ARCHIWUM HISTORII FILOZOFII I MYŚLI SPOŁECZNEJ • ARCHIVE OF THE HISTORY OF PHILOSOPHY AND SOCIAL THOUGHT
VOL. 58/2013 (SUPPLEMENT) • ISSN 0066–6874

MAXIMILIANO HERNÁNDEZ MARCOS

Kant's Criminal Wisdom. A Critical Reconstruction*

ABSTRACT: Kant's criminal theory has been challenged for its supposed strict and abstract retributivism, which distances itself from the predominantly utilitarian views of Enlightenment. This negative perception is exclusively founded on fragment *E* of Remark added to &49 of *The Metaphysics of Morals*. This study proves, however, that Kant had a more complex criminal theory, not explicitly stated, but which can be reconstructed especially through his posthumous legacy. In particular, we highlight Kant's understanding of retribution, as a responsibility of the State, in terms of "criminal wisdom"; in other words, as a public praxis that should combine criminal justice and prudence in accordance with the primacy of moral values over politics.
KEYWORDS: Criminal Law • Kant • Enlightenment • Hegel • retributive justice • political prudence

1. Approach and purpose

The doctrine of Kant on criminal law contained in the *E* fragment of the extensive General Remark added to §49 of The Doctrine of Rights in *The Metaphysics of Morals*, has been questioned by both Kantian and Criminal literature. The former has tended to deny, until couple of decades ago its compatibility with the moral criticism; whereas the latter has seen a metaphysical residual of the pre-modern world completely alien to the Enlightenment concept of punishment paving its way during this time[1]. What seems to be the source of this dichotomous challenge is, undoubtedly, the Kantian defense of an "absolute" theory of punishment, focusing exclusively on its intrinsic relationship to the crime without addressing teleological considerations of punishment which had brought the enlightened to relativize its connection with the crime based on several empirical factors (psychological,

* English translation by Tatiana Alameda Vaquero. This paper is inserted within the national research project-HUM 2007-60799.

[1] About the reception of criminal Kantian theory until three decades ago see: M. A. Cattaneo, *Dignità umana e pena nella filosofía di Kant* (Milano 1981).

sociological political, moral; for example). The abstract rigorism with which the aforementioned fragment holds and applies the retributive conception of criminal punishment, without any concession to different theories about preventive function of public sanctions placed in circulation by the Enlightenment, has contributed to the image of an inhuman Kant, proponent of rationalism punishment *tout court* as opposed to triumphal empiricism that was looking above all for the social utility of criminal punishment.

This simplified picture overlooks that fragment *E* about criminal law is not a short essay on the topic but a marginal, illustrative and critical observation in which Kant, rather than "give us a full theory of punishment"[2], wanted to show it as simply a legal consequence of his rational theory of the state with a clear polemic effect on to the punishment culture during the Enlightenment. This perspective turns this General Remark into a critique against social utilitarianism that rules on behalf of justice inherent to punishment. From this polemic perspective, not only the meaning of the text and its argumentation could be understood, but also its wanderings and outrageous claims which are difficult to fit within the legal and moral criticism of human dignity[3].

The text seems initially to suggest a narrow retributivism, however with clever elucidation Kant provides us a stronger, wise and more complex theory, even though he did not explore and published this avenue. Therefore a sample as "General Remark E", which is analytically focused on justice of punishment itself and its retributive principle, and which is methodologically compelling to leave out any teleological considerations related to the "labyrinth of the Doctrine of Happiness" in criminal matters and denying them the rationale, i.e. the essential meaning of the criminal institution[4]. From the above it does not follow that in the whole process of its public exercise the purposes of prevention cannot and do not have to play any role whatsoever. In fact, Kant expressly acknowledges in Appendix No. 5 of *Rechtslehre* (1798 edition) that alongside criminal justice [*Strafgerechtigkeit*]

[2] H. Mayer, *Kant, Hegel und das Strafrecht*, [in:] P. Bockelmann/ A. Kaufmann/ U. Klug, *Festschrift für Karl Engisch zum 70. Geburtstag*, Frankfurt am Main 1969, pp. 54–79.

[3] We would like to leave for another time the exposure of controversial extent and significance of that "General Remark E"; here on grounds of space and approach, we limit ourselves only to identify it as indispensable criterion of comprehension.

