

## “Merciful Justice” and the Challenges of Posthumanism in Legal Philosophy: Some Comments on the Criterion for Evaluating Technological Progress in the Criminal Justice System

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**Abstract:** “Merciful Justice” and the Challenges of Posthumanism in Legal Philosophy: Some Comments on the Criterion for Evaluating Technological Progress in the Criminal Justice System

The study considers criteria for the development of artificial intelligence in the legal system. The author argues that the criterion for assessing the application of technological developments in law should not be traditional, mostly retributive concepts of justice. Instead of traditional approaches to criminal justice, a more authoritative criterion for the development of the use of artificial intelligence in law should be the concept of “merciful justice,” which the author reconstructs using a clique of relevant contemporary works on the topic of mercy. “Merciful justice” is in line with human-centred criminal law, particularly in relation to human values and the role of humans in the legal system, which poses a major challenge for post humanist research into the integration of technologies such as artificial intelligence into the criminal justice system.

**Keywords:** Justice, Mercy, Merciful Justice, Posthumanism, Philosophy of Law.

**Summary:** 1. Introductory Topics. Does “Posthuman Judgment” Really Create a Better Legal System or Does It Tend to? – 2. What Criteria to Assess the Development of Artificial Intelligence in Criminal Law? “Ordinary” Justice Versus “Merciful Justice” – 3. Posthumanism and Jurisprudence – 4. “Merciful Justice”. What Is It Really About? – 5. The Personalist Catholic Concept of Mercy and Some Remarks About Secular Concepts – 6. An Effort to Recapitulate. In the Name of “Merciful Justice”.

### 1. Introductory Topics. Does “Posthuman Judgment” Really Create a Better Legal System or Does It Tend to?

The rise of artificial intelligence in the phenomena of legal existence as such remains a challenge for legal philosophy, especially for the post humanist-oriented one. We note that without the use (in various forms and intensities) of new technologies, it is even difficult to imagine a legal phenomenon today (it is now unthinkable to enact, enforce or follow the law without relying on some kind of technology to admit).

Especially important is the use of algorithms in the process of applying criminal law, and sometimes even the need to take away the process of interpretation of the law from lawyers, who – unlike “objective machines” – weigh towards subjectivity and through their humanity are simply less appropriate to interpret and apply. However, it is argued that the use of artificial intelligence carries many risks and is not an ideal remedy for the imperfection of “purely human” justice. For example, let us point out that detailed guidelines on the use of artificial intelligence in the justice system are already being adopted today, trying to face emerging problems, including, above all, threats to fundamental rights<sup>1</sup>.

Today, it is undeniable that technological advancements have a significant impact on the law<sup>2</sup>. For example, it is difficult to imagine that legal information can be obtained almost without the use of computers (particularly legal information systems designed and developed specifically for this purpose). It is also difficult not to notice the increasing use of technology in everyday application of law, both in the purely functional aspect, but also when issuing substantive decisions. In turn, the development of technology triggers a whole range of ethical issues, and consequently legal dilemmas. New methods and possibilities for committing and combating crimes are emerging, both prevention and detection<sup>3</sup>.

Questions and related issues can be multiplied, even without being tempted to formulate answers, but rather by showing a vision that requires argumentation. Is it possible to apply criminal law without involving the world of technology in this process, to mention, for example, legal information systems, the recording of court hearings or judicial information portals? Are we able to verify the information about the applicable law obtained through the development of technology, or do we prefer to trust them completely? In what extent will artificial intelligence have an impact on the functioning of criminal justice in the near future?

<sup>1</sup> More about see e.g.: A. Sulikowski, *Posthumanizm a prawoznawstwo*, Wydawnictwo Uniwersytetu Opolskiego, Opole, 2013, pp. 222-226; *European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, Council of Europe, Adopted at the 31<sup>st</sup> plenary meeting of the CEPEJ (Strasbourg, 3-4.12.2018); Council of Europe, Strasbourg 2019. Full text available online <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>, [Access: 07/04/2024].

<sup>2</sup> It is also worth mentioning that already in the 1960s there was an urgent need for the legal sciences and the legal order to acquire the importance of technical progress in criminal law, see e.g. T. Cyprian, *Postęp techniczny a prawo karne*, Państwowe Wydawnictwo Naukowe, Warszawa, 1966.

<sup>3</sup> See e.g. W. Zalewski, “Contrology and Criminal Law: Genesis, Current State, Perspectives”, in *Studia Iuridica Lublinensia*, 30 (2021), n. 2, pp. 381-397.

## 2. What Criteria to Assess the Development of Artificial Intelligence in Criminal Law? “Ordinary” Justice Versus “Merciful Justice”

What should be the criteria for assessing the development of new technologies, including artificial intelligence, in law? Should classical/traditional (consistent with prevailing legal paradigms) concepts of justice be considered in the first place? Most often, it is the argument of “creating a better justice” that speaks for the development of artificial intelligence in the justice system.

