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Punishing (Non-)Citizens[1]

If sociologists are to be trusted, reflexivity, focused on itself and devoid of any religious or at least ideological framework, leads to the weakening of control mechanisms. Such changes are accompanied by the polarization of social classes and by the exclusion of the so-called underclass (which certainly includes a vast majority of criminals) from the civil society. In the doctrine of criminal law of "mature modernism", within the framework of a liberal-democratic state, the civil society, together with the idea of communication, is supposed to constitute a central reference point in the research on criminal liability. Reflexivity brings up new problems. New citizen-oriented criminal law is being shaped, based upon mediation and communication (e.g. restorative justice, Expressive Theory). The civil society does not include the area of politics or political nature of things, where the problem is not the justification of the punishment but the effectiveness of mere spatial isolation. In this sense, it is difficult to talk about the merits of the emancipation of an individual from the limitations imposed by the society. The weakening of any external authority and of political duties owed to the state is replaced by self-control proper to reflexive modernity only in cases where the individuals have adequate intellectual and ethical predispositions. Disappearance of the influence of external rules and values together with the mechanism of exclusion from the civil society results in the weakening of self-control and in selfish care only about one's own perspective (but also in repressive subordination by the state). Such a state of affairs creates favourable conditions for objectifying criminal liability, abandoning the concept of guilt, and for attempts to provide an ethical justification of penalty – which are concepts taken from the "world of citizens".

Keywords: reflexivity, criminal law, philosophy of law, restorative justice, resentment, CLS

1. Introduction

The article constitutes an attempt at a critique of restorative justice as an alternative to the widely comprehended traditional penal law (i.e. classically retributive or

[1] This article is a revised and expanded version of a paper entitled *Punishing (non-)citizens* presented at the Critical Legal Conference 2015, Wrocław. The title of this paper *Punishing (Non-)Citizens* refers to: R.A. Duff, *Karanie obywateli* [Eng. *The Punishment of Citizens*], "Ius et Lex" 2006/1, pp. 19–44. See also: R.A. Duff, S.E. Marshall, *Civic Punishment*, University of Minnesota Law School Legal Studies Research Paper Series, Research Paper No. 15–33, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2684201.

sociologically and anthropologically oriented approaches to criminal law).[2] The tool serving for the critique shall be the category of reflexivity. Restorative justice has not arisen in a scientific and intellectual void – it is deeply rooted in the Age of Enlightenment, in liberalism, and utilitarianism.[3] Contrary to the views of the apologists of the ideal of restorative justice (among whom punishment contesters may be counted), it is not a solution leading to the acknowledgement of subjectivity and concern of the perpetrators, victims, and the community, but a manifest of the farthest-developed commercialization of social relations so far. In order for the mechanism of restorative justice to function properly, its implementation must be preceded by social reforms ensuring fair social order, i.e. fair distribution of goods and burdens.[4]

Restorative justice counts for nothing if there is no sense of community or if a particular group of people is virtually excluded from participation in the life of the community.[5] Ironically, a significant majority of criminals come from this exact group – at the same time constituting a somewhat natural object of the legal penal reaction. Such a state of affairs gives rise to a strong sense of resentment, which does nothing to resolve social issues (such as crime), and may even exacerbate them (the exclusion of the perpetrators of crime and their families increases; it is a specific mechanism of alienation).

It should be emphasized that the purpose of these deliberations is to criticize not the idea of restorative justice itself, but rather the manner of its implementation, which often does not correspond to social reality and is not preceded by appropriate social reforms and social guarantees. In practice, criminal law is still the most inexpensive tool for influencing social phenomena, not contributing, however, to the solution of social problems – as these cannot be resolved by means of criminal law, even if the instruments of restorative justice are implemented.

2. The Enlightenment and the intellectual and axiological foundations of modern criminal law

The Enlightenment rationalism with the related glossary of terms and concepts seems to dominate in the contemporary doctrine of criminal law and criminal policy.[6] On the basis of the philosophy of state and law supreme concepts of this dictionary include contemporary notions of liberal democracy, deliberative or participatory democracy and citizenship (being a citizen).[7] The institutions of deliberative democracy and citizenship

[2] More on the subject: J. Utrat Milecki, *Podstawy penologii. Teoria kary* [Eng. *An Introduction to Penology. The Theory of Punishment*], Warszawa 2006, p. 128ff.; L. Gardocki, *Prawo karne* [Eng. *Criminal Law*], Warszawa 2000, p. 26ff.

