

*Jadwiga Królikowska**

THEORIES OF PUNISHMENT AND THE PROTECTION OF SOCIAL ORDER BY THE CRIMINAL LAW

Abstract: The article deals with the issue of the processuality of punishment. The culturally integrated theory reveals criminal punishment as a social phenomenon which consists of successive and specific phases. During each of these phases punishment is implemented, not only in a different system of social conditions and phases which are appropriate for the legal regulations, but with the participation of other social institutions.

Key words: Punishment, judges, culturally integrated studies, criminal law, social order.

1. PUNISHMENT AND THE THEORIES OF PUNISHMENT AND ITS DEFINITIONS

In the academic literature there are many systems of claims about punishment formulated in the conceptual apparatus and about the model of analysis of various disciplines. Most theories indicate the reasons for punishment and the intended goal to be achieved through it in relation to the individual and to the general public. Many of these theories point to such real functions fulfilled by punishment which are neither officially proclaimed nor even assumed as goals. There are also theories that primarily define the characteristics and hallmarks of legal institutions referred to as punishment.

The image of punishment as an action having a social meaning is created by formal procedures for imposing a punishment and the rigours imposed on its execution. These factors distinguish between punishment as an action that consists in an intentional goal oriented at inflicting suffering on people and other social activities. They give it the status of a unique fact which, at the same time, is recognized as indispensable for maintaining the broadly understood social order. The goal assigned to punishment, which is both preventing crime and administering justice, is important and obvious to the general public.

* *j.krolikowska@uw.edu.pl*. University of Warsaw, Institute of Social Prevention and Resocialization
European Centre for Penological Studies Prof. G. Rejman

The application of punishment was explained and justified by arguments that were considered rational in a particular society at a particular stage of its historical development. There were as many justifications given to punishment, as well as reasons assigned to specific types of punishment in the past, as cultural and social systems. They could have the character of a cultural, religious or political imperative, or a more instrumental approach to preventing crime for the future. However, the shape of solutions rationalized by them and the scope of criminalization resulting from these rationalizations, that is the scope of applying punishment to control specific social behaviours, was strongly associated with the current state of a given culture and the sensitivity of the era. This relationship of criminalization with culture and, in particular, the morality of the era, is confirmed by the existence in every human community of the mechanism of attaching social sense to punishment, and explanation which is also its justification. The explanation given to the intentional inflicting of suffering on the perpetrators of violations of law delegates the benefit of the punishment imposed on the perpetrators of crimes to the superior organizational unit. Its security and stability as a structural whole is protected by the actual execution of respect for norms and values constituting the order of society.

Formulating the theory of punishment poses difficulties above all because the institution of criminal punishment assumes various organizational forms. Various types of punishment also have various and often detailed, purposeful, and functional justifications. The term punishment has many ranges and meanings, not only in colloquial language, but also in the specialist languages of various disciplines. The theory and definition of punishment, which is basic in contemporary programmes of sociological and legal research, emerges through a gradual selection of the most appropriate existing theoretical approaches rather than by formulating it from the beginning¹.

2. THE CLASSIC APPROACH TO PUNISHMENT IN POLISH PENOLOGY: BRONISŁAW WRÓBLEWSKI AND JULIUSZ MAKAREWICZ

Concepts of punishment aimed at justifying the application of unpleasantness to the perpetrator of an act recognized in a given society as “reprehensible”, the Polish pre-war penologist Bronisław Wróblewski (1888–1941) called “rationalizations of punishment”². The concept of “rationalization” has since been clarified, but it is still believed that rationalizations arise because: “The developing human mind wants to know why, for what purpose, or on what basis people react against the perpetra-

1 Hempel Carl G., *Fundamentals of natural sciences*, translated by Barbara Stanosz, Wydawnictwa Naukowo-Techniczne (Scientific and Technical Publishers), Warsaw 1968, pp. 125–147.

2 Wróblewski Bronisław, *Penologia. Socjologia kar*, v.1, Skład Główny w Księgarni K. Rutkiego, Wilno, 1926, i particular pp. 184–253; Wróblewski B., Świda W., *Sędziowski wymiar kary w Rzeczypospolitej Polskiej*, Skład Główny J. Zawadzkiego, Wilno 1939r., pp. 38–39; Jarosław Utrat-Milecki, *Racjonalizacja kary (i polityki kryminalnej)*, [in:] *Kulturowe uwarunkowania polityki kryminalnej*, ed. Jarosław Utrat-Milecki, Oficyna Naukowa, Warsaw 2014, pp. 82–87.

tors of specific acts”³. What we will call “rationalization” may express an individual view of one person or group of people on a given phenomenon, but it may also be an element of ideology promoted by the environment of power, which environment legitimizes its own privileged position with such a rationalizing statement. By making the rationalization of the system of punishment and the organization of the punishment apparatus widely known to the public, the authority, at the same time, expresses the justification for norms and values which constitute the foundation of the society in which it itself maintains a privileged position. It confirms its readiness to fulfil its authoritative duties, including functions in the area of inflicting suffering and restricting the freedom of citizens who violate the normative order.