As a result, we will build a better, more just world – a colloquial, universally proclaimed belief, almost like a manifesto, can be formulated here. However, the development of artificial intelligence and new technologies entails many risks, and the use of algorithms has proven that probability does not guarantee fairness<sup>4</sup>.

How do we ameliorate the legal system by introducing fairer rules? How to accomplish legal algorithms more equitable, or more reliable? Even if the impact of artificial intelligence on the legal system, including criminal law, is becoming an increasingly frequent subject of reflection<sup>5</sup>, it is worth considering whether we are not ignoring the central question, namely what the qualitative development of law should aim towards. It is not about ensuring “more efficient justice” or simply “better justice”, but rather “more qualitative justice”, which is more complex than varieties forms of retribution<sup>6</sup>.

This paper attempts to argue that the evaluation of whether new technologies, such as artificial intelligence, can significantly enhance the legal system should be based on the concept of “merciful justice” rather than still dominant various forms of retributive justice. The objective of “merciful justice” is to attain a state of justice that “can be perfected through love”. “Merciful justice” refers to more than just the efficiency and equality of the legal system. It also encompasses its relational, personal, and human dimensions, emphasizing the significance of love and mercy within this framework<sup>7</sup>.

<sup>4</sup> It is significant that technological development does not solve existing problems, and even generates new ones. It is worth mentioning very well-known problem of discrimination due to the use of algorithms. More see e.g. K.G. Muhammad, *The Condemnation of Blackness. Race, Crime, and the Making of Modern Urban America*, Harvard University Press, Cambridge (MA), 2019.

<sup>5</sup> See e.g. R.W. Campbell, “Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning”, in *Colorado Technology Law Journal*, 18 (2020), n. 2, pp. 323-349; T. Sourdin, *Judges, Technology and Artificial Intelligence. The Artificial Judge*, Edward Elgar Publishing Limited, Cheltenham, 2021.

<sup>6</sup> For an interesting study on the current condition of the retributive idea in the context of criminal punishment see A. Incampo, W. Żelaniec (eds.), *Universality of Punishment*, Cacucci, Bari, 2015.

<sup>7</sup> On how the idea of Christian love (*agape, caritas*) can inspire the philosophy of law, including the philosophy of criminal law, see e.g. R.F. Cochran Jr, Z.R. Calo (eds.), *Agape, Justice, and Love. How Might Christian Love Shape Law?*, Cambridge University Press, Cambridge, 2017.

At the end of the introduction, it should be pointed out which philosophical approach is being practiced here. This study consciously aligns with the current trend of postmodern and post-analytically oriented reflection by detaching from the necessity of analytical studies and instead attempting to draw attention to the necessity of exploring novel paradigms in contemporary philosophical reflection.

### 3. Posthumanism and Jurisprudence

However, before discussing the potential of the concept of “merciful justice” for assessing new technologies in criminal law, it is necessary to recall the assumptions of the post humanist paradigm in jurisprudence<sup>8</sup>. Posthumanism is still an unrecognized, even avant-garde concept, although at the same time it is a textbook or lexicon term. It is believed that for the first time the term posthumanism was used by Ihab Hassan in his essay titled “Prometheus as Performer: Towards a Post humanist Culture”<sup>9</sup>. Interpreting this work, Piotr Zawojski points out:

In the original form of a dramatic text written on the “voices” of the main protagonists, which are: Pretext, Mythotext, Text, Heterotext, Context, Metatext, Posttext and Paratext – Hassan proves that humanism ends because man is changing, and the understanding of humanity is changing<sup>10</sup>.

Moreover, according to Piotr Zawojski:

The ideas of posthumanism are a set of views and concepts that describe the fundamental change taking place in the perception of human’s position in the synergistically interacting environment of living beings, machines, artificial intelligence (AI) and artificial life (Alife). The prefix “Post” implies reflection on the decline or exhaustion of a traditional, historically established paradigm in which the place of humans as the center of the (universal) world was not up for discussion from an anthropocentric perspective. Is posthumanism the end of humanism?<sup>11</sup>

<sup>8</sup> Increasingly, it can be argued that we are entering a period of posthuman law; see e.g. S. Braman, “Posthuman Law: Information Policy and the Machinic World”, in *First Monday*, 7 (2002), n. 12, (<https://doi.org/10.5210/fm.v7i12.1011>).

<sup>9</sup> See e.g. J. Campana, “Afterword: Posthumanism – Past, Present and Future”, in *Multicultural Shakespeare: Translation, Appropriation and Performance*, 24 (2021), n. 39, pp. 191-196; K. Hoffmann, “Posthumanism według Pramoda K. Nayara”, in *Czas Kultury*, (2013), n. 4, pp. 153-161; I. Hassan, “Prometheus as Performer: Toward a Posthumanist Culture?”, in *The Georgia Review*, 31 (1977), n. 4, pp. 830-850.