[3] See: G. Pavlich, *Criticism and Criminology: In Search of Legitimacy*, Theoretical Criminology 1991/1, pp. 29–34; M. Foucault, *Nadzorować i karać. Narodziny więzienia* [Eng. *Discipline and Punish. The Birth of the Prison*], Warszawa 2009, pp. 72, 84; M. Philips, *The Justification of Punishment and the Justification of Political Authority*, "Law and Philosophy" 1986/3, pp. 393–416; M. Wenzel, T. Okimoto et al., *Retributive and Restorative Justice*, "Law and Human Behavior" 2008/5, pp. 375–389.

[4] Cf. M. Philips, *The Justification…*, pp. 393–416.

[5] See: M. Królikowski, S*prawiedliwość retrybutywna wobec sprawiedliwości naprawczej* [Eng. *Retributive Justice versus Restorative Justice*], "Ius et Lex" 2006/1, pp. 107–129; W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego?* [Eng. *Restorative Justice. The Beginning of the Evolution of Polish Criminal Law?*], Gdańsk 2006, pp. 94–153.

[6] Cf. J.Q. Wilson, *The Theory and Practice of Criminal Punishment*, Warszawa 2006; J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton 1970; R.A. Duff, *Punishment, Communication and Community,* Oxford 2001; A. von Hirsch, *Doing Justice: The Choice of Punishments,* New York 1976; N. Christie*, Granice cierpienia* [Eng. *The Borders of Suffering*], Warszawa 1991.

[7] J. Hampton, *Liberalism, retribution and criminality*, in: J.L. Coleman, A. Buchanan (eds.), *In Harm's Way: Essays in Honor of Joel Feinberg,* Cambridge 2007, pp. 159–165.

were both made to measure according to perceptions or ideas of Modern Era liberals and utilitarians – John Locke, Jeremy Bentham, John Stewart Mill.[8] At the same time the modern dictionary of legal (and social) doctrine was created by a revolution that destroyed the social order of *ancien régime*, the continuation of which (its continuation was the modernist program) was defined as progress. Progress leading to the emancipation of humanity (and to increasing the autonomy of equal and free citizens) was, in turn, supposed to justify social changes, political decisions and their consequences.[9]

In criminal jurisprudence, "progress", in this understanding, took on two characters. First, the concept of deliberative (participatory) democracy and of the citizen enticed the representatives of criminal jurisprudence to promote the idea of humane treatment of offenders.[10] It is interesting how humanitarianism took the shape given to it by the creators-reformers in the declaration of human rights. However, the word "humane" in this case means primarily "according to the scientific knowledge of man". The Enlightenment brought the idea of progress as an end in itself. Progress in all areas of human (and social) life was to be guaranteed by science, or more broadly, by the intellect or the human mind. Scientific knowledge was not, at the time, particularly strongly underpinned by methodology, and oscillated between a philosophical and a religious vision of the world, due to the attachment to the Aristotelian-Thomistic tradition – although, of course, the first traces of scientific thought could already be observed in the ideas of Archimedes. Progress as an end in itself, was, in turn, supposed to lead to improving the fate of humanity. Man became an instrument of progress; a tendency which in modern times (the twentieth century) reached its climax. There are more examples of subordinating social order to the idea of progress: for instance, the devastation of the environment is a result of industrial development and consumption (industrialization leads to improved living conditions, thus maximizing the happiness of the masses, so it is useful).[11] In criminal law, such subordination found expression in the anthropological theory of Cesare Lombroso or in the ideas of resocialization. It was the complete opposite of the pre-Enlightenment world and thinking, in which the utilitarian, practical or instrumental categories remained in the background or were insignificant (although, of course, instrumental rationality in ethics was, as it were, "invented" by Thomas Hobbes).[12]

The Middle Ages treated man as a spiritual being and the punishment could be cruel if only it was to save the human soul. It was the spiritual that justified the means (although there was no lack of abuse on the part of rulers, as the monarchs otherwise enjoyed the royal anointment and ruled "of the will of God").[13] The Modern Era in turn, at least since Helvetius, has treated man as essentially a malleable being, susceptible to educational and preventive influence and impact from the external environment.[14]

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[8] Cf. W. Kymlicka, *Liberalism, Community and Culture*, Oxford 1989, chapter IV; D.D. Raphael, *Problems of Political Philosophy*, London 1989, pp. 142ff.

[9] J.-F. Lyotard, *Postmodernizm dla dzieci. Korespondencja 1982–1985* [Eng. *The Postmodern Explained: Correspondence, 1982–1985*], Warszawa 1998, pp. 109–111.

[10] Cf. M. Peno, *Refleksyjna nauka prawa – uwagi na tle nauki prawa karnego* [Eng. *Reflexive Jurisprudence – Remarks in the Perspective of the Criminal Law Jurisprudence*], in: K.J. Kaleta, P. Skuczyński (eds.), *Refleksyjność w prawie. Konteksty i zastosowania* [Eng. *Reflexivity in Law. Contexts and Applications*], Warszawa 2015, pp. 331–353.

