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**LAW AND PHILOSOPHY IN THE FACE OF TERRORISM  
– THE CASUS OF SHOOTING DOWN A HIJACKED PLANE****The concept of „dirty hands” in politics**

The term „lesser evil”, present in language – even casual language – makes it evident that there exists a concept in human imagination of difficult, and in fact maybe even unsolvable moral dilemmas in which all of the present alternatives seem to be somehow wrong and thus difficult or even impossible to accept. Does that „lesser evil” really exist, and if it does – how is it „lesser” and what does that even mean, exactly? Do we have a duty to choose it? Or perhaps a different question should be asked: are we allowed to choose it? And if we do, should we face the consequences, despite the (apparent) necessity of our actions? Each one of us may stand in the face of such a dilemma, but in this paper the focus will be put on the moral responsibility of public officials.

The problem of the aforementioned responsibility has been dubbed the „dirty hands” problem, which proposes that in politics it is allowed – or in some cases maybe even necessary – to infringe upon fundamental moral norms, because there exists, in a way, a specific morality of political action, which is in places independent from the „everyday” and „private” morality<sup>1</sup>. Simultaneously it is worth noting that the concept of dirty hands does not posit the rejection of morality in politics altogether. If it did, it would not refer to the hands of politicians as „dirty”. The use of that particular way directly signifies that the proponents of this concept are aware of the moral consequences of political action – even if they deem that action necessary<sup>2</sup>. That is the core of the dilemma – should the act of „dirtying one’s hands”, so to speak, result in consequences?

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<sup>1</sup> C.A.J. Coody, *Polityka a sprawa brudnych rąk*, in: *Przewodnik po bioetyce*, ed. P. Singer, Warszawa 2009, p. 421.

<sup>2</sup> M. Walzer, *Political Action: The Problem of Dirty Hands*, „Philosophy and Public Affairs” 1973, vol. 2, no. 2, p. 161–162.

Why exactly, though, have politics and politicians been singled out in those reflections? Some philosophers point to the fact that in politics decisions made have a far greater and global scope than those in private lives of individuals and that those decisions affect more people – and thus should be judged differently. Others point out that politicians are representatives – they act not only in their own name, but also in the name and interests of the citizens<sup>3</sup>.

Is this distinction relevant? One may try to prove that from the point of view of the individual – each particular one – a decision made by a single person has exactly the same bearing on the life of the people actually affected as the decisions made by public administration – the latter only affect more people at once. Even though relevant on the grounds of utilitarianism and consequentialism, it is irrelevant from the position of deontology, as the situation of each of the people affected is intrinsically relevant on its own and the weight of a decision can not be reduced to a question of numbers. There are also those that point out the flaws of the argument of representation: the position of a politician isn't any more specific or socially defined than the role of a doctor or a firefighter – and thus it does not change the moral status of the person filling that role<sup>4</sup>. If it did, we would have separate codes of morality for all of these occupations – and even though there are some concretizing elements such as a Medical Code of Ethics, postulating a fundamentally different moral judgements for the same actions due to the differing social position seems absurd.

It seems then that if the problem of „dirty hands” exists – it isn't exactly limited to politics<sup>5</sup>, and thus one should wonder if it really should be judged any different than infringement upon moral norms that happens outside the bounds of political action.

### **A sentence of Polish Constitutional Tribunal on aviation law, signature K44/07**

A good illustration of the problem seems to be the matter of a sentence by the Polish Constitutional Tribunal<sup>6</sup>, in which the section of an aviation law bill was deemed unconstitutional in a part in which it allowed to shoot down a hijacked plane if there were no other alternatives and it was deemed necessary for the security of the state. What's interesting – and relevant – the German Constitu-

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<sup>3</sup> *Ibidem*, p. 162–163.

<sup>4</sup> C.A.J. Coady, *Polityka a sprawa brudnych rąk...*, p. 424.

<sup>5</sup> *Ibidem*, p. 421.

<sup>6</sup> Polish Dziennik Ustaw (Journal of Laws of the Republic of Poland) 2008 r. nr 177, poz. 1095 (signature K 44/07).

tional Court also deemed similar laws unconstitutional, which was in fact referenced in the Polish sentence<sup>7</sup>. The question of technical difficulties in applying the law or in its vagueness shall not be discussed here – instead, the impact will be put on constitutional values and axiological matters which – also by the Tribunal’s own admission<sup>8</sup> – seem to be of greater importance.

