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Ethical Legitimacy of Criminal Law

Given the current condition of debates within legal philosophy it is difficult to tackle issues concerning the relations between law and morality. Ethical legitimacy of criminal law is just one case in point. Difficulty is given rise for at least two reasons. First, much has been said about the interplay between law and morality by lawyers and philosophers. Not only does this hamper one's ability to proffer an innovative account of the problem, but it also instills epistemic pessimism, as it were, by suggesting that the travails surrounding the relations between law and morality are impossible to dispel. A second and related reason is that looking for references or dependencies between law and morality necessitates, at some stage, delving into the notion of natural law. However, adoption of natural law as a declared point of reference generates substantial risk as the term has proven ambiguous and triggered numerous intellectual controversies. Even though natural law has its place within debates at the core of legal philosophy, it tends to be overlooked in the discourse revolving around specific dogmatic branches of law. Therefore, an attempt to overlay, as it were, natural law onto the academic discussion may be perceived as unprofessional and unscholarly. The Polish doctrine of analysis of criminal law and, it may be surmised, the tradition of civil law inherently permeated by legal positivism, are dominated by the dogmatic-literal construction which, at all costs at times, is used to seek solutions to multiple challenges that the state and its legal system must face up to.

Doubtless, the dogmatic-literal method is capable of offering answers to difficulties cropping up in the process of applying criminal law. However, a law-enforcing institution grappling with a difficult question posed thereto often resorts, in light of the limitations of the leading interpretative trend, to discretion and equity whilst ostensibly couching its decision in terms characteristic of dogmatism-literalism. One example of such an equity-based decision is the resolution of the Criminal Chamber of the Supreme Court of Poland dated 12 December 2007 (citation number: III KK 245/07) where it was pronounced that "Extraordinary mitigation of punishment for a defendant guilty of aggravated murder by virtue of art. 148 § 2 of the Criminal Code, where he faces 25 years' or life imprisonment, is not contrary to substantive law because there is no provision that would prohibit the application of this device, and deduction of such a prohibition from the fact that the legislator neglected to determine the principles of extenuating the punishment of 25 years' imprisonment would lead to an alteration of the principles of criminal liability enshrined in the Code, in a way falling

foul of the constitutional principle of a state ruled by law”. Pursuant to art. 148 § 2 of the Criminal Code a person is guilty of aggravated murder if they kill another:

- 1) with particular cruelty,
- 2) in connection with hostage taking, rape or robbery,
- 3) for motives deserving special condemnation,
- 4) with the use of explosives.

Historically, this criminal offence was subjected to imprisonment for not less than 12 years, 25 years or life. However, the Act of 27 July 2005, which entered into force on 16 September 2005, limited the range of punishments available to 25 years’ and life imprisonment. Ultimately, due to improprieties of formal nature this amendment was struck out as unconstitutional by the Constitutional Court. Still, the Court handed down its judgment to that effect only on 23 April 2009 so the law remained intact and binding for almost 4 years. It gave rise to a plethora of doubts, including around fundamental principles such as judicial discretion as well as more practical ones pertaining to the procedure to follow in the case of offenders between 17 and 18 years old who, according to Polish law, cannot be sentenced to life imprisonment. One notable difficulty triggered by the meaning of art. 148 § 2 begged the question whether a sentence of 25 years’ imprisonment may be extraordinarily mitigated something the Criminal Code, as it stood at the time, did not envisage, despite making mitigation available with regard to other types of punishment.