<sup>10</sup> P. Zawojski, “Posthumanizm, czyli humanizm naszych czasów”, in *Kultura i Historia*, (2017), n. 32, p. 69; author’s translation.

<sup>11</sup> *Ivi*, p. 68, author’s translation.

For further consideration, we want to distinguish from the many possible meanings of posthumanism that it is a specific mental attitude that results from the rejection of recognized humanistic beliefs about the central and unique place of humans in the world. Given the scope of this study, it should be noted that our research for defining posthumanism is limited to a fragmented presentation of selected views and proposals. On the other hand, it is important to draw attention to the following findings, which, as follows from the nature of posthumanism, cannot be considered exhaustive and uncontroversial.

Posthumanism can and should be clearly distinguished from the numerous non-traditional movements that involve criticism or at least the reinterpretation of traditional views of humanism. Posthumanism questions the basic assumptions of traditional (classical) humanism and at the same time points to the need to reject the superior role of humans and their centrality in the world (and even the universe) and instead adopt a decentralized and equal attitude towards humans position in relation to the world around. In post humanist terms, human ceases to be the centre of the world, and its values cease to be central axiological categories. Here we should also mention many detailed consequences, because posthumanism requires the decentralisation of human’s position not only towards other beings and the world, but also, for example, dominant cultures towards marginalised or underestimated cultures. Posthumanism involves changing the perspective from hierarchical to dispersed, from egocentric to empathic, Eurocentric to multicultural, from universal to diverse and particular, etc. It is already clear here that posthumanism simply changes the world of human values, because firstly it requires confronting them with the needs of the whole living world, and second, it negates the so far limited understanding of humanity, in fact culturally conditioned to the Eurocentric perspective. In fact, there is no single definition of posthumanism, but there is also no single influence of posthumanism. By its very nature, posthumanism is decentralised and vague, just as the shape of the living world, which it describes (or rather designs?), is vague and at the same time diverse and multicentric. Posthumanism not only revolutionises our view on the meaning of human existence in the world, but also calls into question the shape of human-made cultural products, which include the legal system. It seems that the only strong assertion of posthumanism may be the belief that it is necessary to ask again about humanity and its place in the universe<sup>12</sup>.

What exactly is the essence of posthumanism? Is it a world without human or rather a world in which human is only “deposited” and their position in the world is “appropriate”? Of course, it is difficult, for example, to briefly refer in

<sup>12</sup> Some of the comments on the posthumanism paradigm in this section of the essay come from my previous study: T. Snarski, “Posthumanizm prawa karnego?”, in W. Cieślak, M. Romańczuk-Grącka (eds.), *In dubio pro humanitate. W stulecie urodzin Profesora Mariana Cieślaka*, Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego w Olsztynie, Olsztyn, 2023, pp. 71-87.

this study to the diversified currents of post humanist thought<sup>13</sup>, and even more difficult to predict what paths posthumanism will enter into in the future, including whether posthumanism will eventually replace humanism with what fundamental thought attitude. In any case, in the field of philosophy, including the philosophy of law, it has become increasingly feasible to encounter the adoption of the post humanist paradigm, resulting in the redirection of numerous conventional research concerns towards entirely novel, previously unidentified approaches.

Posthumanism, together with its assumptions and criticisms of humanism, poses many radical challenges to modern criminal law philosophy. Is criminal law necessary for humans and can it be justified by the potential rejection of an anthropocentric and humanistic perspective? Will the logic of law, including criminal law, persist in the posthuman world? Is it feasible to incorporate certain assumptions and concepts of posthumanism into the modern criminal law? What are the implications of a post humanist perspective for the objectives and functions of modern criminal law?

A reflection on possible relationships between posthumanism and law can, without a doubt, raise a number of fundamental questions about the ontology of law, as well as its axiology. Is there still room for traditionally identified legal values, such as the concept of justice, in the post humanist legal paradigm? Does posthumanism negate the idea of law since it is inherently linked to the world of human values? Is this possible and should post humanist law take human values into account? What reassessment of existing legal-philosophical paradigms would require a post humanist approach? Finally: based on what paradigm should posthumanism be evaluated? Is justice – “the highest value of law” – a suitable criterion for the positive assessment of post humanist technology? If so, what kind of justice?

On a Polish basis, Adam Sulikowski presented the possibility of the influence of posthumanism on legal science in a very comprehensive and interesting way in his monographic work. In his opinion:

[...] one can convincingly argue for the emergence and functioning of a phenomenon identified as posthumanism. Posthumanism, although initially marginal and dissident, is growing in strength, increasingly affecting various professionalised discourses. In other words, it has a future ahead of it<sup>14</sup>.