[11] Cf. R. Posner, *The Economics of Justice*, Harvard 1983, pp. 56–67 (the problem of the so-called moral monstrousness).

[12] Cf. J. Stelmach, B. Brożek, *Metody prawnicze* [Eng. *Legal Methods*], Kraków 2006, pp. 128–129.

[13] See: J. Baszkiewicz, *Myśl polityczna wieków średnich* [Eng. *Political Thought of the Middle Ages*], Poznań 2009, pp. 94–98.

[14] More on the subject: N. Gill, *Educational Philosophy in the French Enlightenment: From Nature to Second Nature*, Farnham–Surrey 2010.

According to this tradition priority should be given to prevention, rehabilitation or the communication function of punishment, including the relinquishment of offenses and punishments in favor of social defense measures and the social danger of the offender.[15] Secondly, punishing citizens in deliberative democracy out of the need arising from the cool Enlightenment rationalism must be instrumental, not emotional. Penalty cannot be regarded as "righteous vengeance" – one whose Old Testament prototype is God's answer to a particularly serious sin committed by persons or communities. If one were to use the measure of "justice" in the spirit of modern thought, punishment should be recognized as a kind of rationalized (reasoned by various arguments) retribution.[16]

Moreover, utilitarian rationality "to punish citizens" forces minimization of costs and maximization of objective social benefits related to the institution of punishment. Naturally, the costs and benefits resulting from punishment can be named – as taught by the mainstream economic approach to law.[17] Because the suffering of convicts cannot be quantified, the doctrine of law has slowly been substituting costly criminal liability with compensation methods. The ideology of civil society based on the social contract (and thus based on the equality and freedom of mercantilist-oriented entities) constituted a factor reinforcing such a direction of considering criminal law.[18]

The process of bringing the compensatory (restorative) role of criminal law to the forefront coexisted with the growing role of pluralism or axiological relativism, dulling the moral blade of penalty. The crime has become an evil perceived from the perspective of the community, but not so much moral evil as rather an evil "material" or "countable" – associated with a specific harm rather than morality.[19] Modern social doctrines after all deny the existence of the *sui generis* general or universal code of ethics; it is therefore difficult to provide clear criteria for moral judgments.[20]

Born as a result of the Enlightenment reform, the contesting trends in criminal law jurisprudence in fact merge into the program of modernity, implemented in a globalized world dominated by the philosophy of liberalism – with its ills and weaknesses.[21] At the same time, one can still talk today of the twilight of old controversies. In reflexive modernity, criticism of the post-Enlightenment criminal law as a tool to protect the interests of the group that has an impact on political decision becomes less important. Criminal law, taking a critical perspective, served as an instrument of a political nature but legitimized by expert knowledge (criminological basis of criminal law, expert crimi-

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[15] Cf. M. Peno, *Nowoczesna polityka kryminalna w świetle koncepcji polityki tworzenia prawa Jerzego Wróblewskiego* [Eng. *Contemporary Criminal Policy in the Light of Jerzy Wróblewski's Concept of Law-Making Policy*, in: T. Bekrycht, M. Zirk-Sadowski (eds.), *Wpływ teorii Jerzego Wróblewskiego na współczesne prawoznawstwo* [Eng. *The Influence of Jerzy Wróblewski's Theory on Contemporary Jurisprudence*], Warszawa 2011, pp. 67–74.

[16] Cf. R. Nozick, *Retributive Punishment*, in: R. Nozick, *Philosophical Explanations*, Cambridge (Mass.) 1982, pp. 363–402; A.P. Kaufman, *The Reform Theory of Punishment*, "Ethics" 1960/1, pp. 49–53; D. Golash, *The Retributive Paradox*, "Analysis" 1994/2, p. 72ff.; H. Morris, *Persons and Punishment*, "The Monist" 1968/4, pp. 475–501.

[17] Cf. R.A. Posner, *An Economic Theory of the Criminal Law*, "Columbia Law Review" 1985/6, pp. 1193–1231.

[18] See: A. Marciano, in: A. Marciano (ed.), *Constitutional Mythologies,* New York–Dordrecht–Heidelberg–London 2011, pp. 1–12.

[19] Cf. H. Stewart, *The Limits of the Harm Principle*, "Criminal Law and Philosophy" 2010/1, pp. 17–35.

[20] Cf. B. Williams, *Morality*, Cambridge 1976, pp. 34–96; D. Nelken, *Comparative Criminal Justice. Beyond Ethnocentricism and Relativism*, "European Journal of Criminology" 2009/4, pp. 291–311.

