conference. The agreement obliges Polish Television (TVP) to take into account the position of the Catholic Church and "its intellectual achievements" in its "current affairs programs dealing with moral and social problems and issues regarding professional, social and cultural life" (Kozłowski 2021).

It must be stressed that whether the issue is Christian political populism or Christian penal populism (on both levels), they both leave no room for a different view of the world, different norms, different standards. Criminal law based on such an assumption is the criminal law of the Christian world. It is of no relevance that, even though, as anthropologists show, the majority of people live in monogamous relationships, out of 849 human societies, as many as 700 allow polygamy (which surely does not mean that is common practice) (Agnosiewicz n.d.). Studies conducted among Indians and African peoples show that polygamy is not contrary to nature (Baloyi 2013) and it is a natural (though not very common) practice in Muslim countries (Sakowicz 2011–2021).

Such a model brings to mind the old principle *cuius regio eius religio*, which should be transformed into: *cuius religio eius ius*. Law, including criminal law, is to guard the religion that the legislator considers to be dominant or important. Tomasz Terlikowski argued in a work titled "Moral Totalitarianism" that "only armed with classical philosophy and Holy Scripture can we free ourselves from the ethical chaos that utilitarianism gave us. They are the weapons that can be used to defeat thousands of proliferating masters of suspicion, critics of the Decalogue, or lawmakers who care more about public health money than about human life." Tomasz Terlikowski takes the view that "to regain the foundations for building morality, law and a coherent civilizational project" everyone should follow Pascal and assume the existence of God. He does not refer to an individual conversion, but a mental and intellectual assumption to be made by the whole civilization (Terlikowski 2006: 132–134). In similar fashion, Priest S. Wielgus (Professor of the John Paul II Catholic University of Lublin) argues that positive law may fall into degradation and must therefore be rooted in a code of unchanging values – the Decalogue. He points to laws contrary to morality and sees the following reasons for that phenomenon: the assumption that material well-being is the only criterion for action, cultural uprooting (perpetrated by "pseudointellectuals"), or citizens' declining sense of responsibility for the community ("egoistic hyperindividualism"). Stanisław Wielgus believes the only solution is the adoption of the Judeo-Christian canon (Wielgus 2006).

A further question arises as to whether religion and the canon thereby established may be the basis for the valuation of goods, and resolution of a conflict of goods, that is a process specific to establishing penal regulations, in the light of the notion of moral error of the ecclesiastical authority. Professor of theology Tadeusz Bartoś notes that "in 1866, the Holy Office stated in response to questions from a vicar apostolic in Ethiopia that slavery was compatible with natural law" (Eilstein 2006: 666). The Church was wrong on many issues, e.g. human rights that it acknowledged only in the 20th century, which it itself critically admitted (Dudziak 2007: 377), or *Syllabus Errorum* of Pius IX of 1864 (Pelagius Asturiensis). The Catholic press (of the so-called Open Church) frankly admits that many of the biblical commands, such as the stoning of homosexuals, the expulsion of lepers from the community, and the rules for the treatment of slaves, are today considered immoral (which may mean external sources of morality), and the Ten Commandments refer to a woman as the property of a man, less valuable than a house (Majewski 2021: 31).

In part, the phenomenon under investigation (penal-Christian populism) fits in with so-called legal moralism – a view under which the validity of "moralistic provisions of law is ethically justified" (Pietrzykowski 2005: 104–119). This approach may be depicted by an argument that "the law should prevent and punish immoral behavior" (Feinberg 1998: 8–9). It is clear that "this leads to a situation where those who believe that they have come to the knowledge of the absolute good claim for themselves the right to impose their opinion and will on those who persist in error" (Pietrzykowski 2005: 104–109). Legal moralism does not exclude legal paternalism, that is the imposition of certain behavior on others for their own good regardless of their will (Pietrzykowski 2005: 115–116) by means of the provisions of law, including criminal law. Contemporary Polish law is sometimes given such assessments. By way of example, as Andrzej Wąsek rightly pointed out, criminalization of voluntary sterilization is a manifestation of legal paternalism (Wąsek 1988: 94) (regardless of Polish criminal law assessments of voluntary sterilization, because the views on this issue are not uniform). Legal paternalism can also be seen in the prohibition on commercialization of the trade in organs for transplantation, or the commercialization of surrogacy, but also in the prohibition on euthanasia (not discussed in this article).