Furthermore, Sulikowski adds:

[...] Posthumanism has some potential to bring about changes in legal scholarship. If it succeeds and becomes a mainstream element of modern

<sup>13</sup> For example, see more about in: R. Braidotti, *The Posthuman*, Wiley, Oxford, 2013.

<sup>14</sup> A. Sulikowski, *op. cit.*, p. 9, author's translation.

jurisprudence, it may lead to significant reassessments within dominant legal approaches<sup>15</sup>.

At the same time, it is worth noting the division between technocentric posthumanism (which focuses primarily on technological progress) and naturalistic and biocentric posthumanism (which focuses primarily on the natural environment, conservation and, to varying degrees, the themes of evolutionism)<sup>16</sup>.

In the face of technological progress, we must resort to the post humanist perspective of legal scholarship and ask what criteria we can talk about in parallel with the technological development of the legal system, including criminal law. To formulate this problem differently: according to which criteria should a post humanistically oriented law be evaluated?

At this point, we should therefore return to the questions at the beginning of this study. Should this criterion be retributive justice or other (“traditional”, “classical”) idea of justice or alternative contemporary concepts of justice based, *inter alia* on consideration of mercy? However, if one takes into account the transitions associated with the development of technology and the philosophy of criminal justice, including in a post humanistic direction, the real challenge is not only how the classic concept of justice can be implemented in post humanistic criminal law, but also how a “merciful justice” is possible “as a form of justice perfected by the nature of mercy”. Karol Rutkowski, for instance, in regard to the issue of predictive justice in criminal law, expressly asserts that:

Algorithms, computers, judicial robots, and legal robots in general, will function successfully in the administration of justice if the values I refer to as divine are instilled and transmitted to them as a cultural legacy of humanity, with love, goodness, beauty, truth, and justice as the leading one. In this field, there is a necessity for an extra aspect that is not grounded in statistics, analysis, or logic; mercy is the essential component. This mercy must be a quality of all, without exception, those who apply the law, resolving conflicts, settling disputes, including applying the principles of equity in their resolution or settlement, and administering justice<sup>17</sup>.

Why is the choice of “merciful justice” so important? Because it appears to be the greatest dialectical opposition (contradiction, antithesis) to a post humanist world in which the values of people and their culture are only one among many. It seems that a just world without mercy is compatible with a post humanist world in which machines dispense justice. But can the world of machines be reconciled

<sup>15</sup> *Ivi*, p. 10, author’s translation.

<sup>16</sup> See *ivi*, pp. 119-163.

<sup>17</sup> K. Rutkowski, “Predictive justice – sprawiedliwość algorytmów”, in E.W. Pływaczewski, D. Dajnowicz-Piesiecka, E. Jurgielewicz-Delegacz (eds.), *Prawo karne i kryminologia wobec kryzysów XXI wieku*, Wolters Kluwer, Warszawa, 2022, p. 849.

with the concept of mercy? Can machines not only deliver justice, but also justice that is “connected with love and humanity”?

#### 4. “Merciful Justice”. What Is It Really About?

It is clear that justice itself is defined as a basic idea of law<sup>18</sup>, but it does not exclude the search for other ideas relevant to law. We would like to add that it is worth looking for and thinking about even those ideas that, at first glance, seem far from law and are not appropriate to the concept of law, especially taking into account the paradigms of posthumanism and postmodernism in the legal philosophy.

One of the most important problems in criminal justice philosophy that considers the question of mercy is the question of its relationship to justice and law. What can mercy mean and what does justice mean in criminal law? Can criminal law even take mercy into account? Is there room for desiderata that arise from the concept of mercy in the principles of criminal law? How can the ethics of mercy be reconciled with the ethics of justice in criminal law? The questions could be multiplied, and among the various answers, one possibility is the attempt to unite justice with mercy, leading to different concepts of “merciful justice” in criminal law.

A cursory review of contemporary philosophical literature makes it possible to distinguish several significant proposals for the concept of “merciful justice” (which establish an inextricable link between justice and mercy while accepting that “merciful justice” is a more perfect form of justice than, for example, retributive justice). Some of the most interesting (among others) affirmative concepts of mercy in criminal law are as follows:

i) personalistic Catholic conception of mercy, derived from John Paul II and the social teaching of the Roman Catholic Church,

ii) the various secular oriented concepts presented in contemporary philosophy of law (*inter alia* by Martha Nussbaum<sup>19</sup>, Robert L. Misner<sup>20</sup>, Linda Ross Meyer<sup>21</sup>, Kristen Bell<sup>22</sup> or Mischa Allen<sup>23</sup>). It is also worth noting that many authors here argue for the vital importance of mercy in the contemporary criminal justice system.