[4] I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge 1991), *Ak*. VI: 331–332, pp. 140–141. Due to the large number of translation in different languages of Kant's texts and, due to the original wording of this article was performed using Spanish and German editions; our citation will refer both the *Akademie* pagination, and the page number of this English translation.

there is also a place for criminal prudence [*Strafklugheit*], without which it would not be possible to specify and implement in an empirical way which is right itself according to punitive-juridical reason. Only within the "topic of legal concepts" it is not for *locus iusti* but *locus conducibilis*, that is, determining the manner and means to effectively achieve public punishments to "eradicated crime"[5].

This articulation between criminal justice and prudence as two analytically distinct aspects, which however have to be combined in the public exercise – in the political practice of punishment, is a constant doctrine of Kant in manuscripts which address the topic. Although these do not develop an explicit and thorough systematic theory, due to its fragmented and occasional nature. We can, however, rebuild it in their fundamental pieces from that posthumous legacy, knowing that such a necessary articulation between criminal justice and criminal prudence is not an isolated and random incident but something d e m a n d e d from inside his practical philosophy for its own political criticism: it answers the legal requirement of a public praxis governed by the "political wisdom" [*Staatsweisheit*], that regarding criminal law and jurisprudence shall be endorsed in terms of c r i m i n a l w i s d o m.

In order to reconstruct this plausible Kantian criminal criticism it is helpful to turn to Hegel's precise, neat and philosophically complete guidance, provides to us in his *Elements of the Philosophy of Right*. The Swabian philosopher shared with Kant the same historical problems and convergent ideas on the subject; namely, the critique r e - f o u n d a t i o n of an enlightened legal empiricism on emerging purely legal rational grounds of the absolute conception of punishment. This is not therefore, to reduce Kant's criminal law theory within Hegel, but to understand it more clearly than he expresses himself. We shall contemplate Kant through the sharper and more consistent light of the Berliner master[6].

[5] *Ibidem*, *Ak* VI: 363, p. 168.

[6] W. Schild, *Ende und Zukunft des Strafrechts*, "Archiv für Rechts- und Sozialphilosophie", 70 (1984) pp. 71–112. Schild conducted a fairly exhaustive reconstruction of Kantian criminal theory from Hegel (which brings a more accurate and consistent perspective using his manuscript of Lessons and Reflections), in order to provide a "purifying" interpretation of the "contradictory" places founded on the philosopher critical texts (*ibidem*, at p.72). In an laudable but perhaps excessive hermeneutics charitable gesture, this jurist of Bielefeld felt that to make such reconstruction was necessary to argue "with Kant against Kant" (*Idem*, pp. 83, 87). His reason for it was the emphatic analytical separation between both criminal "justice" and "prudence" held in many places by the philosopher of Königsberg; being a result of methodical restriction to the elucidation of the former in detriment of the latter. In a subsequent paper Schild supplied more clues about that criminal criticism (See: W. Schild, *Anmerkungen Straf-und zur Kants Verbrechensphilosophie Immanuel*, [in:] H. Heinze / J. Schmitt (Hrsg.), *Festschrift für Wolfgang Gitter*, Wiesbaden 1995, pp. 831–846).

2. Hegel's theory of punishment. A brief overview

It is well known that Hegel elaborates his Criminal Justice Thought displaying it formally in three levels of development which Dialectical Logic of Law demands: the abstract or "objective" level of the concept itself of crime and punishment (Abstract Right); the "subjective" performance on the offender (Morality); and its "substantive" effect in civil society (Ethical Life). The first level only features the essential logic of crime and punishment as strictly legal matters, namely, as right denial and restores respectively. Thus Hegel approached it in the chapter that discusses injustice which concluded the first part of *Elements of the Philosophy of Right* and generally defines the legal relationship form(s) between the men – as free agents – and the world. In contrast the other two levels of treatment are concerned with the existential logic of offences and penalties –the specific way of its empirical appearance and realization. Both as imputable and applicable acts for particular moral agents, and as a political phenomena affecting the self-consciousness of citizens about laws' rightness hence the strength of moral community itself.