No “rationalization” is an atemporal and absolute explanation and justification for a specific social action, but a characteristic of a phenomenon consistent with current views on reality shared at a given time by a group of recognized authorities. “Rationalization will use premises whose material, in the meaning of content, will dominate in a given period of time and place. If, in the life of a given social group and in a given period, we find a predominance of religious elements, then the rationalization of punishment will go in that direction, along with the development of utilitarianism or metaphysics which these moments will reflect on rationalization”⁴. The adjustment of rationalization of punishment to the leading views of the era makes it a changeable phenomenon, understood only against the background of the assumptions and goals adopted in specific historical conditions.

As in everyday language, also in law the term “punishment” is used with many different meanings. Disciplinary, administrative, and educational punishment, etc. are discussed. In the field of law, criminal punishment is primarily analyzed. The textbook definition of criminal punishment known to Polish law students, states that: “Criminal punishment is a personal unpleasantness borne by the perpetrator as a retribution for a committed crime, expressing condemnation of the act committed by the perpetrator and administered on behalf of the state by the court”⁵. This definition emphasizes the imperative of punishment, which is to be a necessary and sufficient retribution caused by “an earlier culpable, unlawful and socially harmful violation of criminal law norms standardizing crimes”⁶. This statement emphasizes the rationalization of retribution as the main function of punishment in the sphere of its activities related to justice, guarantee, and protection.

The quoted definition gives the impression that in the area of law the phenomenon of punishment has been included in an exhaustive and the only possible way. Meanwhile, the important fact of choosing the axiological and philosophical assumptions that determined its character has been hidden in it. Another choice of assumptions would lead to a different definition. It is precisely

3 Wróblewski B., Świda W., Sędziowski wymiar kary w Rzeczypospolitej Polskiej, Skład Główny J. Zawadzkiego, Wilno 1939., p. 39.

4 Wróblewski B., *Penologja. Socjologja kar*, v.1, Skład Główny w Księgarni K. Rutskiego, Wilno, 1926, p. 185.

5 Gardocki Lech, *Prawo karne*, C.H.Beck, Warsaw 2013, p. 276.

6 Utrat-Milecki Jarosław, *Kara. Teoria i kultura penalna: perspektywa integralno kulturowa*, WUW, Warsaw 2010, p. 42.

these axiological and philosophical assumptions drawn from the world of ideas that should be shown clearly because they have real and serious consequences in the process of differentiating assessments concerning sociological facts related to punishment. These assessments are a potential source for the emergence of various sociological and legal theories on the content, goals, and functions of punishment⁷. A correct and comprehensive theory of punishment has a chance to arise when the discussion about it will, to an extent greater than before, combine the achievements of various disciplines of science, and above all law, sociology and philosophy into the structure of integrated cultural analyses⁸.

In the classical definition of punishment formulated by the Polish professor of criminal law, Juliusz Makarewicz (1872–1955), the basic variables regulating punishment were indicated not only as a legal phenomenon, but in a broader sense, as a social phenomenon. According to Makarewicz, the essence of punishment is “social condemnation expressed openly, externally, unambiguously by the entire social group, either directly (collectively), or by its representative – a performer punishment (like a hangman etc.), or finally, by the injured (directly) the name of the community. While moral condemnation affects only honour (good name), punishment also extends to other goods of the individual: life, freedom, property, the whole body, etc. Punishment in its essence is never compensation for the injured party, even the pecuniary punishment (fine) is transferred to the state coffers, not to the injured party’s pocket, because punishment, being an act of imposed unpleasantness caused by the entire perpetrator’s group is not aimed at compensation of private harm – the matter is left to separate proceedings (civil proceedings or adhesion proceedings within the criminal trial). [...] Punishment is an act of social revenge (in modern societies euphemistically called criminal justice), which presents itself to an offender as an (intended by society) individual pain – it is *malum passionis propter malum actionis* (Grotius). Punishment is essentially a retribution and nothing else. Anything else that actually links or combines with punishment is an irrelevant addition. Undoubtedly, the very fact of punishing and enforcing punishment strengthens the feeling of certainty and protection in society, a citizen of a state feels that crime will not go unpunished.”⁹.