[21] Cf. Z. Bauman, *Globalizacja* [Eng. *Globalization*], Warszawa 2002, p. 80ff.; Z. Bauman, *Szanse etyki w zglobalizowanym świecie* [Eng. *The Chances of Ethics in Globalized World*], Kraków 2007, pp. 7–26; O. Górniok, *Pytania o prawo karne w tzw. erze globalizacji* [Eng. *The Questions on Criminal Law in the So-Called Globalized Age*], in: W. Czapliński (ed.), *Prawo w XXI wieku. Księga pamiątkowa 50lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk* [Eng. *Law in the XXI Century. The Book Commemorating 50th Anniversary of The Institute of Law Studies of the Polish Academy of Sciences*], Warszawa 2006, p. 222ff.

nal policy, etc.). Criminal law was supposed to protect the interests of the individual inscribed into the framework of liberal philosophy – concerned for their own autonomy, which was guaranteed by private ownership.

The central place, in the liberal tradition, was taken by ownership and rights (freedoms) guaranteed by the state and its structure. In the criminal law jurisprudence of "mature modernism", in the conditions of the liberal-democratic state, civil society with the idea of communication is to constitute the main point of reference in the study of criminal liability.[22] From the point of view of contemporary philosophies of state and law there is no reasonable alternative to the concept of civil society and liberal democracy.[23] Both concepts became rooted in modernity to such an extent that most likely in an unconscious way the emergence of two slightly related spheres got overlooked. On the one hand, in the spirit of modern progress, civil institutions for citizens emerged. On the other hand, a group of non-citizens (at least in the cultural sense – survivors from a no man's land between the private and the public sphere) emerged, for whom these institutions are not intended.[24] For the purposes of further comments, let us assume that a non-citizen is a person who, due to various social mechanisms (social exclusion), has found themselves, through no fault of their own, outside civil society – understood more broadly than a group of citizens having certain rights and freedoms. Civil society is a cultural category, assuming the willingness and possibility of active participation in the shaping of social and political life. In criminal law jurisprudence, a distinct manifestation of this state of affairs is directing criminal policy towards implementing the compensatory function. This is, naturally, a manifestation of commodification of social reality which in this sense leads to the colonization of the "worlds of life".

Retributivism refers to a kind of moral teaching.[25] It is assumed that every citizen is able to understand their moral and legal responsibilities and the source of those obligations. Moreover, they are ready to accept them as fair. As a result of this, fundamentally, every citizen is able to choose actions consistent with those responsibilities. They are ready to accept the penalty for breaching those obligations. Retributivists think that the recognition of moral and legal obligations lies within the capabilities of every individual. As citizens, they have also been given a chance by the state to internalize these obligations in the process of socialization, which takes place in the conditions of a democratic and liberal society.

In fact, supporters of restorative justice view social reality in a similar way. Proponents of such an approach to criminal law place emphasis on the attempt to rebuild and strengthen the smallest social structures and communities within which conflicts emerge. The conflicts can be prevented by the appropriate shaping of social relations. The program of restorative justice is based on activities aimed at social support, including support for families, increasing educational opportunities, social welfare and programs to counter crime-inducing phenomena (e.g. poverty, exclusion, etc.).[26]

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[22] Cf. A. Ripstein, *Equality, Responsibility and the Law*, Cambridge 2004, p. 133ff.; A. von Hirsch, *Uzasadnienie karania i wymiaru kary we współczesnym retrybutywizmie* [Eng. *The Justification of Punishment and the Degree of Sentence in Contemporary Retributivism*], "Ius et Lex" 2006/1, p. 47ff.; I. Primoratz, *Punishment as Language*, in: J. Feinberg, H. Gross (eds.), *Philosophy of Law*, Belmont (CA) 1995, pp. 602–613; R.A. Duff, *Punishment, Communication…*, p. 35ff.

[23] P.H. Denton, *The End of Democracy*, "Essays in Philosophy" 2015/1, p. 70ff.; I. Shapiro, *The Moral Foundations of Politics*, New Haven–London 2003, pp. 190–191, 224–225.

[24] Cf. K. Franko Aas, M. Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford 2013.

[25] R.A. Duff, *Crime, Prohibition and Punishment*, "Journal of Applied Philosophy" 2002/2, pp. 95–97.

[26] See: M. Królikowski, *Sprawiedliwość retrybutywna…*, pp. 107–129.