As the Supreme Court rightly noted in the resolution referenced above: “Extraordinary mitigation of punishment is one instrument available to judges when determining the degree of penalty to be imposed. It makes provision for varied treatment of acts which fit the *actus reus* and *mens rea* of the same offence, as well as of various characteristics of offenders the sum of which makes it often so that, in case of a specific defendant, even the imposition of the most lenient permissible punishment would be too rigid”. Extraordinary mitigation’s aim is to shield the offender and the law enforcement apparatus from the threat of handing down unfair judgments. The Polish criminal law doctrine prefers constructing the elements of criminal offences in very general terms so that definitions of prohibitions are unspecified. In the other words, the scope of actions capable of being caught by a given criminal offence is relatively wide. Given such a peculiarity of Polish criminal law, most sanctions are, in principle, indeterminate, with much room between the upper and lower ends of the spectrum. This, in turn, allows the court to impose punishment that is adequate to the particular act committed by the defendant. In exceptional circumstances the law envisages even mandatory extraordinary mitigation of punishment. Where extraordinary mitigation is unavailable and sanctions are fixed-term, the risk of inflicting unfair punishment, that is one that is inadequate to the extent of social harmfulness of the act committed, rises significantly. To avoid such a scenario, the Supreme Court founded its judgment upon equity by exercising sizable discretion, a move it admitted in the reasons: “The reasoning presented above [one that permits the use of extraordinary mitigation of punishment in a manner similar to fixed-term prison punishments – author’s note] relies on an analogy for the benefit of the defendant, which is a permissible method of interpretation. It does, regrettably, treat 25 years’ imprisonment as a fixed-term punishment¹, however that was necessary in the systemically

¹ Pursuant to the provisions of the Polish Criminal Code, the term “fixed-term punishment” encompasses imprisonment punishments of up to 15 years. In addition, the catalogue of punishments contains a separate sanction of 25 years’ imprisonment as well as life imprisonment.

defective reality created by the legislator. It must be noted that defendants, who just like Andrzej A. committed aggravated murder before turning 18, 25 years' imprisonment is the exclusive sanction envisaged by art. 148 § 2 of the Criminal Code, therefore it is for the court to rectify a legal loophole by rationally mitigating it in order to impose a punishment that is adequate to the objective and subjective circumstances of the case as established in court. To not do so would result in a grave violation of the principle of humanitarianism (...)"

The judgment is but one example exposing serious limitations of the dogmatic-literal method of legal interpretation if it is to be considered a basic and, at the same time, the ultimate tool to ensure correct application of criminal law. Inasmuch as one dissects the equity or fairness of a judicial pronouncement, one must reconstruct a point of reference from which the justifiability of a particular determination may be verified. On the facts like those above, such a point of reference would not be provisions of the Code itself, because it is precisely their application that would produce an unfair result. It could be the constitution, however constitutions are incapable of providing sufficiently unambiguous legal categories which would enable rendering a justified determination². Another way to go, not only at the stage of application but already at that of enactment, is to have recourse to ethical debates. It is the thesis of this talk to signal the necessity of establishing the ethical legitimacy of criminal law. For one may point to types of such legitimacy – primary and secondary. The primary legitimacy derives the legal validity of criminal law from its coherence with the ethical rules of responsibility. On this account, criminal law shapes, together with ethics, a cogent message regarding what is right and wrong. The fact that the law may deviate or even break free from ethical principles does not mean that it ceases to bind in a positivist sense. It is not open to doubt, however, that it loses one of the fundamental justifications for its bindingness, and the enforcement thereof becomes significantly more difficult. Secondary legitimacy, in contemporary doctrine often considered the only relevant notion, signifies the entrenchment of criminal law in a decision of an authorized legislator. This type of legitimacy determines whether a given normative determination is binding, which does not mean it is the only legal device that performs this function.

The natural starting point in the discussion concerning the ethical legitimacy of Polish criminal law is the principle of dignity of the person enshrined in art. 30 of the Polish Constitution: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities". Two groups of consequences may be pointed to that arise from the fact that dignity of the person was introduced into a legal system at the constitutional level and that its significance as against other human rights and freedoms. Let me refer to one group as immediate and the other as distant. By an immediate consequence I understand perceiving the principle of dignity as a normative category which determines the subjectivity of a person as well as the absolute and equal protection of that subjectivity³. The distant consequence contains in the anthropological influence of human dignity upon the law, particularly criminal law. One may be satisfied with the immediate consequence when analysing the relations between human dignity and a legal system. Here

² For more on proconstitutional construction of criminal law and difficulties associated therewith, see: K. Szczucki, *Proconstitutional Interpretation of Criminal Law*, Lexington Books 2016.