Makarewicz’s definition underlines the role of sociological factors in the shaping of punishment. The evolution of legal norms that define the model of a punish-

- 7 An overview of the most popular criminal law textbooks that should contain current reports from scientific penological research shows that the education of Polish lawyers regarding the theory of punishment is more than modest. Most often, it is limited to less than three pages of text, which selectively report theories going no further than the 19th century! Bibliographic hints given to law students are also out of date and they reward the anecdotal approach to punishment and the theories that describe it. Speaking in the language of P. Cuche, “they mix the history of punishment with the history of penological doctrines”.
- 8 Djordje Ignjatović, *Kriminologija*, 13th edition Pravni Fakultet, University of Beograd, Beograd 2016; Djordje Ignjatović, *Kultura i kriminalitet*, Kultura 2017, pp. 85–111.
- 9 Juliusz Makarewicz, *Prawo karne. Wykład porównawczy z uwzględnieniem prawa obowiązującego w Rzeczypospolitej Polskiej*, Książnica Polska, Lwów-Warsaw 1924, pp. 18–19. More of his views on this subject is to be found in his work *Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage*, Published by Ferdinand Enke, Stuttgart 1906 (Polish translation by KUL, Lublin 2009).

ment system is synchronized with changes in social, cultural and moral patterns. Treating punishment as a universal sociological phenomenon, Makarewicz pointed to the systems of norms and values unique in every culture that define the essence, purpose, and function of punishment. From this perspective, it is obvious that in all circumstances the perpetrator's offence puts him in conflict with his own society, which defines the goals and functions of punishment from the point of view of protecting the values recognized by the people in general¹⁰. According to Makarewicz, imposing punishment on the perpetrator of a crime is not only an elementary act of justice, but above all a fight against a socially dangerous situation of impunity, which questions the axionormative foundations of society.

3. THE CLASSIC DEFINITION OF PUNISHMENT IN THE ANGLO-SAXON CULTURAL CIRCLE

For many researchers into legal phenomena, the question of the essence of punishment has been as important as the questions of its meaning, purpose, and function. Antony Flew (1923–2010) in the middle of the twentieth century undertook to organize this issue from a philosophical perspective¹¹. The discussion around his proposal has continued to date. Recently, his views have been discussed with a wide sociological commentary by Jarosław Utrat-Milecki in his book “Podstawy penologii. Teoria kary”¹². A. Flew analyzed his concept of punishment by saying that “the concept of punishment is not strict” and “as a living concept, derived from a normal social dictionary, it is open”. According to A. Flew's definition, punishment: “Firstly, it is to make something evil to the punished, as it was defined by Thomas Hobbes, or to do unpleasantness. [...] Secondly, the task of unpleasantness must be caused by an earlier committing by the punished of a criminal offence, and thus punishing is causing unpleasantness because of committed crime. Thirdly, punishment is to be imposed on a perpetrator for committing a criminal offence. [...] Fourthly, punishment must be an action taken by people. [...] Fifthly, it must be imposed by a legitimate authority”¹³.

The defining of criminal punishment is not only based on the positive indication of its constitutive features, but also on the elimination of many activities having a structure and a course like punishment, but a different social sense. It is not distinguished by any single factor such as unpleasantness, the adoption of formal rules of influence, or the supervision of authorized structures, but by a whole range of variables that occur together in a specific configuration. Considering the

10 Jadwiga Królikowska, *Co socjologowie mówią o karze i punitivności?*, [in:] *Kara w nauce i kulturze*, ed. Jarosław Utrat-Milecki, Wydawnictwa Uniwersytetu Warszawskiego, Warsaw 2009.

11 Antony Flew, *The justification of Punishment* (1954) and also *Postscript* (1967), [in:] *The Philosophy of Punishment. A Collection of Papers*, Harry Burrows Acton (ed.), Macmillan-St. Martin's Press, London 1969.

12 Utrat-Milecki Jarosław, *Podstawy penologii. Teoria kary*, Wydawnictwa Uniwersytetu Warszawskiego, Warsaw 2006, pp. 222–223.