Contrary to claims of some criminologists and sociologists, i.e. those contesting classic and modern criminal law, the model of restorative justice does not serve to rebuild the relationships between peers (people equal to one another) – members of the community (i.e. the victim and the perpetrator) disturbed by the social conflict.[27] Apologizing to the victim and repairing the damage makes sense only if it is sincere. At the same time, sincerity in grief is possible only where there is no resentment. We can accept neither Max Scheller's nor Friedrich Nietzsche's vision. Resentment raised by the implementation of restorative justice has one of two effects.[28] It either leads to the humiliation of the perpetrator through the redistribution of social prestige or to the growing hatred and feelings of grief and jealousy towards the victim. The perpetrator who has to repair the damage may be (or as evidenced by criminologists – usually is)[29] a poor resident of a notorious district of a big city, and the victim may be a rich resident of a suburban villa. It does not seem that a broken window in a luxury car is, in the eyes of the former, an evil equivalent to the suffering associated with poverty. A violation of the rule ordering respect for ownership is evil as a certain injustice, but poverty is also a violation of elementary social rules.[30]

Thus, there is a feeling of resentment of the offender who is to repair the damage done to the victim, exacerbated by the ideology of equality, freedom and autonomy. Not to mention perpetrators belonging to economically or even socially underprivileged minorities, including immigrants.[31] Thus, if we take the classical assumptions and concepts of political philosophy as a starting point – including civil society, participatory democracy as well as freedom and autonomy, equality, and ownership – then methods of restorative justice will represent the pinnacle of criminal law jurisprudence.[32]

However, if we look at modernity, adopting a critical-reflexive perspective, we will easily come to the conclusion that we have returned to our philosophical starting positions, almost the same in which Enlightenment reformers were two centuries ago. In place of existing controversies, new problems are brought by reflexivity. If we are to believe sociologists, reflexivity, focused on itself and devoid of religious or even ideological framework, leads to the weakening of control mechanisms. These transformations are accompanied by polarization of social classes and exclusion from the civil society of the so-called underclass (to which the lion's share of offenders belong).[33]

First and foremost, criminal law for citizens is shaped, based on mediation, communication and restorative justice. In relation to this group, restorative justice is an emanation of the humanitarian progress of criminal law. This group, however, is not the only stratum in modern societies. Ethics and rationality unified in classical political

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[27] Cf. N. Christie, *Conflicts as Property*, "British Journal of Criminology" 1977/1, pp. 1–15.

[28] Z. Bauman, *Szanse etyki*…, pp. 12–18; M. Scheller, *Resentyment a moralność* [Eng. *Resentment and Morality*], Warszawa 2008, pp. 155–212; F. Nietzsche, *Z genealogii moralności* [Eng. *On the Genealogy of Morality*], Kraków 2003, p. 22.

[29] See: B. Hołyst, *Zagrożenia ładu społecznego* [Eng. *Threats to Social Order*], Warszawa 2013, pp. 146–172.

[30] Cf. P. Pettit, *Republican Theory and Criminal Punishment*, "Utilitas" 1997/9, pp. 59–79; C. Finkelstein, *Punishment as Contract*, "Ohio State Journal of Criminal Law" 2011/8, p. 319ff.

[31] Cf. Z. Melosik, *"Epistemologia" postmodernizmu* [Eng. *The "Epistemology" of Postmodernism*], in: Z. Melosik (ed.), *Nieobecne dyskursy* [Eng. *Absent Discourses*], Toruń 1993, p. 168ff.

[32] Cf. B.A. Arrigo, *Social Justice/Criminal Justice. The Maturation of Critical Theory in Law, Crime, and Deviance*, Scarborough 1998, pp. 1–14; M. Fleurbaey, *Fairness, Responsibility, and Welfare*, Oxford 2008, pp. 10–12, 245ff.

[33] A. Giddens, *Życie w społeczeństwie posttradycyjnym* [Eng. *Living in a Post-Traditional Society*], in: U. Beck, A. Giddens, S. Lash, *Modernizacja refleksyjna* [Eng. *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order*], Warszawa 2009, pp. 79–144; S. Lash, *Refleksyjność i jej sobowtóry: struktura, estetyka i wspólnota* [Eng. *Reflexivity and its Doubles: Structure, Aesthetics, Community*], in: U. Beck, A. Giddens, S. Lash, *Modernizacja*…, pp. 146–159; M.B. Katz (ed.), *The "Underclass" Debate: Views from History*, Princeton 1993.

thought called for recognition of the fact that since someone is living in given socio-political conditions, agreeing to laws governing a given community, they implicitly enter into a social contract imposing on them the obligation to comply with the judgments of the community represented by the courts.[34] In particular, they are required to submit themselves to punishment. However, the contract is based on the assumption that the citizen has the autonomy of being able to leave the community.