The Tribunal notes takes note of two issues in particular: the issue of the protection of human life, and the issue of human dignity. In the initial reflections it is noted that even in the case of special circumstances or martial law (for declaring which there is, in the Tribunal’s view, no legal basis in that particular example), the rights described in articles 38 and 30 are not subject to limitation.<sup>9</sup>

The Tribunal also notes however, that the lawful protection of life has no absolute character – in situations of unresolvable conflict between the values protected by law, taking life can be depenalized (for example via the right of self-defense or lawful necessity). It can thus be assumed that shooting down the plane could be acceptable if there were only the hijackers onboard<sup>10</sup>, even though the vagueness of the bill would still make it hard to properly judge the proportionality of values protected in this case<sup>11</sup>. Besides it is noted, which is of particularly high importance, that even should the lawmaker allow for sacrificing a subject or object of lawful protection, it does not remove its constitutional status as a subject or object deserving that protection.<sup>12</sup> The real axiological problem, however, is posed by the status of the passengers and the crew. The Tribunal unambivalently stands on the principle that it is impossible to evaluate the worth of human life by the number of its bearers, their health, estimated lifespan or any other criteria. The Tribunal also posits that the danger to the people on the ground, who might be affected by the attack is only hypothetical, while the danger to the passengers is real and inevitable.<sup>13</sup> The state has a duty to ensure protection of all its citizens and the failure in carrying out that duty does not relieve the state from following other rules of law, nor does it declare them void.

The second of axiological arguments made against the questioned law is the infringement upon the concept of human dignity as established in article 30 of the Constitution. The Tribunal posits that the regulation of the discussed bill results in reification of both the passengers and the crew of the plane.<sup>14</sup> They are

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<sup>7</sup> The ruling of Constitutional Tribunal of Poland, signature K 44/07: <http://otkzu.trybunal.gov.pl/downloadOrzeczenieDoc?dok=23238> (1.05.2016), p. 16.

<sup>8</sup> *Ibidem*.

<sup>9</sup> *Ibidem*, p. 16.

<sup>10</sup> *Ibidem*, p. 32.

<sup>11</sup> *Ibidem*, p. 30.

<sup>12</sup> *Ibidem*, p. 30.

<sup>13</sup> *Ibidem*, p. 31.

<sup>14</sup> *Ibidem*, p. 34.

treated solely as objects of an action aimed at reducing further, hypothetical and possibly greater losses. Their lives are sacrificed in the pursuit of other ends, even though they had no choice or influence on their situation, neither were they it's cause. While making it's argumentation, the Tribunal points out that the human dignity – in opposition to the right to live from article 38 – has an absolute status in Polish law and is not subject to any limitations, even in special circumstances such as a state of martial law.

As it can be seen, the Tribunal is of the opinion that human dignity and thus his right to always be an end of any action, not only a mean to an end, takes precedence even over his right to live. In conclusion, the Tribunal opposes the „sacrifice” of values in the name of pragmatism and efficiency and declares that it is paramount to exercise the power of the state not by any means available, but by means that befit a modern, democratic state of law. It seems then that, at least in this particular example, the act of „dirtying” hands by the public officials is unexcusable, especially should it happen due to an arbitrary choice of the authorities.

### **A philosophical and ethical standpoint in discussing the casus**

It is worth to examine this example not only from a legal, but also from a philosophical standpoint. It will be done by contrasting the utilitarian philosophy of John Stuart Mill and the deontological perspective of Immanuel Kant.

The core of Mill's utilitarianism is the concept of utility – and utility is what brings happiness, by which Mill understands pleasure and the lack of pain<sup>15</sup>. The happiness mentioned is not meant to be personal happiness, but rather it should be the goal of any action to further the joint happiness of every man<sup>16</sup>. It should also be noted that Mill departed from Bentham's idea of pleasure measured by quantity, adding – following the example of epicureans – a „quality” measure and counting the pleasures of the mind higher than the pleasures of the body. He wrote: „It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are a different opinion, it is because they only know their own side of the question”<sup>17</sup>. In conclusion, an action is a moral one if the balance of it's utility is positive.

It must be therefore noted that Mill would probably deem the law in question to be perfectly compatible with the rule of utility. Problematic – for all types of arguments – is the hypothetical nature of danger to the people on the ground, but for the purposes of this argument it could be assumed that the danger is unavoidable.

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<sup>15</sup> J.S. Mill, *Utylitarizm. O wolności*, Warszawa 2012, p. 10.