13 Utrat-Milecki Jarosław, *Podstawy penologii. Teoria kary*, Wydawnictwa Uniwersytetu Warszawskiego, Warsaw 2006, pp. 222–223.

complexity of this issue and striving to formulate an accurate and comprehensive definition, Herbert Lionel Adolphus Hart (1907–1992), in his work “Punishment and Responsibility” published for the first time in 1968, linked the definitional terms of punishment indicated by A. Flew with the idea of John Rawles (1921–2002) presented in the work “Two Concepts of Rules”¹⁴. The terms constituting punishment in its standard version as indicated by A. Flew, H. L.A. supplemented by the terms defining punishment in unusual versions, defined as non-standard. Non-standard understanding of the concept of punishment according to H.L.A. Hart makes it possible to distinguish the following types of punishment:

- “for violation of the rules of law imposed or performed otherwise than through authorized bodies (*decentralized sanctions*);
- for violation of non-legal rules or orders (parental punishment in the family or at school);
- substitute or collective punishment inflicted without prior authorization, support, control, or permission of a member of a social group for acts committed by others;
- inflicted on people who, other than in the previous item, did not commit a crime nor were even suspected of it”¹⁵.

This extension allows spontaneous types of punishment and often one-off behaviours and social actions that escape the rules of morality and have no established legal form as an act, as a rule related to a particular type of behaviour, but which have the meaning of punishment not only from the perspective of the authority that enforces it. but also to the subject suffering it. What is more, the wide impacts which the types exert on the social environment are analogous to the extensive effects of criminal punishment.

Although since the mid-20th century, punishment has been the subject of many important research analyses, their achievements in the field of the research still cannot be considered exhaustive, especially in the case of empirical research conducted with the participation of the social sciences. It is uncertain whether these deficiencies will be quickly made up for, because now the burden of criminological research has been transferred to the problem of crime, perpetrators, guilt, and sacrifice, not to matters related to punishment. Moreover, it can be observed that the theoretical deficiencies in the research field of the essence of punishment, punishing, and impunity are replaced by the analytic exposition of its dramaturgy. In the social space there are more messages depicting the inflicting of punishment (media-related and artistic) than concerning its essence, meaning, and legitimacy. While the performativeness of punishment is dealt with by a large group of people, its essence, purpose, and function are the concern of few people in the world¹⁶. Paying attention to the pure spectacular nature of punishment, while omitting its moral and didactic

14 For more on this subject see Jarosław Utrat-Milecki, *Podstawy penologii...* op. cit. 236 et al.

15 Utrat-Milecki, *Podstawy penologii...* op. cit., p. 236.

16 Michel van de Kerchove, *Quand dire, c'est punir. Essai sur le jugement penal*, Facultes Universitaires Saint-Louis, Bruxelles 2005, p. 5; Mick Mangan, “Reprezentatywny, sceniczny,

thread, is essentially an escape from the most important question about the nature, meaning, and purpose of one of the most important social phenomena.

4. INTEGRAL-CULTURAL EXAMINATION OF CRIMINAL PUNISHMENT

A new perspective in penological research is opened by legal and sociological analyses based on the culture of integration of the methodology and theory of these disciplines. The combination of various research instruments in the course of research and the use of dual substantive control leads to the unveiling of a reality previously known only fragmentarily. The choice of a definition of punishment is the starting point for this research. The definition of all the phenomena referred to as punishment is a difficult matter not only because of its complexity, and cultural and semantic diversity, but also because of the intervention of numerous rationalizations affecting the way it is understood and used¹⁷. It should be taken into account that with such a complex social phenomenon a certain level of ambiguity of this term will persist.

The definition of punishment to which I am currently referring states that: *“Criminal punishment is an intentional condemnation decided by a court on behalf of a political authority and expressed by a legally defined unpleasantness for a perpetrator of a crime”*¹⁸. This definition further says that punishment is: *“complex actions undertaken on the basis of law by authorized bodies, actions that are to satisfy the sense of security, order, and justice of individuals and social groups. Actions that would not be taken in response to a previous crime and would not comprise condemnation expressed legally as a perpetrator’s personal unpleasantness based on a final court judgment, would not be criminal punishment. By definition, punishment is a response to a crime and is in no way related to any rationalization of punishment”*¹⁹.

The same author gives further details on the correct understanding of the sentence and states that “punishment, especially criminal, contains today the following elements: 1) condemnation of human acts (acts and omissions) determined by law with regard to their form and content; 2) assignment, on the basis of law and in the manner prescribed by law, of the condemned act to a punished person; 3) intentionally unpleasant for a punished person; 4) infliction by an independent authority (court) acting by law on behalf of the community; 5) specification in the Act of its forms and principles of inflicting and execution. Criminal punishment is therefore

znaczący, publiczny, zbiorowy” spektakl na szafocie widziany inaczej, [in:] ed. Jarosław Utrat-Milecki, *Kara w nauce i kulturze*, WUW 2009.