³ In line with L. Bosek, "Komentarz do art. 30", [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I*, Warszawa 2016, p. 723.

efforts will be made towards achieving a better understanding of the distant consequence of the influence human dignity exerts upon criminal law.

Nevertheless, irrespective of which consequence of human dignity one may be prompted to analyse, it is necessary to establish the content of the principle, at least its fundamental elements. Dignity is a notion that marks humans out by pointing to their autonomy, supreme value and irreplaceability⁴.

Examples may be drawn on the influence dignity has on criminal law already in the immediate sense. The Polish Constitutional Court has noted that predicating criminal liability upon guilt is a principle stemming from dignity. A similar corollary has been expressed in relation to the presumption of innocence: “The elevation of the presumption of innocence to a constitutional principle makes it a significant factor determining the position of a citizen within a society and against the government, thus guaranteeing proper treatment of him, particularly in the face of a suspicion that a criminal act was committed. The presumption is strictly connected with personal inviolability and protection of dignity and freedoms of the person treated as innate and inalienable goods. (...) The constitutional legislator prioritized human dignity by constructing the relevant provisions in a way that aim to effectively protect it. It is due to this legislative intention that art. 42(3) of the Constitution envisaged a special method of refuting the presumption of innocence. The provision clearly and unequivocally pronounces that the presumption of innocence holds until a final judgment of the court is issued”⁵.

This short description of the principle of human dignity warrants the corollary that dignity is an anthropological notion in a philosophical sense, and that it expresses a preference towards a certain understanding of a person. It is incorporated into the law, together with the context surrounding it, by the legislature, the doctrine and the courts, a phenomenon evidenced by the aforementioned doctrinal and judicial statements. It appears, however, that the understanding of the distant consequence of dignity is enhanced greatly by examining the philosophical character of the principle of dignity.

Philosophical anthropology is a branch of philosophy which strives to interpretatively explain the human being, the human, and his actions⁶. It attempts to establish what being a human means and how it came about. To that end it seeks to describe humans both from the outside and from the inside, their cognitive abilities, freedom, reason, proclivity towards societal life, and their autonomy. In short, philosophical anthropology aspires to provide a comprehensive description of a person, including his actions and the relations between him and the surrounding reality. Therefore, if it is to be assumed that a certain vision of a human being lies at the core of a legal system and forms, at the very least, its constitutional axiology, it is necessary to look for such a model of criminal liability that would correspond with such a vision to the greatest extent. That this is so may be buttressed by two reasons: formal and substantive. The formal reason is traced back to the provisions of the constitution and their character. The constitution is the foundation of a legal system, one that determines its axiological profile. The constitution also implies the requirement of its direct application⁷. In

⁴ Ibid.

⁵ Judgment of the Polish Constitutional Court of 16 May 2000, P 1/99.

⁶ A. Maryniarczyk (ed.), *Powszechna Encyklopedia Filozofii*, vol. I, Lublin 2000, entry: Antropologia Filozoficzna.

⁷ More on this: K. Szczucki, *Proconstitutional Interpretation of Criminal Law*, Lexington Books 2016.

addition, if it is defended that the principle of dignity of the person is an expression of a certain anthropological vision, then, under art. 30 of the Polish Constitution, which affirms dignity as the source of all rights and freedoms, it is difficult to deny that those rights and freedoms shall be coherent with the constitutional legislator's anthropological vision. By referring to the principle of dignity and pointing to it as the basis for a system of rights and freedoms the society performed its role of designating the values constitutive thereof. As Roger Brownsword rightly noted, values constitutive of a society point to its mission, direction, and delineate the boundaries of acceptability of various actions⁸. This role surely also belongs to human dignity.

The substantive reason has its source not in the constitution itself, but in the need to look for such solutions pertaining to the shaping of principles of criminal liability that could correspond best with one's estimation regarding one's responsibility. It should, to a significant extent, derive from a person's ethical convictions. I do not refer here to the scope of criminalization with regard to specific criminal offences, that is one's estimation as to what is right and wrong. By one's ethical estimation regarding the scope of liability I understand the scope of liability traditionally regulated by the general part of a criminal code and analysed in the study of crime. Shaping the principles of liability in such a way may not only be more comprehensible to an ordinary citizen, but it also has a greater chance of being obeyed. Filling the criminal law with artificial constructs, with more normative than factual elements, and wide use of legal fictions, may render criminal law purely conventional, one that does not strive to relate to the sense of justice shared by its subjects⁹.