This Hegelian approach to crime and punishment – which addresses both "essence" and "existence" – simply echoes its two constitutive dimensions: the purely rational of legal injury and its restitution; and the strictly empirical of the actual harm caused and how to prevent it[7]. But it also explains the need to consider – so Hegel does – the performance of criminal justice from a two-fold perspective, namely: the *justice* of the punishment itself as a legal institution; and the prudence of its specific measure as a political practice of the Estate. From the first perspective the punishment justifies itself as overcoming the offence that represents a tort (legal injury) and as such restores the balance in right. In this aspect, the retribution is the essence of the punishment, its rationale, which Hegel performed in logical-dialectical terms of the criminal act self-contradictory nature, of its "nullity will" (§97, §101 Remark). In such a manner that any punishment is "righteous itself" insofar that it restores and enforces the law which has been violated and is thus equal to tort as such (§ 101). Yet from the second perspective the punishment is understood to be a mechanism for preventing future empirical evils

On this study we certainly are debtors to both the approach and the result of the Wolfgang Schild investigation. Neither we intend (as he does) smooth the contradictory irreducible places of Kantian criminal thought, nor present it almost entirely (Schild itself fails to do so) but in its essential lines; those ones who (with the help of Hegel hermeneutics) allow to design in conceptual structure the idea of a criminal wisdom.

[7] For this double dimension see G. W. F. Hegel, *Elements of the Philosophy of Rights*, trans. H. B. Nisbet (Cambridge 1991), §§ 95–98. In this section I will include parentheses indicating Hegel's relevant paragraphs of the references to this work.

towards society, which would arise from crime and delinquency recurrence. The judge and the legislator are public authorities whose duties legally set and specifically apply the quality and quantity of punishment, its modality and grade. As a result the court must adjust its overall task – ensure it against all violence and injury to both citizens' private freedom (person and property) as well as the common good of civil society. In this sense the actual estimation of the penalty must rely on social utility considerations.

Hegel not only takes into account these two constitutive dimensions of the punishment but also indicates the way they should be articulated in public performance. This articulation occurs in the empirical level of punitive measure, to place the "principle of retributive equality" as a normative criminal justice criterion when it comes to set measures of punishment. This retribution works both to restrict the arbitrary state power governed by considerations of public interest; but also as a guideline of orientation in determining physical punishment. Only this retribution is as such abstract and may not translate into an empirical level except in terms of "equality in value" or equivalence between injury from the crime and the punishment prescribed, an equivalence that is moreover, always approximate (& 101 and Remark.).

Searching for criminal equivalence of fair punishment, the legislator and the judge have to estimate the crime's magnitude and nature, taking into consideration a wild diversity of empirical factors that define the crime itself. According to Hegel, these "quantitative and qualitative characteristics" (§96) are mainly three kinds: the extension of material damages caused to the victim (§96, §98); the degree of subjective responsibility of the criminal (§§115); and the magnitude of public dangerousness or social injury inflicted on civil society (§218). Hence, in the actual punishment characteristic the public authority must combine the retributive approach of criminal justice with the preventive approach of punitive justice. The former normatively requires factual equivalence or proportionality to the crimes. The latter seeks the empirical eradication of social damage caused by crime.

From this combination the "political wisdom" of public authorities on criminal matters is established. Hegel does not use this Kantian term but he referred to its intrinsic meaning consistently: the criminal justice has to be not only useful but above all righteous; and yet there is not (worldwide) criminal justice, rather a practical policy adjusted to the historical reality of men and nations. From here we can understand both his critique of Enlightenment theories of legal empiricism[8] and his distance from the

[8] *Ibidem*, §99 Remark. About the critique of Hegel to the criminal empiricism of the Enlightenment may be seen: M. Hernández Marcos, *Justicia y daño. La polémica de Hegel*

old rationalist-metaphysical-religious doctrines of atonement or *ius talionis* (§101 Remark).

3. Kant – crime and punishment

We can now look back at Kant's theory, the first thing we notice is the absence of the three levels of logical development of criminal law that Hegel contemplated on his presentation; and more specifically the lack of explicit distinction between the essential and existential elements, inherent to punishment as an institution of public justice. For instance, this concerns in a substantial way the idea of crime itself, which is diffuse as its definition includes without any kind of discernment the empirical conditions of its precise existence, included in the notes that supposedly determine their own existence. Thus when Kant features the crime as an act of "transgression" of the law[9], he joins the rational "objective" notion of the injustice (*Unrecht)* with the intentionality of the wrongdoer. This intentionally is an aspect of his "subjective" existence which is part of the imputation process rather than his own criminal nature. This issue is both empirical and contingent and is related to determining the degree of moral responsibility of the author, which should come into play only when the specific weight of the criminal action is presented as an essential identifier element of the crime itself. Such overlap (surprisingly found in a thinker who has been aware of the subjective dimension of legal responsibility actions and their gradation[10]) has as one of its most questionable consequences the reduction of criminal element into intentional wrongdoing; thereby excluding all negligent involuntary nature of violent actions, which come to be considered only "responsible" (guilty)[11] acts deserving some form of punishment but not punishable itself.