- 17 The extended definition of criminal punishment adopted as the basis of the integral-cultural theory of punishment was formulated by Jarosław Utrat-Milecki in his book *Podstawy penologii. Teoria kary*, WUW, Warsaw 2007, pp.78–81.
- 18 Utrat-Milecki Jarosław, *Kara. Teoria i kultura penalna: perspektywa integralno kulturowa*, WUW, Warsaw 2010, p. 43.
- 19 J. Utrat-Milecki, *Kara. Teoria i kultura penalna...*, op. cit. p. 43

a series of actions taken on the basis of universally binding law (*ius cogens*) and within the limits and forms provided for by it.²⁰

The presented definition is of a regulatory nature, organizing the field of penological research. It is not related to any ideologizing rationalization that would justify inflicting unpleasantness or suffering on anyone by any authority. This definition indicates the universal sociological character of punishment, and thus the finding of its sources in the general systemic principles of social life.

Although the very definition of the phenomenon is a difficult starting point for sociological and legal research, it is not the only serious difficulty in implementing the research programme. Implementation of empirical research in closed professional environments, such as legal circles, and in particular in the subgroup of judges, requires the solving of the methodological problem caused by the existence of semantic codes understood only among the members. In general, such a phenomenon or tendency in the attitudes of the respondents is known even before undertaking proper research. Sometimes, there are inclinations to use a certain vocabulary (jargon, slang, dialect, secret prison speech, etc.), and sometimes it is a kind of correctness filter (environmental forms of discretion e.g. code of aristocratic distance and emotional restraint, or extravagance formula included in artists' lifestyles)) defending access to the real meanings of facts and statements. In many cases, there is also a conscious creation of secrets and a leaving of interpretation gaps due to concealment or ambiguity of expression. Intentional confabulation and wanton colourization replacing the truth play a great role in concealing the reality.

Some of the codes result from the situational restrictions of people speaking, others come from habits and professional or environmental obligations, yet others result from upbringing in a specific environment that requires submission to certain styles. Some of them may be overcome by the use of appropriate research and interpretation tools, while others may permanently block access to the relevant content of the researched reality. In every situation, gathering information about their occurrence and meaning enables better preparation of research tools, and then a more correct interpretation of the data. In relation to the professional group of judges, this methodological specificity is raised in various fields (legal language, normocentric perspective of observation and interpretation of phenomena, and professional discretion), primarily due to issues related to the description and interpretation of the world more in the language of law than of social sciences, and a vision of the world divided between that which is of interest to the law and that which remains outside it. Comments on the professional orientation of statements of lawyers, in particular judges, were formulated by Adam Podgórecki in his work "Zjawiska prawne w opinii publicznej". He stated that: "Judges, like most lawyers in general, tend to give answers during interviews that give more information about what it should be like rather than about what it is like. To diagnostic questions, and thus questions aimed at determining what the actual situation is like, the judges basically provide answers on what the situation should

20 Jarosław Utrat-Milecki, *Z dziejów pojęcia kary kryminalnej*, [in:] *Z dziejów afektu penalnego*, ed. Jarosław Utrat-Milecki, Wyd. Oficyna Naukowa, Warsaw 2014, p. 73.

be like. Perhaps this is some normocentric deviation of the legal profession in general”²¹. Therefore, there is a reasonable presumption that in any formal situation created by submitting a sociological research tool to a person representing the legal profession (questionnaires, arranging an interview, informing about observation), this particular change to normative declarations will be introduced. The second special feature of the research into punishment carried out with the participation of lawyers (in particular criminal judges) is to persuade them to a broad reflection on everyday matters, which they constantly assess from the perspective of the law and would like to arrange in a specific manner²². It is understandable that the situation of sociological research creates an opportunity for a hidden inclusion in the utterance of the normative and desirable pattern of the matter, and not for the reporting of the actual state of affairs. A statement may be the involuntary espousing by the respondent of a certain state of affairs, not reporting the reality.