Polish constitutional law scholars generally agree that the object of protection of art. 30 of the Constitution has its source in personalist philosophy¹⁰. This is not to say that other strands of philosophy, such as stoicism, medieval philosophy and Kantianism are not relevant¹¹. It should not give rise to doubts to avail oneself of one strand of philosophy to interpret notions genetically originated in another. On the contrary, to not do so could lead to an inference that a given notion is vague or even ambiguous. The principle of dignity is a case in point as it – depending on the intellectual context – is interpreted in various ways, many of which are mutually exclusive¹².

⁸ R. Brownsword, *Human dignity from a legal perspective*, [in:] M. Düwell, J. Braarvig, R. Brownsword, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge University Press 2014, p. 8.

⁹ A similar thought has been expressed by R. Brownsword: „If humans are to express their dignity by doing the right thing for the right reason, they need a context in which they can develop moral virtue and then act on it. One of the key roles that the express legal referencing of human dignity might play in an increasingly technological setting, is to compel regulators to be very careful about employing strategies that might corrode the essential context for moral virtue” (Ibid, p. 19).

¹⁰ L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa 2012, p. 21. Cf. also O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Warszawa 2011, s. 415.

¹¹ H. Izdebski, *Godność i prawa człowieka w nauczaniu Jana Pawła II*, 45 *Studia Iuridica* 2006, p. 299 *et seq.*; W. Arndt, *Godność człowieka jako istotny element racji stanu*, [in:] A. Krzynówek-Arndt (ed.), *Kryterium etyczne w koncepcji racji stanu*, Kraków 2013, p. 65; M. Dan-Cohen, „A Concept of Dignity”, 44 *Israel Law Review* 2011, p. 11 *et seq.*

¹² R. Brownsword has commented on this as follows: „Whereas, in some cases, human dignity is articulated and applied in a ‘liberal’ spirit (underpinned by an ‘empowerment’ conception), in others the guiding spirit is ‘conservative’ (underpinned by a conception of ‘human dignity as constraint’). Broadly speaking, while liberals appeal to human dignity in order to protect and to extend the sphere of individual choice, conservatives appeal

In pursuit of the correct interpretative backdrop against which dignity is placed in the Polish legal system, the preference towards Christian personalism is substantiated by reference to the preamble of the Constitution which mentions dignity in the context of “the Christian heritage of the Nation and universal human values”¹³.

Before I single out the fundamental elements comprising the principle of dignity of the person it shall be noted that the interpretative model adopted here does not, in any way, transgress the neutrality of the law nor its neutrality. Academics have differentiated between three types of ideological neutrality of the law: correlative, genetic and argumentative¹⁴. Correlative neutrality indicates that determinations made within a legal system are not convergent with determinations made by reference to a specific ideology or religious doctrine. Genetic neutrality denotes a situation where legal notions present within a legal system, including the constitution, have no source in a given ideology or religion. Where the presence of a legal notion is legitimized by its religious origin and interpretation of its meaning is dependent upon decisions made within a doctrine or ideology, or one’s belonging to a church or other religious organization – we may talk about a lack of argumentative neutrality. Achieving correlative and genetic neutrality is impossible and, more importantly, unjustified. For it is often the case that decisions made within a legal system resemble those made or contemplated within religious or ideological doctrines, which does not mean that determinations made by public institutions hinge upon judgments made in extra-legal contexts. It is natural that the legislator internalizes notions entrenched within a society, ones that often derive from philosophy or religion. By introducing novel instruments into the law it is possible to endow them with a specific definition or stick to their extra-legal connotation. As a consequence, it shall be accepted that law preserves its argumentative neutrality as its determinations do not hinge upon judgments made within religious organizations or ideological movements. This is not to say, however, that whilst interpreting an idea – especially in the face of discarding genetic neutrality – one cannot refer to its axiological source and original characteristics.