Thus Kant proceeds to define the crime narrowly calling it "public crime" as opposed to "private crime" – although it is not punishable itself – and claims that it is a transgression of public law "because they endanger the commonwealth and not just an individual person"[12]. Here and only

contra la teoría ilustrada del derecho penal, [in:] AA.VV., *Derecho, Historia y Religión. Interpretaciones sobre la "Filosofía del Derecho" de Hegel* (Salamanca 2011), 12 pages.

[9] I. Kant, *The Metaphysics of Morals*, *Ak* VI: 224, p. 50. For a reconstruction of Kant notion of crime and its problems see: W. Schild, *Ende und Zukunft des Strafrechts*, *op.cit*., pp. 77–78 & 87–88.

[10] About the imputation and its gradation see: *ibidem*, *Ak* VI: 227–228, pp. 52–53. Cf. I. Kant, *Lectures on Ethics*, trans. P. Heath (Cambridge 2001) *Ak* XXVII.1, 228–298, pp. 80–89. Also see: *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1: 561–567 (in: *Lectures on Ethics*, pp. 315–321), emphasis in 567 (pp. 320–321).

[11] Cf. I. Kant, *The Metaphysics of Morals, Ak* VI: 224, p. 50; *Ak* VI: 227, p. 53.

[12] *Ibidem*, *Ak* VI: 331, p.140.

here is where Kant introduces in the notion of rational crime an aspect of its existence as a political phenomenon; namely, the public outreach of its dangerousness which should not be taken to define the concept itself but only for estimating the factual danger on a given civil society. That here the critical philosopher restricts himself (as noted by H. Mayer) to assume current legal-positive criminal ideas of his time[13], does not deny but confirms this absence of a rigorous analysis with relevant distinctions of these basic criminal concepts. This is evident that he fails to deliver a clear definition of the idea of crime itself; of its rational "essence" (however it is implicit in his argumentative context) as contained in Hegel in terms of i n j u s t i c e or coercive *Unrecht*. This suggests Kant's lack of interest to develop an accurate criminal theory which could clarify difficulties in understanding and consistency posed by his meager and fragmentary texts on the subject.

However, if we focus on concept of punishment, we may find – contrary to what happened with the concept of crime – that Kant himself thoughtfully considered and discerned both rational and empirical sides or aspects; namely, its essential dimension as "legal effect" of lawlessness[14], and its existential aspect as injury or physical pain suffered by the offender. Kant –lacking the accuracy of Hegelian conceptual analysis- reiterates its arguments the same definition: punishment is characterized as harm or physical evil *(Übel)* that follows from moral evil (*Böse*) or injustice committed by the lawbreaker[15]. Such empirical harm brings to light the c o u n t e r-coercion punishment as external or "strict right" act[16], whereas the requirement that

[13] H. Mayer, *Kant, Hegel und das Strafrecht*, *op.cit*., pp.62–63. By following W. Naucke, *Die Reichweite des Vergeltungsstrafrechts bei Kant*, [in:] „Schleswig-Holsteinische Anzeigen" (9, 1964) pp. 203. Mayer emphasizes that Kant follows the strict conception of criminal law "in the old sense", which it can be found in the manual of G. Achenwall, *Jus naturae in usum auditorum* (Gottingen 1767) and within this restrictive view of crime, only contemplate as "public offense" the most serious crime.

[14] I. Kant, *The Metaphysics of Morals, Ak* VI: 227, p. 53. Cf. *Critique of Practical Reason*, trans. M. Gregor (Cambridge 2003), *Ak* V: 37, pp. 33–34, which provides on the same terms the "essential" definition of the general concept of "punishment" (*Strafe*): "corollary" or effect of transgressing a "moral law". *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1: 552, §43, p. 308. I. Kant, *Lectures on Ethics, Ak* XXVII.1: 286, p. 79. Kant's characterization of punishment is usually "moral", even when he recognizes that the only real punishment is the "legal".