<sup>18</sup> P. Kołodko, “Sprawiedliwość jako naczelną idea prawa”, in M. Szyszkowska (ed.), *Filozofia prawa w życiu i nauczaniu*, Temida 2, Białystok, 2004, p. 142.

<sup>19</sup> M. Nussbaum, “Equity and Mercy”, in *Philosophy & Public Affairs*, 22 (1993), n. 2, pp. 83-125.

<sup>20</sup> See R.L. Misner, “A Strategy for Mercy”, in *William & Mary Law Review*, 41 (1999-2000), n. 4, pp. 1303-1400.

<sup>21</sup> See L.R. Meyer, *The Justice of Mercy*, The University of Michigan Press, Ann Arbor, 2010.

<sup>22</sup> See K. Bell, “Critical Mercy in Criminal Law”, in *Law and Philosophy*, 42 (2023), pp. 351-378.

<sup>23</sup> See M. Allen (2020), *Locating forgiveness in criminal law and punishment*, Online Repository of Birkbeck Institutional Theses. Retrieved from <https://eprints.bbk.ac.uk/id/eprint/40138/>, [Access: 08/03/2024].



It is significant that justice without mercy is criticized in each of these concepts, although they are understood differently and characterized by different origins and arguments (in particular, secular concepts must be distinguished from those of religious origin).

In a remarkably synthetic fashion, this merciful approach to justice represents the intellectual framework devised by Terry A. Velting, who notes:

[...] mercy is not simply a countermeasure or complement to justice; rather, mercy “watches over justice” – not to thwart or deny justice’s rightful claims, but to ensure that our practices of justice are never conducted solely according to calculation and measurement but are also weighed or motivated by mercy and love<sup>24</sup>.

## 5. The Personalist Catholic Concept of Mercy and Some Remarks About Secular Concepts

In further consideration, it is necessary to concentrate on the personalist Catholic conception of mercy which, in what appears to be the most radical way, postulates the inseparability of justice and mercy.

Modern personalist Catholic concept of mercy derives from the teaching of Pope John Paul II, formulated in particular in the Encyclical *Dives in Misericordia* of 30 November 1980<sup>25</sup>. In Polish literature is referred to as the personalistic Christian concept of mercy (“*personalistyczna koncepcja chrześcijańskiego miłoseirdzia*”)<sup>26</sup>. On the grounds of the analysis of the contents of the Encyclical *Dives in Misericordia* of John Paul II, the following findings relating to justice, which make up the personalist concept of mercy, can be distinguished:

1) An affirmative attitude towards mercy and its recognition as a key category of Christianity, in contrast to critical assessments of mercy and the rejection of the idea of mercy as the very principle of social life<sup>27</sup>.

2) Mercy reveals the priority of love over justice in the sense that justice should also serve love (it is not a value in itself)<sup>28</sup>. According to John Paul II: “It

<sup>24</sup> T.A. Velting, *The Beatitude of Mercy. Love Watches Over Justice*, Wipf and Stoch Publishers, Eugene, Oregon, 2010, p. 10.

<sup>25</sup> See John Paul II, *Dives in misericordia. Tekst i komentarze*, Redakcja Wydawnictw Katolickiego Uniwersytetu Lubelskiego, Lublin, 1983.

<sup>26</sup> See J. Zabielski, *Wydobywanie dobra. Teologia chrześcijańskiego miłosierdzia*, Wydawnictwo Uniwersytetu w Białymstoku, Białystok, 2006, pp. 88-105.

<sup>27</sup> John Paul II, *op. cit.*, p. 9. The footnotes to the text refer to the Polish book edition of the encyclical. However, for quoting passages from the encyclical, I have used the official English translation available on the website: [https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_30111980\\_dives-in-misericordia.html](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia.html), [Access: 08/04/2024].

<sup>28</sup> *Ivi*, p. 17.

becomes more evident that love is transformed into mercy when it is necessary to go beyond the precise norm of justice-precise and often too narrow”<sup>29</sup>. This notion of mercy implies, therefore, various approaches to justice and ties mercy to such an understanding of justice, in which love plays a fundamental role<sup>30</sup>.

3) Mercy has a distinct, personalistic quality that consistently acknowledges the inalienable and inherent dignity of each individual<sup>31</sup>. It is identified with the ideal of the New Testament Christian love *agape*, which embraces everyone regardless of their moral conduct.

4) The aim of mercy is always to “promote and advance/extracting the good” and to care for human dignity<sup>32</sup>.

5) The recognition that the pure retributivism expressed in the formula “eye for an eye and tooth for a tooth” is “a distortion of justice”<sup>33</sup>, and at the same time “mercy is the most perfect incarnation of justice”<sup>34</sup>.