5. THE LEGAL AND SOCIOLOGICAL RESEARCH “KULTURY PENALNE 2012–2014” (PENAL CULTURES 2012–2014)

Against the background of scientific definitions of punishment, those used by lawyers, in particular judges, seem very synthetic. In the study “Penal Cultures. Cultural context of criminal policy and criminal law reforms. The legal-penological, historical, sociological, and cultural (anthropological) analysis of criminal law reforms in Poland against the background of European and world trends” conducted in 2012–2014 at the University of Warsaw, answers to the open question about the definition of punishment brought surprises. From among 160 judges-respondents, as many as 53 (33.13%) did not answer the question at all²³. One of the fuller answers to this question was: “Punishment is a reaction of the state to the perpetrator of a crime expressing disapproval of the act committed by him/her, striving to achieve an educational and repressive goal in relation to the convicted, which should prevent further crimes in the future, both by the perpetrator and other people”. The definition emphasized first of all the legality of proceedings specified by the term punishment and its imposition by the competent state authority and pointed to its educative and repressive character in relation to the perpetrator and society.

Some judges pointed out in their definitions that punishment is “an unpleasantness that is a consequence of criminal activity, the purpose of which is to isolate the perpetrator, prevent further offences, and raise the legal awareness of society”. Thus, the social significance of the isolative function of punishment and its broad impact on the awareness of the general public were emphasized.

21 Podgórecki A., *Zjawiska prawne w opinii publicznej*, Wydawnictwa Prawnicze, Warsaw 1964, p. 205.

22 Podgórecki A., *Zjawiska prawne w opinii publicznej*. Op. cit. pp. 14–20.

23 Some respondents left the space for answers blank, but many respondents crossed the space out, which, according to the researchers, highlighted the respondent’s reluctance to provide an answer.

A certain group of respondents drew attention first of all to the fact that punishment as unpleasantness is to be “adequate to the type of crime, degree of guilt, personal conditions of the perpetrator, and his/her behaviour before and after committing the crime.” These factors taken into account in the procedure of administration of punishment by the judge make up the justice of punishment. The feature of justice was emphasized in many definitions. The statement that punishment is “a fair reaction of the judicial authorities to the committing of a crime or misdemeanour, aimed at achieving preventive and educational goals in relation to the perpetrator and society” can serve as an example. The emphasis on the justice of punishment was also found in the lucid answers of judges that “just retribution”²⁴ is punishment. The parameter of justice was considered by all respondents to be necessary, and at the same time sufficient to distinguish between the referents of punishment.

Some respondents drew attention to the effect of justice of punishment on persons who were injured by crime. They wrote that punishment is the reaction of the justice system “rendering satisfaction to the justified interests and harm of the injured parties”. In such definitions, justice is treated as the most important feature that constitutes punishment.

Although from the perspective of learning it seems important to define punishment, some respondents avoided answering this question. They stated that “the definition is of no practical significance for persons inflicting punishment” or wrote that “the codex definition is correct”. There were also respondents who wrote that “it is difficult to create such a definition. Punishment is a problem too complex to be defined.”

The issue of determining the most important features of punishment is different (Table 1). The judges’ responses in the conducted study were consistent. Out of the fifteen proposed features of punishment assessed on a 9-point scale, the judges considered justice, proportionality to guilt, and inevitability as the most important²⁵. The respondents were not offered any particular meaning to these terms, they were based on their own concept of justice, proportionality to guilt, or severity. Justice was indicated at the highest level of importance by 145 respondents, that is 90.63% of respondents. Proportionality to guilt was indicated at the highest level of importance by 127 respondents, that is 79.38% of respondents. Inevitability of punishment was indicated at the highest level of importance by 126 judges, that is 78.75% of the respondents. Many, 103 respondents, that is 64.38%, considered the effectiveness of punishment and its comprehensibility for the punished at the highest level on the scale.

In the next place, the educational goal of punishment in relation to the perpetrator of the offence was listed by the judges. According to lawyers, it is associated with the indication to the perpetrator of the crime of the applicable norms and values and instruction on the fact that acts which violate the principles of conduct

24 Underlined by the respondent.

25 In the table presented to the respondents, punishment features to choose from are listed in the following order: “just, exemplary, immediate, severe, inevitable, proportionate to guilt, public, painful, effective, shocking the perpetrator, understandable for the punished, understandable to the public, deterrent to the perpetrator, deterrent to potential perpetrators, educational, other?”

in the community are seen, assessed, and punished²⁶. A total of 93 judges, that is 58.13% of the respondents, pointed to the educational goal of punishment as an important individual and preventive function of punishment, putting it at the highest level on the scale of importance.

