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The Theory of Punishment and the Practice of Criminal Justice

1. Introduction

Penology is usually defined as an interdisciplinary area of research on criminal punishment and other legal and social reactions to acts prohibited under the threat of punishment.[1] In contemporary Poland, it does not belong among dynamically developing fields of legal studies. In recent decades, certain issues concerning the theory of punishment, the aims and functions of criminal penalties, and their social consequences, have been discussed in criminology[2] and the doctrine of substantive criminal law.[3] In-depth interdisciplinary penological studies, such as the works of Jarosław Utrat-Milecki,[4] have rarely been published. This lack of interdisciplinary penological studies is surprising given the earlier development of penology in Poland.

The beginnings of systematic penological studies in the world date back to the eighteenth century and were related to the Enlightenment programme of criminal justice reforms. Poland at the end of that century lost its independence. Until 1918, its territory was divided among Russia, Austria, and Prussia. However, already in the nineteenth century Polish scholars incorporated penological issues in their discussions of criminal law.[5] At the beginning of the twentieth century, Juliusz Makarewicz wrote an extensive study on the philosophy and development of criminal law. His work, published in 1906 in German (*Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage*), was widely considered crucial for the development of modern penology in Poland. It should be added that Makarewicz was one of the main authors of the 1932 Polish Penal Code. His extensive penological

[1] J. Utrat-Milecki, *Penologia ogólna. Perspektywa integralnokulturowa*, vol. 1, Warszawa 2022, p. 11.
[2] K. Krajewski, *Teorie kryminologiczne a prawo karne*, Warszawa 1994; *Od szkoły klasycznej do neoklasycznej w prawie karnym*, ed. J. Widacki, Kraków 2016.
[3] M. Królikowski, *Sprawiedliwość karania w społeczeństwach liberalnych. Zasada proporcjonalności*, Warszawa 2005.
[4] J. Utrat-Milecki, *Penologia ogólna…*, vol. 1–2.
[5] D. Janicka, *O pionierach nauk kryminologicznych w Polsce*, "Czasopismo Prawno-Historyczne" 2016, no. 68(1), p. 39.

knowledge was of great importance for this Code, which was regarded as a model example of a compromise between the ideas of the classical and positivist schools in criminal law and as one of the most modern penal codes in Europe at that time.[6]

Some years later Bronisław Wróblewski introduced the notion of penology into scholarly discourse in Poland. In 1926, he published a two-volume study focusing on the philosophy of criminal law and justifications (rationalisations) of punishment.[7] In 1939, he stated in an article on scholarly/academic rationalisations in criminal law that punitive reactions to crime at both levels of legislation and of application of the law could be rationalised in various ways: in a scholarly, philosophical, or pre-scholarly fashion. According to his views, scholarly rationalisation of punishment was based on an empirically confirmed relationship between a penalty or other penal measure and the expected outcome. Philosophical rationalisation used various types of reasoning such as those relating to the nature of things. In turn, pre-scholarly rationalisation occurred when the relationship between punishment and expected outcome was based on intuitions and *ad hoc* observations made without objective monitoring. The legislator, Wróblewski claims, used mainly philosophical and pre-scholarly rationalisations and introduced into criminal law penalties and other penal measures the effects of which had not been confirmed by objective research. Surveys of judges also indicated that they rationalised the imposition of penalties in philosophical or pre-scholarly terms.[8] Wróblewski mentions, among factors inhibiting objective rationalisation of punishment, the deficiencies in the knowledge of the time about the effectiveness of penal reactions. However, he expected positive changes in that area owing to the development of the positivist school in criminal law which favoured a scholarly and objective approach to combating crime.[9]

After the Second World War, penological issues in Poland lost their importance. One of the reasons was barriers hindering the development of interdisciplinary discussion of criminal law and punishment in the authoritarian countries of the Eastern Bloc. This is especially true in relation to the first post-war decade when crime was treated by state authorities as a relic of the capitalist system, and largely as a manifestation of resistance to the communist system of the time.[10] The situation changed partly in 1956 when the intensity of political repression decreased. Polish scholars were able, although only to a limited extent, to participate again in international penal congresses and carry out academic research on crime and punishment. In the 1970s, penological problems were discussed in Leszek Lernell's works.[11] Since then, systematic penological studies

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[6] D. Janicka, *Kodeks Makarewicza w opiniach niemieckich autorów* [in:] *Nil nisi veritas. Księga dedykowana Profesorowi Jackowi Matuszewskiemu*, eds. M. Głuszak, D. Wiśniewska-Jóźwiak, Łódź 2016, p. 513.