6) The belief that mercy can be a remedy for a phenomenon, expressed in the formula “*summum ius – summa iniuria*”<sup>35</sup> emphasize the important role of mercy, which consists of preventing distortions of the idea of justice and rubbing from it elements such as stubbornness, hatred, cruelty<sup>36</sup>.

7) The Conviction of the relational, bilateral nature of mercy and the link between mercy and justice<sup>37</sup>.

8) Forgiveness and the connection of the idea of forgiveness with mercy plays important role in it<sup>38</sup>. At the same time, the conviction that mercy and forgiveness cannot be equated in any way with the moral justification of evil and indulgence towards the harm done<sup>39</sup>.

9) The conviction of the necessary link between mercy and justice, with mercy and forgiveness to give justice a new content<sup>40</sup>. At the same time, the conviction of the distinctions between mercy and justice are also present, though they are inextricably linked. According to John Paul II:

Thus, mercy becomes an indispensable element for shaping mutual relationships between people, in a spirit of deepest respect for what is human, and in a spirit of mutual brotherhood. It is impossible to establish

<sup>29</sup> *Ivi*, p. 20.

<sup>30</sup> *Ibidem*.

<sup>31</sup> *Ivi*, pp. 20-22.

<sup>32</sup> *Ivi*, p. 22.

<sup>33</sup> *Ivi*, p. 34.

<sup>34</sup> *Ivi*, p. 39.

<sup>35</sup> *Ivi*, p. 34.

<sup>36</sup> *Ibidem*.

<sup>37</sup> *Ivi*, p. 38-40.

<sup>38</sup> *Ivi*, pp. 40-42.

<sup>39</sup> *Ivi*, p. 41.

<sup>40</sup> *Ivi*, pp. 41-42.

this bond between people, if they wish to regulate their mutual relationships solely according to the measure of justice<sup>41</sup>.

10) The conviction of the necessity and universality of mercy in social rules, including law<sup>42</sup>.

11) The conviction that mercy is compatible with equality, if mercy itself is correctly understood. As John Paul II notes:

Mercy that is truly Christian is also, in a certain sense, the most perfect incarnation of “equality” between people, and therefore also the most perfect incarnation of justice as well, insofar as justice aims at the same result in its own sphere. However, the equality brought by justice is limited to the realm of objective and extrinsic goods, while love and mercy bring it about that people meet one another in that value which is man himself, with the dignity that is proper to him<sup>43</sup>.

The attitude of mercy from a Catholic perspective emphasizes personal dignity in a special way and deviates decisively from the everyday and vocabulary ideas of mercy. It seems that such a concept also suggests “merciful justice”, which is a more perfect justice formula, e.g. retributive justice, which is based on the inextricable link between justice and mercy, necessary for human dignity and represents an ideal of justice that is difficult but possible. At the same time, such “merciful justice” emphasizes the importance of relationship, equality, forgiveness, and a focus on “doing the right thing”. Ultimately, justice is a kind of “bringing out the good/extracting the good” from every bad (evil) situation, made possible by merciful love.

One can judge that the Catholic combination of justice and mercy is an idealistic and even utopian approach. However, the various conceptions of justice in the context of mercy formulated in contemporary legal philosophy also draw attention to the need to overcome the retributive paradigm and deepen the understanding of justice based on the differently understood value of mercy.

For example, Martha Nussbaum’s views on mercy remain firmly rooted in the idea of Stoic restraint and grace. Mercy, in this view, boils down to engaging, empathetic judgment of the other person and identification with their situation. It is a merciful attitude that is, so to speak, a prerequisite for a person’s good judgment, paying attention not only to the assessment of facts and circumstances, but also to the comprehensive recognition by the criminal justice system of the complexity of the situation of a person subject to the sentence, associated with restraining anger, demonstrating moderation, gentleness, goodness, and finally taking into account the flawed nature of every human being<sup>44</sup>.

<sup>41</sup> *Ivi*, p. 40.

<sup>42</sup> *Ivi*, pp. 39-40 and 43-44.

<sup>43</sup> *Ivi*, p. 39.

<sup>44</sup> See M. Nussbaum, *op. cit.*, pp. 85-105.

It can therefore be considered that, in Martha Nussbaum's view, mercy is not only a virtue or a value, but is also a difficult process requiring active participation (and at the same time careful preparation and appropriate competences) in which we try to take into account humanity in the process of criminal justice in a "total way", with all its consequences. It can be estimated that so understood mercy enables us to have a much more comprehensive and mature assessment of man in the process of criminal jurisprudence of his or her act (acts) than by the criteria of justice without merciful approach.