Table 1. Features of punishment

Features of punishment	Not important 1	2	3	4	Moderately important 5	6	7	8	Very important 9
Just	0	0	0	0	4	2	3	5	145 90.63% no answer 1
Proportional to guilt	0	0	1	0	4	2	10	12	127 79.38% no answer 4
Inevitable	0	0	0	0	5	3	6	17	126 78.75% no answer 3
Effective	1	0	0	2	9	2	17	23	103 64.38% no answer 3
Understandable for the punished	0	1	0	2	18	8	11	16	103 64.38% no answer 1
Educative	1	1	0	1	10	6	22	24	93 58.13% no answer 2
Deterrent for the perpetrator	1	0	0	1	29	7	37	22	89 55.63% no answer 3
Understandable for society	0	1	1	7	23	12	16	15	82 51.25% no answer 3
Immediate	2	1	4	3	29	14	16	22	67 41.88% no answer 2
Deterrent for potential perpetrators	1	0	2	3	32	12	27	22	58 36.25% no answer 3

26 In contrast to the educational function of punishment, the judges used the term resocialization, awareness, interacting, informative or teaching functions.

Features of punishment	Not important 1	2	3	4	Moderately important 5	6	7	8	Very important 9
Exemplary	5	3	6	12	44	20	13	16	37 23.13% no answer 4
Unpleasant	2	4	10	10	47	23	24	6	26 16.25% no answer 8
Shocking the perpetrator	13	9	11	16	47	14	15	13	15 9.38% no answer 7
Public	30	19	27	15	38	4	7	8	4 2.5% no answer 8
Severe	21	13	16	26	51	11	8	5	3 1.88% no answer 6
Other, what? (without scale): proportional to damage; wise and rational; cheaper.									3 1.88%
									N=160

Over half of the judges examined (89 people, 55.63%) stated that punishment should be a deterrent to the perpetrator. Such a direct indication of the educational and deterrent intention of punishment emphasizes that judges are guided primarily by individual and not general prevention. Punishment with the motive of instruction, or restraint, or deterring the perpetrator from committing crimes, is strongly emphasized in the judges' recommendations by including all grades in the range from the "moderately important" level to the "important" level.

This direction of the judges' interpretation of the purpose of punishment by indicating its broader educational features is also maintained in the assessments of the importance of such features as punishment to be "understandable to society", "immediate" and "deterrent to potential perpetrators". For these reasons, 82 (51.25%) judges considered making punishment comprehensible to society as "very important", 67 (41.88%) of judges making it immediate (being a logical consequence of an act) considered it very important, and 58 (36.25%) of the respondents making it a deterrent to potential perpetrators. In the indication of these features, emphasis was gradually shifted to the fulfilment by punishment of the conditions of general prevention.

The judges' opinions also show a somewhat weaker emphasis on the significance of such features of punishment as exemplarity, unpleasantness and the shocking power of punishment to the perpetrator. Although these features were indicated less frequently (they were not "the most important"), the majority of respondents still supported the importance of these parameters at the points of the scale from "moderately important" to "important" with the highest number of votes in the "moderately important" category. In the opinion of the respondents, these factors were not in the foreground but still important. From the comments placed in the margins of the questionnaire by individual respondents, it can be seen that such terms as "exemplary", "painful" and "shocking the perpetrator" are considered imprecise in meaning²⁷.

Against the background of what is an important feature of punishment, features that are considered unimportant are more clearly visible. The public feature of punishment (129, 80.63%) and its severity (117, 73.13%) are unimportant. Most of the respondents gave their vote in the range from unimportant to moderately important.

Among the additional comments of the respondents were statements that punishment should be "proportional to damage", "wise and reasonable", "more cost-effective", but the level of importance of these parameters was not determined on the scale.

Important issues regarding the judges' perception of punishment are revealed by the answer to the question in which the judges had to choose one of four opinions. The respondents were offered the following options: "It is best to punish an act severely at first and prevent subsequent acts", "it is best to treat the first offence gently, but warningly", "every situation is different and you cannot be bound by any rule", "I do not agree with any of these statements". By far the largest group, as many as 135 judges (84.38%), are those who chose the statement that "every situation is different and you cannot be bound by any rule". Judges are, therefore, oriented to assess the perpetrator and the act in individual categories. The emphasis put by the respondents on the individualization of the proceedings with the perpetrator indicates the conviction of the judges that multi-faceted analysis of matters should not undergo any restrictive interpretation, for example regarding predictions of behaviour of the perpetrator.