[7] B. Wróblewski, *Penologja. Socjologja kar*, vol. 1–2, Wilno 1926.

[8] B. Wróblewski, *Naukowa racjonalizacja w prawie kryminalnym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1939, vol. 19, no. 3, pp. 265–267.

[9] *Ibid*., pp. 268–270.

[10] L. Tyszkiewicz, *Zarys rozwoju kryminologii w Polsce w latach 1945–1969*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1970, no. 32(3), pp. 64–66.

[11] L. Lernell, *Podstawowe zagadnienia penologii*, Warszawa 1977; *idem*, *Współczesne zagadnienia polityki kryminalnej. Problemy kryminologiczne i penologiczne*, Warszawa 1978.

have been rare. Generally, the penal studies in contemporary Poland are dominated by dogmatic analysis. The existing knowledge gap encourages some reflection on the theory of punishment and its impact on the practice of criminal justice. Owing to the complexity of this issue, this article covers only selected aspects of this topic.

Following the Polish penologist Lernell, I assume that theory of punishment means a coherent system of views on the justification of punishment. Unlike the theory of punishment, the term penological concept has a much broader scope of meaning. The latter can be understood as certain views functioning in the minds of individuals, including persons making decisions at various stages of the criminal justice system, as to what a criminal penalty is. The penological concepts of various people often result from their philosophy of life and their visions of the world, justice, and relationships between people.[12] Over the centuries, theories of punishment have mainly been debated by philosophers of law. After the emergence of criminology as a separate field of knowledge, they also attracted the attention of criminologists. However, as Andrew von Hirsch once noted, criminologists were unaccustomed to dealing with philosophical questions.[13] In the next part of this article, I briefly present some theories of punishment debated in the contemporary philosophy of punishment. Subsequently, I focus on their impact on criminal justice systems in various countries.

2. Contemporary theories of punishment

In recent decades most discussions concerning the theory of punishment have taken place between supporters of consequentialism and retributivism. The former is a theory according to which the moral rightness or wrongness of an action depends entirely on its consequences. An action is right if its outcomes are good. When it comes to punishment, the good that can be served by it is the prevention of crime. According to Antony Duff, a leading expert on the philosophy of punishment, in order to justify a system of punishment from the perspective of consequentialism, it must be shown, not only that it does good, but also that "no available alternative practice could be expected to bring about as much or more good, at lower cost."[14] Therefore, Duff highlights two important points of consequentialism as a theory of punishment. The former requires a demonstration that punishment prevents crime by deterring, rehabilitating, or incapacitating actual or potential offenders. The latter requires a demonstration that the costs of such prevention do not outweigh its benefits and that no other, more cost-effective, techniques of crime-prevention are available.[15]

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[12] L. Lernell, *Podstawowe zagadnienia penologii…*, pp. 36–37.

[13] A. von Hirsch, *Proportionality in the Philosophy of Punishment*, "Crime and Justice" 1992, no. 16, p. 56.

[14] R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, "Crime and Justice" 1996, no. 20, pp. 4–5.

[15] *Ibid.*, p. 5.

In contemporary penology the term consequentialism is often replaced by utilitarianism. Michael Tonry points out that the current interchangeable use of these terms is, in many cases, based on simplified views that utilitarians are interested only in deterrence. Jeremy Bentham, who created the foundations for the development of the utilitarian theory of punishment, actually emphasised deterrent considerations, but he also wrote about rehabilitation, incapacitation, and moral education. The overriding justification for punishment in his views was to minimize the harms that resulted from crime, both to victims and to offenders.[16] The utilitarian theory of punishment is subject to criticism from retributivists who argue that it permits punishing the offender more severely than he/she deserves or even for punishing the innocent if the benefits of so doing outweigh the costs.[17] Retributivists claim that utility as the criterion for punishing does not exclude the punishment of a few innocent persons in a situation in which their pains are outweighed by benefits in deterring crime and reassuring the public.[18]