[15] "Punishment in general is the physical evil visited upon a person for moral evil" (*Lectures on Ethics*, *Ak* XXVII.1: 286, p. 79). "In punishment, a physical evil is coupled to moral badness" (*Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1: 552, §43, p. 308). Cf. *Vorarbeiten zur Metaphysik der Sitten*, *Ak* XXIII: 343, & 352; *Critique of Practical Reason*, *Ak* V: 37, pp. 33–34.

[16] I. Kant, *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1: 554–555, p. 310. The punishment as "physical evil" is rooted in the *coercibility* that is inherent to externality of legal

this physical evil is only the corollary – or "immediately necessary consequence of morally bad act" – of the offender's infringement shows his rational legitimacy; namely the qualification of punishment as a "righteous act" without which the violent punishment simply would seem as an arbitrary, absurd and unacceptable evil[17].

As the only legitimate coercive power might correspond to whom is at once the only one able to apply justice, namely the power of the state, the punishment is for modern Kant an exclusively Political Right [*Staatsrecht*]; and its application, therefore, is an "act of public justice"[18]. This state's monopoly introduces a further aspect which is not part of the concept of punishment as such, but its factual or practical execution: the punishment is no longer just a "moral" act of retributive justice to restore the violated right by coercive physical evil inflicted on the offender; is also and above all a "political" act in such a manner. That then, the pure rational-legal requirement of justice which constitutes *ratio essendi* of punishment could be fulfilled only in the specific context of a particular government; and thus with the mediation of the empirical-pragmatic purposes that he aims according to historical conditions of its civil society. The punishment becomes an instrumental role here: it becomes a means of social crime deterrence, a measure for the state to ensure the security of its citizens. Indeed, even becomes part of the set of rules and administrative sanctions designed to preserve the happiness and welfare of the people. We should see in detail this peculiarity of punishment within public justice and political praxis.

law; Kant has shown that by analogy with the natural principle of action and reaction of bodies in motion (cf. *The Metaphysics of Morals*, *Ak* VI: 231–233, pp. 57–58). Physical punishment is legitimate as counter-coercive, as a violent reaction (and neutralizing) of the coercive violent of the crime (cf. *Vorarbeiten zur Metaphysik der Sitten, Ak* XXIII: 352). Following Kant on this point, Hegel would characterize this empirical-external dimension of punishment with the wise expression "second coercion" (G.W.F. Hegel, *Elements of the Philosophy of Rights*, §93).

[17] I. Kant, *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1:553, §44, p. 309. Kant conceived punishment as a kind of proportional *a priori* synthesis – i.e., rationally inexplicable – between "physical evil" and "moral evil". Its essence is justice, under which it is so inconceivable that crime goes unpunished as inconceivable is that punishment is hazardous or not applicable to a prior crime (*ibidem*, XXVII.2.1.:552–553). For a comprehensive analysis of how to understand the justice of punishment in Kant see: R. Brandt, *Gerechtigkeit und Strafgerechtigkeit bei Kant*, [in:] G. Schönrich / Y. Kato, *Kant in der Diskussion der Moderne*, Frankfurt am Main 1996, pp. 425–463, emphasis on p. 452; W. Schild, *Anmerkungen zur Straf- und Verbrechensphilosophie Immanuel Kants*, *op.cit*., pp. 831–846, emphasis on p. 840.

[18] Kant, *Vorarbeiten zur Metaphysil der Sitten, Ak* XXIII: 343. Cf. *The Metaphysics of Morals*, *Ak* VI: 331–332, pp. 140–141.

4. Outline of criminal wisdom

When analyzing punishment in general a distinction can be observed between two types of basic concepts: the "moral" or retributive and the "pragmatic" or deterrent[19]. Thus Kant emphasizes that all the punishments of governments are pragmatic because the purpose being either to prevent further offence serving as a "corrective", or to present an example to the potential offenders[20]. Yet the preventive aspect inherent to authority punishments becomes complicated when the punishment itself is not against mere administrative misdemeanors of the citizens, but rather against criminal behavior. So here comes into play both the pragmatic function of all authority punishment and the retributive role which corresponds to criminal punishment in its own right. That is, precisely the one that is justified as an appropriate response to an external "moral" transgression, coercive *injustice*. The Authority should then make the decision (at both legislative and judicial level) bearing in consideration simultaneously counsels of prudence and the categorical imperative of criminal justice. The following quotation from Kant's Lectures known as *Metaphysik der Sitten Vigilantius* illustrates this dual perspective of criminal punishment:

> The first are truly the *poenae justitiae*, because they are immediately necessary according to the principles of justice – the others are *deterrents*, insofar as the punishment is viewed at the same time as a means; in *castigationes*, as a means of improving the peccans, and in *exemplares*, as a means of preventing further crime by others. A distinction is therefore made between *justitiae et prudentia poenitiva*; the latter merely determines the amount of coercion that transgressors of the law may encounter; since every punishment must be based on justice, it is therefore subordinated also to *justitia poenitiva*, and must furthermore be so framed at all times, that it is in a position to promote morality, or at least not to restrict it[21].