<sup>16</sup> *Ibidem*, p. 16–17, 22–23.

<sup>17</sup> *Ibidem*, p. 14.

able and grave, for it was probably the *ratio legis* of the law. In such event, a balance of utility of both decisions should be made. On one hand – refusal to shoot down the plane will result in the deaths of both the people and board and the deaths of additional victims on the ground. Shooting down the plane, in turn, will reduce the number of those deaths. Because people are – for Mill – the bearers of utility, the second example is naturally more in line with the utilitarian theory, because death of a greater number of people undoubtedly contributes more to the lessening of the global happiness than the death of a lesser number of people. The decision to shoot down the plane is thus not only preferable, but actually required – maximalizing utility is our moral duty.<sup>18</sup> When it comes to the Tribunal's objections, from Mill's point of view they are maybe not irrelevant, but less important – the judges' conviction of precedence of certain moral values over human life can be interpreted as a desire for virtue. But for Mill virtue is nothing more than a mean to happiness, and thus – a pleasure.<sup>19</sup> The positive aspect of the judges' argument is thus only heightening their sense of virtue, and thus their personal happiness, which seems in obvious ways less utilitarian than saving the lives of additional people – life itself is, after all, a state that is necessary for the mere possibility of experiencing any happiness whatsoever.

Even though Mill is rather crafty in defending himself from the claims of utilitarianism's egoism, he seems to avoid the subject of reification of the human being by reducing him to a state of bearer of utility. It thus devaluates his dignity – a dignity that was the focal point of both the Tribunal's reasoning and the ethics of Kant, the impact of which can be clearly seen in the Tribunal's sentence.

The main point of Kant's deontology is the categorical imperative, contained simultaneously in two formulas: „Act only according to that maxim whereby you can at the same time will that it should become a universal law”<sup>20</sup> and „Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end”. The Kantian categorical imperative permits no exceptions, is not reliant on neither circumstances nor consequences, but is instead a cornerstone of the Kingdom of Ends, which is a community of people bound together by common norms and by being to themselves never only a mean to an end, but always an end at the same time.<sup>21</sup> The morality of an action is not dependant on it's consequences but in the principle of will that was the reason behind the action, because a truly moral action is motivated by duty<sup>22</sup>.

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<sup>18</sup> *Ibidem*, p. 86.

<sup>19</sup> *Ibidem*, p. 48–51.

<sup>20</sup> I. Kant, *Uzasadnienie metafizyki moralności*, Kraków 1953, p. 50.

<sup>21</sup> *Ibidem*, p. 68–69.

<sup>22</sup> *Ibidem*, p. 20.

Kant is similarly adamant and absolute to Mill, but from the point of view of his ethics it is our duty not to shoot down the plane. In doing so we would use the passengers as means to an end, which stands in stark opposition to the categorical imperative. It is unexcusable to sacrifice the life of any person without his or her consent, even should it lead to saving a greater number of people. Each person is endowed with natural human dignity<sup>23</sup> and thus his life is not quantifiable in terms of numbers. It can also be said – pretty convincingly – that even though it may be imagined that sacrificing innocent lives for the purpose of saving greater numbers was an universal law, it can't possibly be willed for it to be so. It would endanger one's own life and also lower the trust put in the state, the purpose and duty of which is the protection of its citizens.

### **Closing remarks on the moral responsibility of the state and its officials**

It's dangerous to make – and regard with seriousness – statements such as that you know the „solution” to the problem of dirty hands. It is, as it's often the case in terms of ethics, a dilemma that may in fact be unsolvable. The best you can do is present your own position and try to argue for it the best you can. It seems, then, that Kantian ethics – the strong echoes of which can in the aforementioned sentence of the Tribunal<sup>24</sup> – better encapsulates the spirit of a modern democratic state of law. Political systems of modern democracies were made on the foundation of certain axiological values not because – or at least not in general because – it was utilitarian, or because it was broadly accepted by society or that it made anything easier. Rather, those values were chosen because they represent something more than pure utility and safeguard the position of a man not only as a bearer of that utility. Such view unavoidably relativizes the value of human life through the criteria of quantity. It is doubtful anyone would actually like to live in a state in which he may – at every second – be sacrificed as a person for the needs of the majority – even should the majority be overwhelming. In light of that, sacrificing the aforementioned values, even in course of action supposedly heading to „greater good” or „lesser evil” seems unjustified. It would be absurd to assume that moral conduct and values such as human dignity are „luxurious commodities” reserved for the times of peace and are suspended in times of grave need. It is in those times in particular, in fact, when they are needed the most. The cruelty of means used by the opponents of the state of law should never sanction the use of the similar means by the state itself, and war waged

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<sup>23</sup> *Ibidem*, p. 70–71.