As opposed to consequentialists, retributivists rationalise punishment as an appropriate or obligatory response to crime that needs have no aim beyond itself. Retributivism is often characterised as the theory which says that "punishment is justified if and to the extent that it is a morally deserved response to an instance of criminal wrongdoing."[19] However, it should be emphasised that there is no one retributivist theory of punishment, but many different views are classified as retributivist. What is common to various versions of retributivism is the belief that punishment must be justified in terms of its intrinsic character as a response to past wrongdoing.[20] Among several versions of retributivism currently discussed by punishment theorists, there are negative, modest, and positive retributivism. According to negative retributivism, the innocent must never be punished. According to modest retributivism, lawbreakers should never get more punishment than they deserve. Both negative and modest retributivism imply no duty to impose punishment on the basis of desert. The former uses desert to establish whether punishment is permissible while the latter uses it to set an upper limit on permissible punishment.[21] Unlike the negative and modest retributivism, positive retributivism claims that deserved punishments must be imposed. Its basic feature is the view that punishment ought to be proportionate.[22]

Positive retributivism is sometimes divided into a fairness-based and a desert-based variation. The former places the justification of punishment in the removal

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16 M. Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America*, "Crime and Justice" 2018, no. 47, pp. 128–129.

17 A. von Hirsch, *Doing Justice: The Principle of Commensurate Deserts* [in:] *Sentencing*, eds. H. Gross, A. von Hirsch, New York–Oxford 1981, p. 245.

18 A. von Hirsch, *Proportionality in the Philosophy…*, p. 58.

19 G. Duus-Otterström, *Why Retributivists Should Endorse Leniency in Punishment*, "Law and Philosophy" 2013, no. 32(4), p. 459.

20 R.A. Duff, *Penal Communications…*, pp. 6–7.

21 M. Tonry, *Punishment and Human Dignity…*, p. 131; G. Duus-Otterström, *Why Retributivists Should Endorse…*, p. 465.

22 G. Duus-Otterström, *Why Retributivists Should Endorse…*, pp. 465–466.

of the unfair advantage achieved by the criminal, while the latter sees punishment as the infliction of appropriate suffering and recognizes the dominant role of the principle of proportionality.[23] Von Hirsch, the author of the contemporary theory of just deserts, conceives the principle of proportionality (in other words, the principle of commensurate deserts) as a requirement that the severity of punishment should be commensurate with the seriousness of the wrong.[24] This principle in his views looks retrospectively to the seriousness of the offender's crime which depends on the harm done or risked by the act and the degree of the perpetrator's culpability. He considers the principle of proportionality a requirement of justice for many reasons, mainly because it protects the rights of the offender against sacrificing them for the good of others.[25]

Proportionality in retributivism can be absolute or relative. In line with the first conception of proportionality, there is for each crime an intrinsically proportional punishment. A relative approach is less demanding and holds that crimes of similar seriousness should be punished by penalties of similar severity. Göran Duus-Otterström explains the difference as follows: while the absolute conception of proportionality will hold that punishment should be intrinsically proportionate to crime X, the relative conception will hold it to be proportionate, relative to how the penal scale is anchored.[26] What seems the biggest challenge for the theory of just deserts is the question of the deserved (commensurate) quantum of punishment owing to the lack of unambiguous criteria to measure the seriousness of offences as well as the severity of punishments. This theory focuses mostly on the question of justification, which is the question of what might justify the state's institutions of punishment. However, it does not provide an answer to the question of sentencing as to how much and what kind of punishment should be imposed in response to a particular crime.[27]

In addition to positive retributivism, the theory of limiting retributivism associated with Norval Morris has developed in recent decades. Under this version of retributivism, proportionality can only be a limiting principle. According to Morris, a limiting principle of punishment does not say how much an offender deserves, but only gives the outer limits of leniency and severity, which cannot be exceeded. In his work on limiting retributivism, he explains that "when we say a punishment is deserved we rarely mean that it is precisely appropriate"; in his view, in such cases we usually mean that punishment "is not undeserved; that it is neither too lenient nor too severe."[28] As a result, deserved punishment lies on a continuum between the unduly lenient and

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[23] R.A. Duff, *Penal Communications*…, p. 26; G. Duus-Otterström, *Why Retributivists Should Endorse*…, p. 464.

[24] A. von Hirsch, *Doing Justice: The Principle*…, p. 243.

[25] *Ibid.*, p. 245.