[19] About this typological distinction see: *Metaphysik der Sitten Vigilantius, Ak* XXVII.2.1:551, p. 307; *Lectures on Ethics*, *Ak* XXVII.1:286, p. 79 and; *Reflexionen n.* 6525–6529, 6682, 8041. This basic typology of sanctions (in German *Strafe* design both punishment *sensu stricto* and in general) belongs to the general theory of action, as formulated in Kant's own reflections from preliminary chapter on "Rewards and Punishments" (or demerits) of *Initia philosophiae practicae primae* (1760) of A.G. Baumgarten.

[20] I. Kant, *Lectures on Ethics, Ak* XXVII.1:286, p. 79.

[21] I. Kant, *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1:551, p. 308. Cf. *Lectures on Ethics*, *Ak* XXVII.1: 286, p. 79 and *Vorarbeiten zur Metaphysik der Sitten*, *Ak* XXIII: 343. Cf. *Reflexionen n.6684, 7283, 7289, 8029, 8035, 8041.*

The Kantian acknowledgment of the moral and politic dimension of punishment, and of the two forms of practical rationality – justice and prudence – combined therein; is also accompanied (as it appears on quotation above) by an indication of the manner in which they should be conjugated: the principle of justice should always be the normative foundation of the punitive prudence; to which corresponds either case of the punishment empirical-positive determination, namely its type and its magnitude. We are facing neither an exclusionary criminal dualism nor a mere complacent criminal one. The former may be overcome only asserting the extreme ethical rationalism of *ius talionis*, or proclaiming the crude empiricism of the preventive utility of punishment. The latter is not a simple juxtaposition of different criteria whose way of arrangement or composition could be in each case to the judgment of the public authority. Thus following the line subsequently developed by Hegel, here Kant presents the exercise of criminal justice as a distributive task liable in its application to a principle of hierarchy (as a distributive justice which could be organized into a hierarchy). He does pursuant to general requirements of p o l i t i c a l w i s d o m that he would provided as a guiding praxis principle for every ruler and authority, included in the Appendix of his opuscule *Toward Perpetual Peace*. The formula of moral and political reconciliation (under the unconditional primacy of Rights about the materialized utility in the ideal figure of "moral politic"[22]) is now translated into the imperative that subordinates the principle of prudence punitive within criminal justice, into the requirement that legislator and judge criminal measures are first and foremost fair.

It is important to ask the questions; what does this moral imperative of justice mean at the stage of fixing the penalties? How should we understand the rationale behind the criminal punishment of the state? First and foremost, the principle of justice includes on itself the "relevance" requirement of criminal punishment and, at the same time, this presupposes the recognition of "punishability" [*Strafbarkeit*] of the act itself. That is, its qualification as crime, as tort, as *in foro externo* moral evil, along with the responsible assumption for the punishment as consequence of moral evil action[23]. Kant said, "Our idea of justice requires that the moral worth of the

[22] I. Kant, *Toward Perpetual Peace,* trans. M. Gregor in *Immanuel Kant: Practical Philosophy* (Cambridge 1997), *Ak* VIII: 377, pp. 344–345. About the idea of "political wisdom" in Kant see: M. Hernández Marcos, *Política y Antropología en Kant*, [in:] L. Ribeiro Dos Santos / J. Gomez Andre, *Filosofía Kantiana do Direito e da Politica* (Lisboa: Universidade de Lisboa, 2007), pp. 65–100, emphasis on 66–74.

[23] I. Kant, *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1: 552–553, p. 308–309. Cf. *Metaphysics of Morals*, *Ak* VI: 363 note and 331.

action be recognized", while simultaneously, "the transgressor knows within himself what his action is worth"[24]. In fact, both regulatory conditions were voiced by the criminal law literature in two well-know quotes: *Nulla poena sine crimine* and *Nullum crimen sine poena*. The former includes the first demand of punishment, whereby is only fair to publicly punish acts when they constitute a criminal offence. The latter echoes a further requirement, i.e. the no-impunity for criminal offence according to which we do not support or accept as fair that the crime goes unpunished. This moral relationship between crime and punishment (hence act and consequence) is necessary and is containing the principle of justice, which Kant (following the traditional scholastic formalism) has been condensed on the topic *quia peccatum est*.