In the surveyed group, only one person acknowledged that "it is best to punish a wrong deed severely at the beginning and prevent the next ones", and therefore to react preventively in a stern manner. While severe punishment of the first act has no supporters among the respondents, the warning of the perpetrator with a milder punishment is treated as something that can be taken into account when examining specific situations. Nineteen judges (11.88%) were in favour of responding with punishment for a wrong act of the perpetrator, but they think that the first offence should be treated gently, but warningly. This is the opinion that at the beginning you must prevent bad behaviour by admonishing, and strengthening and directing

27 One of the respondents put a question mark in the "exemplary" space and another asked "what is it?" in the space "shocking the perpetrator".

upbringing. The judges expressing such an opinion are inclined to admonish the perpetrator and, above all, to signal to him that his deed has been perceived and described as “punishable” and this is to why the perpetrator has become an object of interest for the justice system. In this situation, impunity of the perpetrator is avoided and at the same time a chance to improve is offered to him/her.

The study showed that there is no conviction in the group of judges that crime prevention should be implemented by radical deterrence, or raising fear with extremely severe punishment. The general question of how judges prevent the build-up of criminal behaviour can be answered that – in the light of their declarations – they are primarily focused on individual analysis of cases and possibly giving the perpetrator a chance to improve by a warning punishment.

6. CONCLUSION

Empirical legal and sociological research conducted into a group of 160 Polish criminal judges shows that from the perspective of judicial punishment, despite subjecting it to strict rules of law, punishment as a real phenomenon and institution of law remains a concept open to various meanings, as was signalled from the perspective of analytic philosophy by Antony Flew. This issue becomes even more complex when we take into account the process of punishment, emphasized in the concept presented by Jarosław Utrat-Milecki. The concept emphasizes that the extent of punishment as a social phenomenon translates in law into successive stages of punishing determined by law. At each of these stages, punishment is implemented in a different pattern of social conditions, first of all, in changing social institutions and corresponding phases of legal regulations.

From the perspective of the penological or criminological analysis of standard definitions of punishment and the related rationalizations of punishment, the standard definitions can at most be the starting point for empirical research on the complexity of punishment. They are to open the way for a more comprehensive understanding of the tasks of individual institutions, the rules of social life, and – in particular – the role that punishment plays in the life of the perpetrator of a crime and of the injured party and people associated with them. It is a simplification to equate the declared rationalization of punishment with the real character of measures awarded and executed, referred to as organizational forms of punishment. The rationalizations assigned to punishment may result from the normative approach to these issues by both theoreticians and practitioners of law. Rationalizations should be subject to a meticulous, critical analysis. Apart from the impact of strictly political and criminal matters on the dynamics and structure of crime, may have wider sociological and anthropological investigations of criminal punishment as an institution and a social phenomenon may be of particular importance. It is in such a broader socio-cultural context that the phenomenon of crime and punishment can be better represented by the very complex relationship that can occur between crime and punishment under specific social and political conditions.

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Jadwiga Królikowska

Univerzitet u Varšavi, Institut za društvenu prevenciju i resocijalizaciju
– Evropski centar za penološke studije Prof. G. Rejman

TEORIJE KAŽNJAVANJA I ZAŠTITA DRUŠTVENOG REDA KRIVIČNIM PRAVOM

APSTRAKT

U radu su prikazani rezultati pravnih i socioloških istraživanja na temu kažnjavanja, koja su sprovedena u periodu od 2012. do 2014. godine na Univerzitetu u Varšavi, pod rukovodstvom prof. G. Rejmana iz Evropskog centra za penološke studije. Osnov za istraživanje nalazi se u penološkim istraživanjima koja su Bronisław Wróblewski i Witold Świda obavili u Poljskoj u periodu od 1937. do 1939. godine. Istraživanjem je obuhvaćeno 160 sudija – krivičara, koji su davali odgovore na 81 pitanje iz oblasti kažnjavanja. Sudije su obrazlagale korišćene definicije kažnjavanja, ističući njene najvažnije osobine, ali su dali i svoje mišljenje o novim zakonodavnim rešenjima u Poljskoj. Cilj istraživanja je da se na osnovu dobijenih odgovora, sagleda penološko znanje savremenih sudija.

Polazna tačka istraživanja bila je definicija kažnjavanja koju je formulisao Jarosław Utrat-Milecki, koristeći teorije i metode integrisanih kulturoloških istraživanja koja su sprovedena u oblasti društvenih i pravnih nauka. Kritički je analizirana racionalizacija kojom su određeni specifični ciljevi i opravdanje postojanja kažnjavanja. Istraživanje je pokazalo da na percepciju kažnjavanja, njen smisao i ciljeve, ne utiče samo kriminalna politika države, već i veliki broj socioloških faktora, poput kulture društva i moralne osetljivosti perioda koji posmatramo.

Ključne reči: Kažnjavanje, sudije, kulturalno integrisane studije, krivično pravo, društveni poredak.