In contrast, in Martha Nussbaum, the foundation of a merciful attitude (in a gross simplification due to the framework of this paper) remains the treatment of each concrete case as a complex story of human endeavour in an adventurous world; such mercy requires a holistic consideration of humanity, including its resulting frailties in the face of the demands of justice. As Nussbaum postulates: "A merciful judge need not neglect issues of deterrence, but she is above all committed to an empathetic scrutiny of the 'insides' of the individual life"<sup>45</sup>. Nussbaum strongly advocates mercy in criminal law, emphasising:

As judges, as jurors, as feminists, we should, I argue with Seneca, oppose the ascendancy of these more obtuse animals [snakes, lions, bears – identified with anger, the desire for competition and vindictive cruelty – T.S note] and, while judging the wrong to be wrong, still cultivate the perceptions, and the gentleness, of mercy<sup>46</sup>.

In the perspective of Polish legal philosopher Marta Soniewicka, unlike Nussbaum, the idea of Stoic restraint and graciousness (*clementia*) differs from the Christian conception represented by St. Thomas of Aquinas. In fact, mercy in the Christian tradition has a much deeper meaning, even because it is connected not only with the virtue of moderation or justice, but also with the virtue of love<sup>47</sup>.

With regard to the Christian conception of mercy Marta Soniewicka distinguishes two essential dimensions: 1) the identification of mercy with pity or compassion (directed to abstain from the imposition or execution of a well-deserved punishment, to show grace, at the same time resulting from the inner decision of the forgiver (whose main feature is fidelity to love); 2) to identify mercy with compassion (compassion), which is based on establishing a mutual relationship with another person, while at the same time recognising the primacy of his dignity, guided solely by unselfish love (*caritas*)<sup>48</sup>.

<sup>45</sup> *Ivi*, p. 115.

<sup>46</sup> *Ivi*, p. 125.

<sup>47</sup> M. Soniewicka, *Granice sprawiedliwości. Sprawiedliwość ponad granicami*, Wolters Kluwer Polska, Warszawa, 2010, pp. 95-97.

<sup>48</sup> *Ivi*, pp. 96-97.

As it turns out, while secular conceptions of merciful justice differ from the Catholic conception, they also share a number of common features<sup>49</sup> that can lead to universal conclusions.

It is worth referring to Wanda Achremowiczowa’s opinion:

Regardless of the worldview of the authors, whether theistic or atheistic, the theme of mercy awakens attention to the material or spiritual needs of one’s neighbor, a sense of responsibility for others, it moves and sometimes deeply shakes and stimulates the will. It always broadens the reader’s horizons, contributes to personal development and is therefore humanistic in the truest sense of the word<sup>50</sup>.

I believe that the assessment quoted above from literary studies can also be successfully transferred to the social sciences, including law, and that the examination of the question of mercy and its significance for criminal law is also a search for a strengthening of mercy in a humanistic sense of criminal law.

## **6. An Effort to Recapitulate. In the Name of “Merciful Justice”**

Last but not least, one can also support the concept of “merciful justice”, which is an idealized proposal in criminal justice philosophy that addresses justice issues. At this stage we will try to introduce an original perspective on justice, which we can call “merciful justice”, relying on specific proposals developed in modern legal philosophy. In a criminal case, the judge must take into account modern ideas about mercy and take into account certain factors to achieve the goal of “merciful justice”:

- 1) Base all decisions on the principle of “extracting the good from every circumstance of life” and respecting human dignity.
- 2) Examine thoroughly the circumstances of an individual undergoing the legal process regarding their behaviour in a criminal context. Evaluate individual situations by “flipping the viewpoint” and imagining yourself in the place of the person facing the court.
- 3) Show kindness while always keeping in mind the respect owed to all individuals, including the rights of those who have been victimized.
- 4) Your kindness should not compromise legal equality.
- 5) If you can, choose forgiveness, reconciliation, repair of damage, and conflict resolution. Utilize the concepts and lessons from restorative justice.

<sup>49</sup> See more e.g. R. Gascoigne, “Justice and Mercy: Recent Catholic Teaching and Martha Nussbaum’s Political Emotions. Why Love Matters to Justice”, in *Studia Teologiczno-Historyczne Śląska Opolskiego*, 39 (2019), n. 2, pp. 43-51.

<sup>50</sup> W. Achremowiczowa, “Problematyka miłosierdzia w literaturze polskiej. Wartości humanistyczne”, in W. Granat (ed.), *Ewangelia miłosierdzia*, Pallotinum, Poznań – Warszawa 1970, p. 378, author’s translation.

6) Never settle for retributive justice as satisfactory.

7) Dismiss the concept of retributivism and backward-looking justice in favour of a more comprehensive viewpoint that also considers the future.

The proposed desiderata of requirements for “merciful justice” serves as a model, yet each element merits further exploration, and the list warrants expansion. Nonetheless, they demonstrate that “merciful justice” necessitates requirements that are exceedingly challenging to implement within the criminal law system, particularly when considering the human influence on said system. Simultaneously, it is the concept that appears to endorse, at least in its propositions, the capacity for love inherent in individual humans. Yet, achieving this could prove to be very challenging under any legal system, even those created and enforced by people. Therefore, it can be presumed that “merciful justice” is the conceptualization of criminal law, which can be simplified as: “the greater mercy within the law, the more flawless and suitable it is for humanity and its requirements”.