Secondly, as soon as it is recognized the punishability of an act, *ergo* the necessity for the offender to take responsibility for the moral evil inflicted; simultaneously is founded the violence of the c o u n t e r-coercion punishment, i.e. the physical evil which is punished on an empirical level as juridical-positive measure. Because that punishment is part of social justice (as moral response to legal injury), it has its tangible aspect in the damage done to the infringer; the same way as the offence he is responding for has its externality in the injury inflict to the victim. The empirical suffering which punishment is (unwarranted itself, meaningless and inhuman) thus has its legitimacy and its legislative basis in the legal-moral evil which thereby is trying to erase. Therefore, Kant has justified this empirical and inherent side of government punishment –the physical penalty involved- arguing there is to observe on it merely a "symbol of p u n i t i v e d i g n i t y" [*Strafwürdigkeit*]; namely, an always limited sensitive sign of *poena mere moralis*, because amongst men all criminal justice is under the government "status of coercive power"[25].

Yet the physical evil of punitive coercion only might be justified if is closely linked to the harm caused by criminal action; otherwise it may have the appearance of arbitrariness, of totally unfairness and even immoral. Hence thirdly, the principle of justice demands to be seen (on the empirical

[24] *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1:552–553, p. 308–309. Kant seems to participate or at least anticipate the idea -then clearly exposed by Hegel- according to which the offence is a self-contradictory act (*Metaphysics of Morals*, *Ak* VI: 320–321, pp. 131–133). Also see: W. Schild, *Ende und Zukunft des Strafrechts*, *op.cit*., pp. 83–84.

[25] Letter from Kant to J. B. Erhard 21.12.1792, *Ak* XI: 398–399. This Kantian argument is very important because involves the recognition that among men there can never be real, perfect punishment entirely fair (that belongs only to God). Penalties are only "means and signs of the punishment itself" (*Metaphysik der Sitten Vigilantius, Ak* XXVII.2.1:556, p. 311), i.e. a criminal justice always perfectible.

dimension of coercive harm) the rational connection between injustice (*Unrecht)* and *poena moralis*, between the act of lawlessness and its necessary effect of immediate annulment. This implies that fundamental equality of *iustitia poenitiva* must supply the normative criterion for factual measurement of public punishment; and therefore the *ius talionis* or principle of retribution [*Wiedervergeltung*]; because that equality comes to translate itself in terms of existential equality between criminal injury and criminal punishment, which represents the only *a priori* fixing and fair weighting measure of state penalties. However, the law of retaliation (as a principle of equality between crime and punishment) is here just the moral voice of justice when it comes to determining the government punishment in both legislative and judicial ways; it is the guiding idea of positive specification which accredits within the political human forum as sensible signs of *poenae mere morales*. This law operates as a criterion and normative limits of justice when it comes to measure and weight the punishment in an empirical manner[26]; but does not establish or determine its specific profile, the extent and nature of punishment. On the contrary, this law categorically demands equality, equivalence or proportionality with both the magnitude and nature of the coercive injury to those who respond. Here ends the normative work of justice and begins the teleological task of political prudence; in which the former has to appear under the notion of "moral politician".

For Kant (and for Hegel) the qualitative and quantitative measurement of physical penalty is a political task; wherein the lawgiver (legislator) and judge must bring into play the pragmatic rationality of prudence, that caters to principles of both general deterrence (exemplary punishment for all) and special (disciplinary or corrective punishment of offenders). This deterrence of crimes in society is collected by criminal literature under the Latin formula *ne peccetur*.

> But if the punishment is just, then the degree and nature of it, and whether a physical penalty is needed, are decided as prudence and mercy may dictate. Here justice, which rest in itself on wholly indispensable principles, does have a certain *latitudo*[27].

Recognition of effective punishment as a political means and prerogative of the state certainly brings the admission of hypothetical nexus that would link conditionally both crime and punishment, taking into account

[26] W. Schild, *Ende und Zukunft des Strafrechts*, *op.cit*., pp. 83–86.