[26] G. Duus-Otterström, *Why Retributivists Should Endorse*…, p. 467.

[27] M. Tonry, *Punishment and Human Dignity*…, p. 130.

[28] N. Morris, *Punishment, Desert and Rehabilitation* [in:] *Sentencing*…, p. 267.

the excessively punitive. Within these limits, a just sentence may be determined on other grounds, including utilitarian goals of crime prevention.[29]

This brief review of retributive and consequentialist theories by no means exhausts the complexity of issues discussed in the contemporary philosophy of punishment. It should be added that the lines between different kinds of retributive theory are blurred.[30] The same applies to the boundaries between utilitarian and retributive theories. Certain versions of retributivism, such as communication theory,[31] are difficult to distinguish from utilitarianism. Current discussions among punishment theorists largely centre on predictive (risk-based) sentencing and the possibility of integrating it within the consequentialist or retributivist framework. The reason why predictive sentencing is at the heart of the discussion seems to be that it makes it possible to achieve effective reductions in the prison population and expenditures without increasing recidivism.[32]

3. Theories of punishment and changes in punishment practice

Numerous penal philosophers share the opinion that they usually pay too little attention to sentencing and ignore issues of great importance to practitioners. Most theories of punishment deal mainly with the justification of punishment as an institution.[33] As a result, there is an extensive body of philosophical literature on justifications of criminal sanctions. There are many philosophical works devoted to consequentialist general justifications for the existence of criminal sanctions based on their crime-preventive effects. The same can be said about retributive justifications, which have ranged "from talionic notions of requiting evil for evil, through 'moral paternalist' theories, to theories emphasizing the communicative character of punishment."[34] Problems related to the question of what kind of penalty should be imposed on this offender or that kind of offender are much less frequently considered by philosophers, making, according to Antony Duff, their voices useless for penal practitioners.[35] This does not mean, however, that theories of punishment are completely devoid of practical significance.

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[29] *Ibid.*; see also: R.S. Frase, *Limiting Retributivism* [in:] *The Future of Imprisonment*, ed. M. Tonry, New York–Oxford 2004, pp. 85–89.

[30] M. Tonry, *Punishment and Human Dignity*…, p. 130.

[31] See, for example, Antony Duff's theory of communicative punishments as aiming at bringing an offender to a repentant understanding of his/her wrongdoing and enabling appropriate reparation, reconciliation, and rehabilitation; R.A. Duff, *Penal Communications*…, pp. 80–83.

[32] *Predictive Sentencing: Normative and Empirical Perspectives*, eds. J.W. de Keijser, J.V. Roberts, J. Ryberg, Oxford–Chicago 2019.

[33] M. Tonry, *Punishment and Human Dignity*…, p. 130.

[34] A. von Hirsch, *Penal Theories* [in:] *The Handbook of Crime and Punishment*, ed. M. Tonry, New York–Oxford 1998, p. 659.

[35] R.A. Duff, *Penal Communications*…, p. 57.

In penology, it is generally accepted that consequentialism in the form of utilitarianism strongly influenced the criminal justice systems in the United States[36] from the nineteenth century to the 1970s. The post-war period until the 1970s is sometimes referred to in American penology as the period of the domination of "consequentialist orthodoxies."[37] In accordance with utilitarian principles, a primary goal of the state and federal criminal justice systems was crime prevention through rehabilitation of offenders. Consequentialists argued for indeterminate sentences, considering them necessary to achieve the aim of rehabilitation. They maintained that courts could not be expected to precisely determine the kind and length of the necessary treatment at the time of giving verdicts. For this reason, they advocated that decisions concerning sufficient progress of offenders in their reformation and the length of their stay in prison before release should be handed over to prison administration and other experts in corrections.