Modern times, globalized and arranged in the (politically and economically) liberal spirit, warrant the freedom of movement for the administrators of capital – corporations providing work and daily bread. Citizens, however, especially those belonging to the underclass, are often almost "attached to land", as seen especially in the countries of Eastern and Central Europe which are painfully suffering the consequences of a system transition. Therefore, is the Socratic contract in force? Do they have the duty to repair the damage and submit themselves to criminal liability? Certainly belonging to the civil society – which in reflexive modernity is a cultural category – justifies such a social contract. But the condition of justification must be a real possibility of participating in the operation and benefits of the community.

3. Reflexive modernity, civil society and criminal law

Beyond civil society lays the sphere of politics or policy, which is not about the justification of punishment, but the effectiveness of simple spatial isolation. In this sense, it is difficult to talk about the benefits of the emancipation of an individual from the limitations imposed by society. The weakening of the external authority and political responsibilities towards the state is replaced with self-control proper to reflexive modernity only where the individuals have adequate intellectual and ethical predispositions.[35] The disappearance of the influence of external rules and values, along with the mechanism of exclusion from civil society structures results in the weakening of self-control and a selfish attention exclusively to one's own perspective (but also in repressive subordination by the state). As a result, persons belonging to the underclass in the best case try "not to get into anyone's bad books" in order to enjoy immediate benefits from the institutions of developed societies, thus becoming a "bargaining chip" adjusted to political mechanisms of a democratic civil society, as well as their subject.[36] Such a state of affairs creates favourable conditions for objectifying criminal liability, abandoning the concept of guilt, and for attempts to provide ethical justification of penalty – which are the concepts taken from the "world of citizens". This, in consequence, leads to the politicization and objectification of people banished to the social periphery.[37]

It is symptomatic that even in the 1970s it was the neo-Kantian order to restore moral subjectivity of the offenders (H. Morris, J. Feinberg, A. von Hirsch) that was to serve as a stimulus to reform penal doctrines and to abandon the criminal law rehabilitation

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[34] J.G. Murphy, *Marxism and Retribution*, "Philosophy and Public Affairs" 1973/2, pp. 217–243.

[35] S. Lash, *Refleksyjność i jej sobowtóry*…, p. 149ff.

[36] Cf. R.A. Duff, *A criminal law for citizens*, "Theoretical Criminology" 2010/3, pp. 293–309.

[37] S.N. Eisenstadt, *Utopia i nowoczesność. Porównawcza analiza cywilizacji* [Eng. *Utopia and Modernity. A Comparative Analysis of Civilisations*] Warszawa 2009, p. 143ff.; U. Beck, *Ponowne odkrycie polityki: przyczynek do teorii modernizacji refleksywnej* [Eng. *The Rediscovery of Politics: Towards a Theory of Reflexive Modernization*], in: U. Beck, A. Giddens, S. Lash, *Modernizacja*…, Warszawa 2009, pp. 11–54.

model.[38] In this sense, criminal law jurisprudence has come full circle. Criminal policy is going back to the isolation-treatment phase. Restorative justice measures and other safeguards are applied with regard to citizens, while the underclasses are subjected to treatment and therapy, combined with possibly effective and long-lasting isolation (and for immigrants – expulsion from the country).[39]

Reflexive modernity is witnessing a declining importance of the criticism of post-modern criminal law as a tool for protecting the interests of the group that has an influence on political decisions – i.e. as a tool that is essentially political although justified by expert knowledge (criminology, criminal policy etc.). A central position, in the liberal tradition, was occupied by ownership and by the rights guaranteed by the state and its structures.[40] Reflexivity, as has just been mentioned, leads to the weakening of control mechanisms.[41] Such changes are accompanied by the polarization of social classes and by the exclusion of the so-called underclass (which certainly includes a vast majority of criminals) from the civil society. In place of hitherto existing controversies, reflexivity brings up new problems. Above all, new citizen-oriented criminal law is being shaped, based upon mediation and communication (e.g. restorative justice, Expressive Theory of Punishment).[42]

It seems that in the context of reflexivity the contemporary philosophy of penal law must face three issues. The first problem concerns the sources of modern penal law rooted in the Age of Enlightenment. Enlightenment brought about the ideal of individualistic and autonomic citizenship (i.e. autonomy of the individual citizen from the community and the state), supported by political liberalism and a utilitarian approach to the social reality. Crime and punishment ceased to belong to the realm of conscience and penance; instead, they became part of a social game based on profit and loss calculation. Man was no longer a "social animal", turning into a simple machine counting the amount of pleasure and pain resulting from his actions (one may call it "an ethical automatic machine"). However, citizens, who were supposed to embody the model of a rational entity (in the utilitarian sense), did not want to submit to philosophers such as Cesare Beccaria (who, in addition, was primarily an economist), J.S. Mill or J. Bentham.[43] As a result, the 19th century gave rise to intellectual currents opposing the rationality and freedom of man, as well as the category of the perpetrated crime and deserved punishment. Subsequently, it was claimed that the alleged criminals shall be isolated and "treated" if possible (educated morally, to be exact). However, that was a transitional period because the prevailing belief that man's actions are determined by external factors could not be reconciled with the 20th-century ideal of subjectivity and human dignity.[44]