Polish criminal jurisprudence seeks a systemic justification for decisions on criminalization. Such decisions may be taken for various reasons, and depend on the assessment of undesirable behavior by the legislator. Lech Gardocki calls these reasons the theories of criminalization. He distinguishes among them symbolic criminalization, which he defines as "the collective need to punish". A provision of criminal law is in this case a manifestation of a commitment to social morality and order. Drawing on Heinz Steinert, he stresses that the issue is "the sanctification" of a particular value, which he illustrates with the provision prohibiting abortion (Gardocki 1990: 62–66). The situation arises where human dignity is protected (even against an individual's will). In a sense, one can

also consider criminalization where the motive is to relieve social tensions. Lech Gardocki indicates that the sociology of morality draws attention to this kind of function of the norms of ethos (which can be compared to praying for rain, thus helping overcome the feeling of helplessness) and illustrates it with the French law on the protection of the home in wartime, and the ban on adultery. Interestingly, he classifies these criminalizations as rational criminalizations because they fulfill certain goals intended by the legislator (Gardocki 1990: 59–61).

11. Christian penal populism and the issue of punitiveness

One of the distinguishing features of penal populism is punitiveness, which may be defined as "the result of the tendency to make extensive use of instruments provided for in criminal law to limit the scope of phenomena assessed as socially undesirable" (Jasiński 1973: 23).

The above analysis of selected criminalized behaviors and a short list of others with similar characteristics make it possible to recognize that decisions based on the protection of Christian values in the area of criminalization policy do not necessarily mean introducing or increasing criminal liability. There are behaviors which, accepted or even promoted by the Catholic religion, should not be subject to criminal liability. A violation of the bodily integrity of a child should not be punishable, nor should the refusal to undergo vaccination if cell lines of aborted fetuses were used in the production process. This means that in the case of penal-Christian populism, punitiveness is not an element that permanently constructs it.

Account should also be taken of the argument of Karolina Kocemba and Michał Stambulski that the relation between populism and human rights is not straightforward and cannot be reduced to a simple incompatibility thesis (Kocemba, Stambulski 2020: 153). This issue is more evident in the case of populism based on the fight for Christian values. The criminalization indicated may form the basis for a criminal response, not so much to a violation of human rights, but to a violation of certain values. There is therefore no conflict between the good of the minority, the social majority, and the related dilemma. The issue in this case is (almost) exclusively a restriction of human rights to protect (Christian) values.

12. Rational response

This discussion may in essence stop at this point, but I believe that it seems worthwhile to reflect on whether and what can be done in the case of identification of penal-Christian populism (provided the issue is given a broader dimension).

Wojciech Zalewski claims that the most effective factors that curb populism include: international law, a strong civil service, appreciation of the role of specialists, independent media, a welfare state, and the pursuit of independent paths of development (Zalewski 2009: 23–29). I hold the view that a rational response to penal populism requires proper communication between public authorities and the public, reliable information and openness to other models of functioning – other cultures, religions and points of view. This approach makes it possible to pose questions as to what dignity really is, and whether, for instance, selling one's own organs in fact violates it (such a question is put by, e.g. Radcliffe-Richards 2006: 66).

It should be noted that when armed conflict between Roman Catholic and Protestant forces within the Holy Roman Empire ended with the Peace of Augsburg and the principle of *cuius regio eius religio,* one of the responses was the Lockean concept of toleration (for more details see Szwed 2014). This very same tolerance should be a response to the aforementioned principle *cuius religio eius ius.* The problem is that as a rule the legislator's thinking rejects tolerance of a different view of the world and employs symbolic and emotion-defusing criminalization as a tactic.

It is clear that the underlying basis for the thesis of the unacceptability of penal-Christian populism is the principle of proportionality of the establishment of criminal liability (*ultima ratio* of criminal law), principle *in dubio pro libertate* and the related right to self-determination.

In Poland, the principle of proportionality has a constitutional status and is established in Art. 31 (3) of the Constitution. One cannot fail to notice that it is precisely the protection of morality that is one of the justifications permitting the limitation of human rights and freedoms. Putting aside a detailed constitutional analysis of the provision, two issues should be pointed out: 1) the provision of Art. 31 (3) of the Constitution does not indicate what variety of morality it refers to, and whether it refers only to one (by implication, Christian), whereas the Preamble seems to suggest a possible "multi-view" approach (taking into account many standards of behavior); 2) morality in the name of which human rights are restricted should not always be protected by means of criminalization – it requires the fulfilment of three conditions defined as the principles of usefulness (adequacy), necessity and balancing of goods. Reference should also be made to a view of Joel Feinberg that no matter how flexible the limit of criminalization may be, it will never be sufficient to justify the penalization of a particular behavior by referring to the fact that it only harms the perpetrator or is utterly immoral (Feinberg 1984). These views allow for the development of the concept of the moral neutrality of law (liberal neutrality) referred to as reasonable pluralism. Under this concept, the state may not enter the sphere of individual choices of "good life", which means the prohibition on preferring certain moral concepts and legal regulations of a moralistic nature (which is a postulate of the anti-perfectionism of law) (Pietrzykowski 2005: 132–133). I believe that one of the most significant arguments for this perception of law is the indicated difference between religious norms and

legal norms. Religious norms do not apply to nonbelievers and those who do not intend to abide by them, whereas legal (universal) norms apply to everyone in a specific space. The latter must therefore take into account the different perceptions of religion in the individual and social world, as well as of different religious and areligious attitudes. It is important to note that the postulate of "moral neutrality" does not imply the amorality of law and underestimating the role of morality in social life (Sadurski 1990, Sadurski 1992; Sadurski 1994: 22–30).