At the same time, most practitioners in the United States shared these utilitarian ideas. They were in favour of indeterminate prison sentences and corrections aimed at helping convicts adjust to society by means of labour, education, vocational training, good behaviour incentives, and other programmes carried out in penal institutions. The expression of this consensus between penal theorists and practitioners was the 1962 Model Penal Code commissioned and approved by the American Law Institute. It was drafted by a committee consisting of professors, judges, prosecutors, defence lawyers, and corrections officials who shared similar visions of sentencing focused on crime prevention and offenders' rehabilitation.[38] It should be stressed, however, that the "consequentialist orthodoxies" in the United States cannot be reduced to the rehabilitation of criminals. A deeper analysis of the American rehabilitative penology confirms that its primary aim was to reduce recidivism by facilitating the reformation of offenders, but it also had another aim, that of identifying incorrigible prisoners who could not be reformed and should be punished harshly.[39] The broad support for indeterminate sentences among penal theorists and criminal justice practitioners stemmed from the belief that such sentences were the best method of providing prisoners with the opportunity for social rehabilitation, while at the same time enabling the incarceration of incorrigible offenders without their release.[40]

This consensus around the aims of the American criminal justice systems collapsed suddenly in the 1970s. The reasons for the decline were complex. Extensive penological literature shows that the intellectual and social climate in the United States of the 1970s

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[36] Owing to significant differences between sentencing systems in individual states and, additionally, within the federal sentencing system, it is more appropriate to write about criminal justice systems in the United States than about one American criminal justice system.

[37] R.A. Duff, *Penal Communications*…, pp. 1–2.

[38] M. Tonry, *Punishment and Human Dignity*…, p. 121; *idem*, *Can Twenty-first Century Punishment Policies Be Justified in Principle* [in:] *Retributivism Has a Past. Has it a Future?*, ed. M. Tonry, New York 2011, pp. 6–7.

[39] A. Grasso, *Broken Beyond Repair: Rehabilitative Penology and American Political Development*, "Political Research Quarterly" 2017, no. 70(2), pp. 395–397.

[40] *Ibid.*, pp. 396–397.

was of great importance. The civil and prisoners' rights movements as well as a loss of trust in the state contributed to the rejection of the rehabilitative ideology.[41] In the 1960s and 1970s the state ceased to be perceived as a benevolent authority dealing in order to promote social goods and came to be regarded as an oppressive institution. It was emphasised that state power over citizens had to be strictly limited in order to protect individual freedom and rights. Indeterminate sentencing was found unfair, resulting in violation of prisoners' rights and causing unjust disparities.[42] Additionally, rehabilitative programmes underpinning indeterminate sentencing proved to be much less effective than expected. After the publication by Robert Martinson of his influential work on treatment programmes in prisons and probation,[43] optimistic beliefs about the possibility of offenders' rehabilitation were replaced with the simplified formula that "nothing works" in corrections. Subsequent weighty arguments against "consequentialist orthodoxies" were of a moral nature. Penal theorists criticized consequentialism because offenders were not punished for what they had done. The kind and extent of the punishment depended on the offender's prospects of reformation and were, therefore, detached from the nature and seriousness of the crime committed. According to critics of consequentialism, criminals were not treated with respect as rational and responsible moral agents, but as a means to achieve social benefit in the form of crime reduction.[44]

After the fall of consequentialism in the 1970s there was a revival of retributivism in penal theory. However, it cannot be ignored that this shift towards retributivism took place mainly in the United States and some other Anglo-Saxon countries (Great Britain, Australia, and New Zealand). In continental Europe, these changes were moderate. Owing to a strong tradition of the classical school of criminal law which developed in the nineteenth century, continental European criminal justice systems were not dominated by the ideas of consequentialism as was the case in the United States. In the first decades of the twentieth century, the so-called modern or sociological school, inspired by the ideas of Carl Stooss and Franz von Liszt, brought attention to offenders' characteristics and to individual prevention in criminal law. Undoubtedly, these new ideas on punishment proposed by the modern school affected the development of criminal law in continental Europe; however, they did not result in the rejection of the old ideas. Instead, they led to the adoption of compromise solutions, which generally recognized punishment as retribution proportional to the gravity of the crime committed. At the same time, they allowed judges to take into account some utilitarian goals when imposing punishment.[45]

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41 M. Tonry, *Punishment and Human Dignity*…, p. 122.

42 R.A. Duff, *Penal Communications*…, p. 2.

43 R. Martinson, *What Works? – Questions and Answers about Prison Reform*, "The Public Interest" 1974, no. 42, pp. 22–54.