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[38] M. Chmieliński, *Kanta filozofia kary* [Eng. *Kant's Philosophy of Punishment*], "Ius et Lex" 2006/1, pp. 310–322; R.A. Duff, *Theories of Criminal Law*, in: E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2013, available online at: http://plato.stanford.edu/archives/sum2013/entries/criminal-law/.

[39] Cf. B. Wojciechowski, *Dyskursywno-Etyczne Uzasadnienie Kary Kryminalnej* [Eng. *Justification of Criminal Sanction from a Discourse and Ethical Point of View*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006/3, pp. 137–151.

[40] T. Snyder, *Czarna ziemia. Holocaust jako ostrzeżenie* [Eng. *Black Earth: The Holocaust as History and Warning*], Kraków 2015, p. 113ff.

[41] U. Beck, *Ponowne odkrycie…*, pp. 11–54.

[42] All mainstream trends discussed in detail in: M. Tunick, *Punishment. Theory and Practice,* Berkeley–Los Angeles–Oxford 1992; M. Wenzel, T. Okimoto et al., *Retributive and Restorative…*, pp. 375–389; W. Wringe, *An Expressive Theory of Punishment*, London 2016, pp. 3–17.

[43] C. Beccaria, *On Crimes and Punishments,* in: R. Bellamy (ed.), *Beccaria: On Crimes and Punishments and Other Writing*s, Cambridge 1995, p. 9ff.; B.E. Harcourt, *The Illusion of Free Markets Punishment and the Myth of Natural Order*, Cambridge–London 2011, p. 53ff.

[44] L. Levanon, *Personhood, Equality, and Possible Justification for Criminal Punishment*, "Canadian Journal of Law and Jurisprudence" 2014/2, pp. 439–442.

The second issue concerns the model of deliberative community. If people are rational entities (the second half of the 20th century brought about a return to Kant), then they should be allowed to participate in the governing of the community that they constitute.[45] Although such an approach may seem to stand in opposition to the liberal modernist vision of technocracy, it does the most to ensure and extend the sphere of citizen autonomy (as Robert Nozick called it – deciding about oneself) and political freedom.[46] Rule of the experts and rule of the people – autonomous units, are two extremes difficult to reconcile.

The abovementioned fact may be easily observed by asking a question fundamental to penal philosophy: do citizens want more or less of penal law? Does less penal law guarantee more freedom or perhaps it is penal law that ensures equal freedom of equal individuals?[47] Modernity provided us with a simple answer to these questions – decision-makers are technocrats because they have the means to control citizens, instill fear in them, and build a populist crime policy. Crime policy does not belong to citizens, despite the slogan stating "citizens will punish citizens" that accompanies contemporary neoclassical thought in the science of penal law.[48] The mechanism of penal justice does not accommodate justice *per se*. Besides, apart from the participating citizens, there is a group of people who are socially excluded in some sense – also due to the injustice of principles determining the manner of participation of individuals (citizens) in the community. The excluded individuals are not citizens (i.e. they are not citizens-in-fact), and yet they live in the world of civic institutions.

The third problem is strictly related to counteracting the maladies of the modern state and penal law. Restorative justice was supposed to be the answer in the penal sphere. Yet it seems that the ideal of restorative justice does not survive the confrontation with the utilitarian liberal social reality, in which social stratification separating citizens and non-citizens is getting deeper.

Penal law does not solve social problems and it may actually even exacerbate them. Restorative justice was supposed to mask this simple fact, proving that penal law may bring about specific social benefits – for the community, as well as for the victim and the perpetrator of the crime. However, contemporary post-modern societies are exposed to the risk of resentment that compromises hope (still) placed in penal law reform aimed at restorative justice.[49] Therefore, a return to another model of penal law is necessary. Reflexive critique of solutions offered by late modernism, referring to rehabilitation and social defense, accommodating determination of at least some of the aspects of human life, seems to be the direction in which the contemporary science of penal law will soon proceed.

Despite the obvious differences between retributivists and the restorative justice movement, the point of reference is the concept of the citizen, understood as a person integrated into the framework of civil society. The problem is that individuals who for various reasons have been excluded socially remain on the outskirts of the traditional civil society and are not interested in community-building. According to the retributivist

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[45] See: J. Miklaszewska, P. Spryszak (eds.), *Kant wobec problemów współczesnego świata* [Eng. *Kant and the Problems of the Modern World*], Kraków 2006; M. Chmieliński, *Kanta filozofia*…, pp. 310–322.