If a constitution does not necessitate the adoption of a maximalist view of dignity, this cannot be achieved by establishing a fitting interpretative context. Otherwise only a minimalist account would be available. As M. Düwell rightly argues, such interpretations are plausible, yet they do not go far towards understanding human dignity in a way that would determine the content of a catalogue of human rights, and therefore influence the scope and shape of liability in criminal law¹⁵. Dignity should not be understood as an open norm to be filled with meaning *ad hoc* depending on the structure of specific societal relations. Similarly,

to human dignity in order to impose limits on what they see as the legitimate sphere of individual choice” (R. Brownsword, see note 7, p. 1).

¹³ L. Garlicki, “Komentarz do art. 30”, [in:] idem (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, Warszawa 2003, pp. 3-4.

¹⁴ M. Królikowski, K. Szczucki, *Państwo świeckie, neutralne czy bezstronne*, 11-12 *Więź* 2010; J. Krukowski, *Konstytucyjny model stosunków między państwem a Kościołem w III Rzeczypospolitej* [in:] A. Mezglewski (ed.), *Prawo wyznaniowe w systemie prawa polskiego*, p. 93; D. Laycock, *Substantive Neutrality Revisited*, 110 *West Virginia Law Review* 2007, p. 51 *et seq.*; S.E. Williams, *Religious Exemptions and the Limits of Neutrality*, 74 *Texas Law Review* 1995, p. 119 *et seq.*

¹⁵ M. Düwell, “Human dignity: concepts, discussions, philosophical perspectives”, [in:] M. Düwell, J. Braarvig, R. Brownsword, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge University Press 2014, s. 37.

dignity cannot be reduced to a person's right to have rights nor to a prohibition on treating a person like an object¹⁶.

In line with the personalist interpretation of dignity, it occupies the top position in the hierarchy of notions (beings) known to man. It has been argued that, together with its acts of cognition and love, it oversteps nature¹⁷. From the perspective of the significance of the principle of dignity in criminal law it is necessary to expound upon an anthropological description of a person as the doer of an act. A person realizes his own structure of self-possession and self-rule through his actions. By wanting to act and acting intentionally he exceeds beyond himself, as it were, towards what he considers to be diverse good. At the same time, an act is a manifestation of one's "I" and an expression of one's self-determination¹⁸. Man's reason and freedom serve as the rationale of individual actions. These characteristics also constitute a natural foundation for human dignity¹⁹. For dignity of the person, concentrating man's reason and freedom, is the basis for human actions. Therefore, if it is an act that lies at the core of the study of criminal law, if the human act is chiefly the object of criminal assessment, human dignity and the characteristic of the human condition stemming therefrom shall not be overlooked in the analysis of the notion of an act and criminal liability. It is submitted that human behaviour may be classified as consistent or inconsistent with human dignity²⁰. Consequently, it is all the more justified to maintain that criminal should in their assessment of persons be coherent with the assessment made by reference to human dignity, at least to the extent that it shall not criminalize acts compatible with the principle of dignity or acts capable of having, as it were, a dignity-based recommendation.

A person's capacity for self-determination (so, in essence, his freedom) is a demonstration of dignity. This observation warrants a worthwhile assertion: criminal law should classify as an "act" only conscious and voluntary actions by persons²¹. All other actions, incapable of being described as conscious and voluntary, should be excluded from the definition of an "act". It is reason and freedom, part and parcel of dignity, lie at the essence of reasons for human behaviour. Therefore, dignity determines one's ability to act and to bear responsibility for them.

To a certain extent the understanding of dignity demonstrated above finds an analogous interpretation in the account of dignity as one's right to live a life of one's own²². This perspective shall not, however, be interpreted too individualistically. The construction of dignity made for the purposes of criminal law shall not lose sight of the societal dimension,

¹⁶ Ibid.

¹⁷ M. A. Krąpiec, *Człowiek i polityka*, Lublin 2007, p. 270.

¹⁸ K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 2000, pp. 195-196.

¹⁹ K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 2000, pp. 212-213; T. Styczeń, "Być sobą to przekraczać siebie – o antropologii Karola Wojtyły. Postówie", [in:] K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 2000, p. 495.