44 R.A. Duff, *Penal Communications*…, pp. 10–11.

45 J. Utrat-Milecki, *Kara. Teoria i kultura penalna. Perspektywa integralnokulturowa*, Warszawa 2010, pp. 70–71.

Among model examples of such a compromise was the Polish Penal Code of 1932. It was based on the idea of purposeful punishment (in German, *Zweckstrafe*), which was intended to achieve preventive goals, but was not detached from the gravity of the act committed. In addition to punishments, the Code provided for an extensive catalogue of protective measures. Medical protective measures were mostly applied to perpetrators who were not criminally responsible owing to mental retardation, mental illness, or other mental disorders, if their remaining at large threatened the legal order. However, placements in a house of forced labour or in a facility for incorrigible persons were provided for criminally liable offenders, if they still posed a threat to society after serving their sentence.

In the 1960s and 1970s, there were still significant differences between legal theory and punishment practices in the United States and continental European countries. Unlike the United States, in Europe retributive ideas rooted in the philosophy of Immanuel Kant and Friedrich Hegel continued to be an element of a compromise approach to punishment. For this reason, it is impossible to agree with Christopher Slobogin's views that in the 1960s the sentencing regimes in most American and European jurisdictions were indeterminate and that in the next decade "a sentencing revolution" took place in both the United States and several European countries.[46] While the claim about "a sentencing revolution" seems to clearly illustrate the changes in the United States, in Europe it is treated as "a transatlantic misunderstanding."[47] Tonry in his preface to a book on the past and future of retributivism rightly notes these differences in legal systems and legal cultures between the English-speaking countries and continental Europe.[48]

The radical changes in the United States of the 1970s were carried out in a social, political, and intellectual climate that emphasized fairness and consistency in sentencing as well as equal treatment of offenders. In penological works, attention was paid to "principled sentencing" consistent with human rights and just freedoms. Criminal justice under consequentialist ideas was criticized for being "unprincipled" owing to the lack of apparent principles and generally accepted criteria for imposing punishment. Judges in the United States in the period of domination of these ideas had a lot of discretion to choose sanctions from a wide range of options in order to tailor their sentences to the correctional needs of offenders. As a result, the penalties imposed for like offences differed significantly and reflected the approaches and visions of punishment of particular judges. Judges were not required to give reasons for their sentencing decisions and no meaningful review of such decisions was available. Additionally, in cases of prison sentences, a parole board held authority to determine actual lengths of confinement.[49] In this context, it is not surprising that the proper way to reform criminal justice systems in the United States was seen in retributive ideas

[46] C. Slobogin, *A Defence of Modern Risk-Based Sentencing* [in:] *Predictive Sentencing…*, p. 107.

[47] T. Weigend, *"Neoklassizismus" – ein transatlantisches Missverständnis*, "Zeitschrift für die gesamte Strafrechtswissenschaft" 1982, no. 94(3), pp. 801–814.

[48] M. Tonry, *Preface* [in:] *Retributivism Has a Past…*, p. viii.

[49] K.R. Reitz, *Sentencing* [in:] *The Handbook of Crime…*, p. 543.

concerning punishment. In response to the widespread criticism of the unprincipled exercise of state power over criminals, two theories of punishment gained popularity, namely the Norval Morris theory of limiting retributivism and the Andrew von Hirsch theory of just deserts.

From the point of view of sentencing practice, the theory of just deserts was soon believed to be of little use because it did not provide answers to such questions as how to assess blameworthiness and how much punishment a given offender deserved. Limiting retributivism focused more on criminal justice policy-making. Apart from Norval Morris, its other supporters (Michael Tonry, Richard Frase, Kevin Reitz) dealt with such issues as a sentencing commission and sentencing guidelines, procedures for setting penalty levels, and judicial discretion in sentencing. Sentencing provisions included in the Model Penal Code, revised in 2017, were clearly based on the theory of limiting retributivism.[50] This theory was found promising as a basis for a consensus model of criminal punishment because it maintained an appropriate balance between the conflicting punishment goals and made it possible to reconcile retributive values, and especially the need to limit the maximum severity of punishment, with utilitarian crime control purposes such as deterrence, incapacitation, and rehabilitation.[51]