The principle by which dilemmas in the field of criminalization policy are (or may be) resolved is the principle *in dubio pro libertate*, the spirit of which partially relates to the postulate of "the moral neutrality of law". Bogusław Banaszak expressed an interesting opinion that the principle *in dubio pro libertate* makes it possible "to ensure the greatest possible effectiveness of constitutional rights and freedoms" (Banaszak 2012: 375). In turn, Szymon Tarapata raises the question of the scope of the rule *in dubio pro libertate* in the process of the establishment of law, i.e. whether the legislator should refrain from regulating an issue if in doubt as to the possibility of laying down a specific provision, e.g. a new typification. He differentiates two approaches: vertical and horizontal. Under the vertical approach, i.e. the relation between lawmaker and individual, the legislator should refrain from dubious regulation due to the principle *in dubio pro libertate*. Under the horizontal approach, i.e. between individuals, the principle *in dubio pro libertate* is equivalent to the principle *in dubio pro dignitate*, which Sz. Tarapata derives from the constitutional principle of human dignity (Art. 30 of the Constitution of the Republic of Poland). Thus, in the event of a conflict, for instance, between freedom and another constitutional principle that is more closely related to the principle of dignity, the latter principle should be more strongly protected (Tarapata 2016: 62–63). Partially refuting the above thesis, it should be recalled that when dignity is understood in such a broad manner and, at the same time, is assigned a metaphysical meaning, the principle *in dubio pro libertate* virtually ceases to have any relevance. Further, all legal restrictions on autonomy, including criminal law provisions, must raise the question of the obligatory protection of basic rights. The above-mentioned restrictions are justified precisely by reference to human dignity. Given the above, an interesting question is posed by Anna Podolska who wonders whether the interference of the sovereign, from whom dignity is not derived, with the freedom to dispose of dignity, constitutes its violation (Podolska 2013: 30).

It is easy to justify the criminalization of certain behaviors by making a reference to human dignity, and this formulation is indeed most frequently cited (see e.g. the earlier criminal liability for homosexuality). A human person also enjoys freedom and the right to self-determination and this choice should be free from any pressure and manipulation. I find it hard to come to terms with the paternalistic or moralistic vision of criminal law (Preisner 2014: 51–65; Fernández-Ballesteros 2019) which, in order to protect human dignity, prevents a person from taking actions that do not harm others. John Stuart Mill argued "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. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right" (Mill 1959: 129). This view still holds true. It is hard not to agree with Andrzej Kopff who argues that each individual should be able to independently shape their personality and their fate according to their own will (Kopff 1972: 3). In turn, Arwid Mednis is of the opinion that the provisions of the Polish Constitution allow a conclusion that the lawmaker seeks to confirm, that the subject of protection is a broadly understood autonomy of the individual which "manifests itself in a defense against having decisions made for us or meddling in our actions" (Mednis 2006: 113–115).

13. Summary

The answer to the question of whether making references to the protection of Christian values (as a specific "pre-legislative" measure) is a form of penal populism must be that it is a specific form of penal populism with slightly different characteristics – punitiveness is not its distinctive feature, sometimes the calls for criminalization in this area go in the opposite direction. Is it rational criminalization? From the legislator's perspective, the answer is that it is, which poses a unique threat to human rights and freedoms.

Legislative decisions based on the protection of "Christian values" as tools of the political game (taking advantage of the domination of Catholics in society and/or constructing an attractive and simple world based on a single moral system) violate the standards of a democratic state – they often fail to comply with the principle of subsidiarity, breach the principle *in dubio pro libertate* and disrespect the right of a human person to self-determination. Moreover, Daniel N. DeHanas and Marat Shterin warn that "The multifaceted roles of religion in populism should prompt us to abandon any naive assumptions that religion is merely an empowering force, or that when it does empower it will work for the social good." They are of the opinion that "studying populism movements should give us pause to reflect on our understandings of the sacred and how these can, in some cases, bring social harm" (DeHanas, Shterin 2018: 177–185).

It is obvious that any interference of the law in the area of morality implies a restriction of freedom (Bunikowski 2010: 379–380) because lawmaking is itself such a restriction. The question should be put another way – can morality be a justification for that restriction, and can morality connected with a specific religious viewpoint affect the shaping of law applying to everyone; regardless of the beliefs of the addressees of the law and without respecting their free will? Therefore, the

conclusion must be that criminal law that is free of any moral populism (including, among others, Christian populism) must rely solely on the minimum ethical requirements common to believers of different religions and non-believers, and with respect for the rights and freedoms of all members of society.

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