[27] I. Kant, *Metaphysik der Sitten Vigilantius*, *Ak* XXVII.2.1:553, p. 309. Cf. *Vorarbeiten zur Metaphysik der Sitten, Ak* XXIII:346.

the social and public ends pursued[28]. But Kant raises here a legal requirement that any moral politician must meet (even in the field of criminal law) his ideal of "political wisdom"; i.e. integrated and complete rationality as practical reason under the primacy of morality. Then foremost recall, on one hand, the categorical connection that justice established between criminal transgression and its legal consequence, has to make an appearance in the process of criminal and state law; not only as basis of the punishment but well as absolute limit of any political instrumentalism (politicization) of punishment, means as restrictive criterion of the government arbitrariness in the factual weighting of penalties throughout the principle of equal retribution with the social injury for crime. And also, on the other hand, does not cease to emphasize the requirement to adjust the physical evil of punishment to the duty to respect the moral person of the accused; and even the ethical duty of philanthropy through penal suffering moderation, avoiding unnecessary cruelty and outrage on the sanctions[29].

If this ethical requirement to avoid diminishing the morality of men with the debasing of public punishment came to sign the enlightened claim; i.e. criminal humanitarianism against excessive hardness and vengeful sadism that were common practice of old regimes; however, that legal imperative of justice was directed against the mainstream among the enlightened towards a exclusive (or at least utilitarian in its essence) vision of punishment as a simply political tool of crime and social damage prevention or any other empirical ends of the state. The brief and controversial fragment *E* of the General Remark about criminal law in *Metaphysics of Morals* responds to the complaint of the Enlightenment asking for utilitarian reductionism of punishment. From here and only from here this fragment should be read; however, without ignorance of inconsistencies and outrageous claims which Kant incurred in here; however, some could be explainable for its illustrative effectiveness, since they are "popular" in an eminently rhetorical argumentation. ≈

[28] About the "hypothetical" conditioning under which is presented the categorical necessity of the relationship between transgression of the law and moral punishment in the sensitive and public externality of punitive human justice see that letter of Kant to J. B. Erhard of 21.12.1972 (*Ak* XI: 398–399).

[29] I. Kant, *Metaphysics of Morals*, VI: 333, p. 142; cf. *Metaphysik der Sitten Vigilantius*, XXVII.2.1:689, p. 418. Here, rejoicing in the suffering of the prisoner is sentence as "misanthropy". About this inhumane vice see: *Metaphysics of Morals,* VI: 332–333, pp. 141–142.

MAXIMILIANO HERNÁNDEZ-MARCOS – profesor historii filozofii na Uniwersytecie w Salamance. Członek DGE18J (Deutsche Gesellschaft für die Erforschung des 18.Jahrhunderts) i sekretarz redakcji czasopisma *Azafea. Revista de Filosofía* (Salamanca) and *Res Publica* (Murcia). Jest autorem artykułów na temat: filozofii Immanuela Kanta, filozofii oświecenia, prawa naturalnego i kodeksu pruskiego, a także niemieckiej filozofii okresu weimarskiego. Jest autorem książki: *La* Crítica de la razón pura *como proceso civil* (Salamanca 1994); redaktorem tekstów: *Hermann Heller, El sentido de la política y otros ensayos* (Valencia, Pre-Textos, 1996) oraz *Kant II* (Madrid, Gredos, 2010), a także współredaktoem tomów *Literatura y política en la época de Weimar* (Madrid 1998) oraz *La primera Escuela de Salamanca (1406–1516)* (Salamanca 2012).

MAXIMILIANO HERNÁNDEZ-MARCOS – tenured professor of history of philosophy at the University of Salamanca. He is a member of DGE18J (Deutsche Gesellschaft für die Erforschung des 18.Jahrhunderts) and the editorial secretary of the scholarly journals *Azafea. Revista de Filosofía* (Salamanca) and *Res Publica* (Murcia). He is author of many articles about the following research lines: the philosophy of I. Kant and the Enlightenment, Natural Law and the Prussian Code and German political philosophy of the Weimar era. His most important books include his doctoral thesis: *La* Crítica de la razón pura *como proceso civil* (Salamanca 1994); the editings of the texts *Hermann Heller, El sentido de la política y otros ensayos* (Valencia 1996), and *Kant II* (Madrid 2010); and the co-edition of the collectives volumes *Literatura y política en la época de Weimar* (Madrid 1998), and *La primera Escuela de Salamanca (1406–1516)* (Salamanca 2012).