<sup>24</sup> The ruling of Constitutional Tribunal of Poland, signature K 44/07..., p. 35.

even against the most heinous opponent with the use of certain means becomes in itself an example of moral evil. One of the prime duties of the state is to protect its citizens, and realizing that end by using the citizen himself as a means seems a grim joke.

Political commentators and philosophers are certain that despite all the lofty words, the hands of the politicians will become dirty eventually, nonetheless, and it is virtually unavoidable, if only for the simple reason of human error and the effect of emotion on human behaviour – absolute moral theories are a lot easier on paper than in practice. It should therefore probably be noted that „unavoidability” of dirtying one’s hands should not be viewed as a blank justification and as an encouragement to choose alternatives that are utilitarianly easier. In a given moment, a certain situation, perhaps all choices are in fact morally dubious. But that does not mean that it was not possible to prevent such a situation earlier by greater care and deeper prevention. Instead of lamenting the unsolvable nature of the dirty hands problem, the state should do everything to not have to actually face it.<sup>25</sup> When it does happen, though, there seems to be only one option for those that value the axiological foundations of the modern democratic state of law. It is not an arrogant pride of a Machiavellian prince, who did what was necessary for the good of the state where others hesitated.<sup>26</sup> It also is not the anguished lament of Weber’s man, self-flagellating himself with his thoughts and sacrificing his own salvation for the salvation of the world<sup>27</sup>. The proper response seems to instead be the one proposed – after Camus – by Walzer. By making one’s hands dirty, so to speak, one must also acknowledge the responsibility of one’s actions and be ready to face their consequences.<sup>28</sup> „Lesser evil” is lesser nonetheless and as such, it has its consequences. Those who want to rule must abide by that and must be ready for it. Their punishment – even should it only be in form of a public condemnation – is in a way a payment for their deeds. Political „necessity” also has a price and eventually, in face of all the alternatives, it seems just to pay it.

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<sup>25</sup> *Ibidem*, p. 6; C.A.J. Coady, *Polityka a sprawa brudnych rąk...*, p. 427.

<sup>26</sup> M. Walzer, *Political Action...*, p. 175–176.

<sup>27</sup> *Ibidem*, p. 176–177.

<sup>28</sup> *Ibidem*, p. 178–180.

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### Summary

The paper discusses the problem of moral responsibility for difficult decisions in the sphere of politics on the example of a former regulation of aviation laws concerning shooting down a hijacked plane. The text analyzes a sentence of the Constitutional Tribunal on the matter, especially the issue of the right to live and the concept of human dignity. A comparison is made between Mill's utilitarianism and Kantian deontology as two opposing moral philosophies. In the end a hypothesis is made that state authorities should be held morally accountable by the public for their choices, even should that accountability result in their condemnation or the loss of office.

*Keywords:* philosophy, ethics, Kant, Mill, hijacking, plane

## **PRAWO I FILOZOFIA WOBEC TERRORYZMU – KAZUS ZESTRZELENIA PORWANEGO SAMOLOTU**

### Streszczenie

W artykule rozważono problem odpowiedzialności moralnej za trudne decyzje w sferze politycznej na przykładzie niegdysiejszej regulacji prawa lotniczego o zestrzeleniu porwanego samolotu. Przeanalizowano orzeczenie Trybunału Konstytucyjnego w tym zakresie, zwracając uwagę na przedstawione przez Trybunał argumenty za derogacją przepisu, zwłaszcza na problematykę prawa do życia oraz konstytucyjną zasadę wolności człowieka. Przeprowadzono także porównanie Millowskiego utylitaryzmu oraz Kantowskiej deontologii jako dwóch przeciwstawnych filozofii moralnych. Ostatecznie przedstawiono tezę jakoby piastuni władzy publicznej byli w pełni odpowiedzialni moralnie wobec społeczeństwa za niejednoznaczne wybory, których dokonają – choćby nawet owa odpowiedzialność miała skutkować ich potępieniem moralnym czy utratą urzędu.

*Słowa kluczowe:* filozofia, etyka, Kant, Mill, uprowadzenie, samolot