²⁰ M. Szymonik, *Filozoficzne podstawy kategorii godności człowieka w ujęciu personalizmu szkoły lubelskiej*, Lublin 2015, pp. 215-216.

²¹ K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 2000, p. 73.

²² M. Düwell, see note 14, pp. 38-40. This account of dignity was first proposed in the American literature by A. Gewirth. Cf. A. Gewirth, *Reason and Morality*, Chicago University Press 1978; A. Gewirth, "Human Dignity as the Basis of Rights", [in:] M. J. Meyer and W. A. Parent (eds.), *The Constitution of Rights: Human Dignity and American Values*, Cornell University Press 1992, pp. 10-28.

emboldened in the Polish Constitution by reference to the principle of common good²³. In this connection, it is pertinent to note that a person realizes himself through his own actions, has a broad right to shape his decisional discretion, and the related ability to bear responsibility for those actions²⁴.

It is not difficult to prove the necessity of searching for primary legitimacy (ethical legitimacy) for decisions with regard to criminalization in the specific part of a criminal code – those by which the legislator introduces new criminal offences or modifies the scope of those already in existence. The relation between such decisions and ethics appears directly evident chiefly because criminal offences by their own nature are orientated towards protection of goods, that is singling out the values particularly important for a society in which a given criminal code functions. The argument as to which goods shall be protected, as well as the scope of that protection, is not only a legal argument but also – or perhaps mainly – an ethical one. The specific part of a code does not exist in isolation, however. Among the fundamental issues – alongside the problem of the definition of an act described above – determined by the general part are, *inter alia*: the subjective side of a crime, inchoate offences (e.g. attempts, including inept attempts, aiding and abetting, accomplices, incitement) as well as defences.

Depending on the legislator's decisions in the realms discussed above, the boundaries of criminalization may be pushed very far. Criminal liability for an attempt in connection with an offence which criminalizes merely abstract endangerment of a good (e.g. driving under the influence) widens the limits of liability. Similar conclusions may be drawn in a discussion regarding the subjective side of a crime, particularly inadvertence. The Polish Criminal Code distinguishes between conscious and unconscious inadvertence. In each of those cases the defendant's violation of the relevant rules of caution in dealing with a good serves as the starting point, however conscious inadvertence is in play where the offender predicted a possibility of committing the act even though he did not want it and did not agree to it, whilst unconscious inadvertence – where the offender could have predicted the commission of the act. Holding a defendant for non-intentional causing of an accident, that is for violating the rules of caution governing car traffic where he did not envisage the possibility of committing a crime (unconscious inadvertence), not only significantly widens the boundaries of liability and gives rise to doubts as to the sensibility of punishing such a driver²⁵. It is beyond doubt that he did not want to violate a protected legal good, as no intention can be ascribed to him. It must be considered whether legal instruments which accept such an expansive interpretation of inadvertence have primary legitimacy.

An answer to a problem so stated shall be sought in the vision of man professed by the anthropological principle of human dignity, particularly if it is treated by the constitution as a foundation of its determinations. Dignity of the person becomes, therefore, a platform where primary and secondary legitimacy of criminal law may be reconciled. Dignity understood within the interpretative context proposed here mandates looking at a person as a subject that

²³ Article 1: "The Republic of Poland shall be the common good of all its citizens".

²⁴ To a similar effect: M. Dan-Cohen, *Harmful Thoughts. Essays on Law, Self, and Morality*, Princeton University Press 2002, p. 135.

²⁵ Another issue is his civil liability in damages.

realizes himself through his free actions sourced in his capacity for self-determination²⁶. The boundaries of self-determination should serve to delineate the scope of one's liability. In conclusion, it is doubtful to hold one liable beyond the bounds of one's intention.

²⁶ T. Duma, *Człowiek sprawcą czynu. "Karola Wojtyły próba wyjaśnienia podstaw dynamizmu osoby"*, [w:] A. Maryniarczyk, P. Sulenta, T. Duma, *Wokół antropologii Karola Wojtyły*, Lublin 2016, p. 258.