[46] R. Nozick, *Anarchia, państwo i utopia* [Eng. *Anarchy, State, and Utopia*], Warszawa 2010, pp. 7–13, 75ff.; L. Levanon, *Personhood*…, pp. 439–442.

[47] Cf. A. Zoll, *Wina i kara* [Eng. *Guilt and Punishment*], "Nauka" 2004/1, pp. 31–46.

[48] R.A. Duff, *Karanie*…, p. 21ff.

[49] Cf. R.E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, "Ethics" 1977/4, p. 279ff.

philosophy, these people cannot be forced to cooperate – to integrate into the bloodstream of civil society with its democratic and liberal (in the sense of political philosophy) values and responsibilities. However, the proponents of restorative justice not only make the same mistake as retributivists (forcibly integrate people into the community), but somehow contrary to the intentions, they may deepen social differences and conflicts, clearly leading to resentment. In the case of restorative justice trends, resentment is substituted by the classical concept of stigmatization associated with criminal punishment understood in retributive terms.

Beyond this fact is the propensity of at least some people to violate the law. Nevertheless, it is not necessarily their personal choice. Sometimes they may not be aware of the legal and moral responsibilities or may have other reasons for taking actions that benefit them in some way but at the same time deviate from the standard or generally accepted behavior. In this sense, retributivists can at least state that punishment serves as retribution for the violation of norms. Proponents of restorative justice, in turn, in the case of these people, must agree on a penalty, excluding most perpetrators of common crimes from the scope of alternatives to punishment.

4. Conclusion

Criticism of the post-Enlightenment order can be the basis for reflection on modern institutions. The ethics of modernity is not in any way more perfect than the pre-Enlightenment (e.g. medieval) ethics, and the solutions which supposedly express human emancipation and enshrine human subjectivity and autonomy can be interpreted as "inhumane" at a level comparable to witch burning. A good example is restorative justice and the problem of resentment applicable here (whether in Nietzsche's or Scheller's version). If, in the twenty-first century, two centuries after the beginning of the Enlightenment transformation, there are still people who have reasons to commit crimes, this should be considered a failure of social scientists, philosophers and reformers.

Liberal and utilitarian values are blind to real social problems, and criminal law guided by the spirit of these values does not solve any problems but generates or amplifies them (criminal offences are committed largely by people excluded from civil society, who are still expected to care for the common good and feel responsible for violating the rules of social cooperation in the name of said civil society).

Restorative justice was supposed to be a response to criminal law facing the challenges of modernity, but it can easily blunt or weaken punishment where punishment is needed, or be used to provide a prosthesis for the dismantled institutions of the welfare state. It is supposed to offer an alternative to the classical criminal law, but in fact it demonstrates that such an alternative does not exist. This is because it would require radical changes, which are too expensive and politically not very attractive. And still, individuals belonging to the group of the most frequently penalized remain outside the framework of civil society. Perhaps, therefore, it is necessary to change the overall way of thinking about the criminal justice system – which reflects the particular model of social justice – in order to create the basis for change in the philosophy of criminal law.[50]

[50] B.A. Arrigo, *Social Justice…*, p. 1ff.

The Enlightenment as a certain intellectual project set itself the goal of solving key human problems. These included crime, a violation of social order. Besides, crime stems from multiple sources – it is a reflection of poverty, exclusion and all kinds of inequality. Therefore, it is connected with a wide range of social problems. Modernity, being a continuator of the Enlightenment, led to the negation of non-scientific and emotional punishment schemes. The solution was sought in restorative justice. Simultaneously, due to the domination of liberalism, modernity has forced criminal justice to become similar to a market in which mainly the privileged have a share. They are also its beneficiaries. Thus, we have reformed criminal law and allegedly focused it on the human being (breaking the frameworks of cold rationalism), while at the same time excluding from this system everybody who from the social point of view is not needed – after all, the excluded are in prisons, and crime is a policy and electoral gaming tool. Consequently, we have here two faces of modernity – reflective and political.

Reflexivity in the science of criminal law takes the form of the search for new and alternative ways and means of solving the problems associated with the phenomenon of crime, including attempts to redefine crime and punishment. The impact of politics can be seen by analyzing the attempts to reform criminal law, which have only superficial character. Although measures alternative to punishment (restorative justice, compensation measures) are employed, criminal law is still recognized as the cheapest, quickest and most effective way to influence the functioning of society. This exempts politicians from the liability for the actual problems (poverty, social exclusion, social inequalities), which in turn are among the main causes of crime.

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