What other determinants might be necessary for a merciful approach in criminal law? First of all, the perspective of mercy in criminal law should be considered not only as an exception but also as a crucial principle that complements the requirements of criminal justice. Mercy should not be viewed as incompatible with criminal justice, but rather as a factor that promotes its nuanced understanding.

Secondly, the perspective of mercy is intended to promote and at the same time refine the understanding of the principles of humanism and humanitarianism of criminal law, on the one hand constituting an essential element of it and, on the other hand, filling it with a full essential axiological basis arising from the absolute protection of everyone the inalienable personal dignity inherent in human beings.

Third, the inclusion of mercy in criminal law should motivate always seeking a morally appropriate response to crime, which will be a response of “good” to the “evil” caused by crime. In this sense, mercy negates all forms of irrational, cruel and inhumane punishment.

Fourth, mercy opens the criminal justice institutions to all remedies to solve the crime problem. From the perspective of mercy, criminal punishment ceases to be an inherent element of criminal law and becomes only one of the possible options (it loses the status of a necessary element for criminal law and becomes an accidental element). At the same time, this approach strengthens the principle of subsidiarity of criminal law, where not only the legislation itself and the application of criminal law should be the ultimately applicable normative solutions, but also criminal punishment in response to the crime should be the last

resort if there is the possibility to address crime-related problems through measures appropriate to, for example, various forms of restorative justice<sup>51</sup>.

Fifth, mercy in criminal law is inextricably linked to the appreciation of forgiveness and reconciliation. All criminal justice institutions and mechanisms should promote reconciliation and forgiveness and create conditions and mechanisms for their emergence. In particular, the role of the presence of reconciliation and forgiveness in the criminal assessment of an offense should be strengthened.

Sixth, a merciful perspective draws attention to criminal justice as a complex and complicated process in which care must be taken to take humanity into account as much as possible in the criminal justice assessment of an offense. This is intended to strengthen the humanistic dimension of criminal law.

It is now appropriate to pose the crucial inquiry. Considering the significant difficulty that humans encounter with mercy and the intricate and challenging nature of the requirements of “merciful justice”, is it feasible that artificial intelligence will ever be capable of acting with mercy (in accordance with the requirements of “merciful justice” and the vision of a “merciful criminal law”) and not solely with retributive justice concepts?

From the perspective of “merciful justice”, it is necessary to question whether the development of artificial intelligence in law will be a real breakthrough for a better legal future. Yes, we can make our legal systems more efficient, more rational, more structured, more retributive and more objective. But will we humanize them according to Catholic or Martha Nussbaum’s ideas on mercy? Can an artificial intelligence even recognize the complex network of human struggles and the complexity of an individual’s story that we evaluate? Can the machine be just and merciful at the same time?

Justice has many names, including the concept of “merciful justice”. A justice capable of empathy, compassion and love. Justice that is extremely difficult for people to accept because it is repeatedly rejected as incompatible with equality, with the retributive demands of just punishment. Justice, understood in this way, is not only a criticism of existing concepts, but it can (and even should be) an instrument of criticism of technological posthumanism in jurisprudence.

Regardless of which concept of “merciful justice” we accept among the polysemic voices of modern legal philosophy, it seems that “merciful justice” should be the fundamental paradigm in assessing the development of artificial intelligence in the criminal justice system. Because this “merciful justice” seems to be an idea that aims to really make criminal law better, more humane.

Ultimately, “merciful justice” will remain a human voice in a legal system based on artificial intelligence, algorithms, equality and probability; a voice for people in a post humanist legal world. Ultimately, it is mercy, which is not

<sup>51</sup> See e.g. the study is considered fundamental to the assumptions of restorative justice: N. Christie, “Conflicts as Property”, in *The British Journal of Criminology*, 17 (1977), n. 1, pp. 1-15.

traditionally equated with the law, that can bring about the salvation of the law, understood as a product of human culture and the resulting humane treatment of the person. Paradoxically, through the post humanist paradigm, which also struggles with the development of new technologies, mercy can be discovered as a value of the law and at the same time as a highly human value.

When reflecting on the development of artificial intelligence, let us not ignore the most human, demanding and difficult idea of mercy, because it may turn out that this will remain the most significant interface between the world of law without humans and human being. Therefore, the development of artificial intelligence may not be a true transition of criminal law and its justice, but merely a refinement of certain forms of justice until “a technology capable of mercy” is developed. Such a perspective allows us to truly critically evaluate the development of artificial intelligence in law and reminds us that the ideas of law and justice remain the most human in a post humanist world.