The current picture of sentencing in the United States, however, seems still "unprincipled." Tonry claims that "as things now stand, there is no generally accepted American jurisprudence of punishment."[52] In his opinion, a few state sentencing guidelines systems loosely based on retributive ideas coexist with drug-focused and other problem-solving courts, restorative justice initiatives, treatment programmes for offenders, and prisoner reentry programmes fitting within utilitarian values. Additionally, there are mandatory minimum sentences, three strikes laws, and life imprisonment without parole, which do not fit into any normative theory. At the same time this author stresses that the lack of a widely agreed jurisprudence is not just a purely intellectual problem with no practical significance. On the contrary, it has enormous practical and moral importance, because it makes punishment inconsistent, unequal, and unjust. It creates a situation in which "the luck of the draw, not normative ideas about justice, determines whether people wind up in prison for years, in community treatment programs, or diverted from the criminal justice system."[53] Tonry evaluates European countries much more positively owing to their legal institutions and rules aiming to assure that offenders are treated justly, consistently, and humanely.[54]

In Central and Eastern Europe, far-reaching changes in the approach to punishment at the end of the twentieth century resulted from the changes in their political system. The primary goal of these reforms was to adapt punishment to international standards, including the standards of the Council of Europe. In recent decades, this organisation has made many efforts in order to establish rules which would enable the development

50 M. Tonry, *Punishment and Human Dignity*…, p. 131.
51 R.S. Frase, *Limiting Retributivism*…, p. 83.
52 M. Tonry, *Punishment and Human Dignity*…, p. 123.
53 *Ibid.*, p. 124.
54 *Ibid.*, p. 120.

of a coherent and consistent sentencing policy in Europe. However, establishing common sentencing principles for all Council of Europe countries has turned out to be very difficult because of their diverse legal traditions and sentencing practices.[55] In 1992, a recommendation on consistency in sentencing was adopted by the Council of Europe.[56] So far, its implementation has not been the subject of thorough research. In recent years, fragmentary and internally inconsistent punishment reforms took place in some European countries, as evidenced by the 2022 reform in Poland which introduced life imprisonment without the possibility of early release.[57] Undoubtedly, interdisciplinary discussions on the theory and practice of punishment as well as the development of criminal justice systems are also needed in European countries.

4. Conclusions

There is an extensive body of literature on theories of punishment. Penal philosophers discuss different versions of retributive and consequentialist theories as well as mixed theories. At the same time, penal philosophers and criminologists in the United States and Europe emphasise the need for a human, fair, effective, and coherent criminal justice system based on normative principles. Currently, the impact of punishment theories is limited in practice owing to many reasons. Issues most important to practitioners, such as the question of how much punishment should be imposed on a given offender, are frequently not found to be so important by penal philosophers. Numerous recent reforms of criminal justice systems in the United States and European countries do not fit into any normative framework because they are populist in nature and aim to achieve mainly political goals. Additionally, reforms based on coherent theoretical assumptions which aim at creating a normative framework for punishment are implemented in some social and political contexts. Nicola Lacey and Hanna Pickard rightly point out that context is of great importance. Proportionality is considered in the philosophy of punishment as an abstract ideal, but in the real world it is "a product of political and social construction, cultural meaning-making, and institution-building."[58] In the real world, punishment considered proportionate for a given type of crime (theft, robbery, rape, etc.) in one country may be found unproportionate in another. Undoubtedly, more interdisciplinary discussion and research that takes into account both the theoretical and practical problems of punishment are necessary in order to ensure an appropriate normative framework for criminal justice systems.

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[55] A. Ashworth, *Towards European Sentencing Standards*, "European Journal on Criminal Policy and Research" 1994, no. 2(1), p. 7.

[56] Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing.

[57] K. Wiak, Z. Gądzik, *Zmiany w zakresie warunkowego przedterminowego zwolnienia z odbycia kary w nowelizacji Kodeksu karnego z 7 lipca 2022 r.*, "Probacja" 2023, no. 1, pp. 41–60.

[58] N. Lacey, H. Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, "The Modern Law Review" 2015, no. 78(2), p. 216.

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Summary

Barbara Stańdo-Kawecka

The Theory of Punishment and the Practice of Criminal Justice

Penal studies in contemporary Poland are dominated by dogmatic analysis. Penology, understood as an interdisciplinary area of research on criminal punishment and other legal and social reactions to acts prohibited under the threat of punishment, does not belong to dynamically developing fields of legal studies. An existing knowledge gap encourages some reflection on the theory of punishment and its impact on practice of criminal justice. Over the centuries, theories of punishment have mainly been debated by philosophers of law. In recent decades, most discussions concerning the theory of punishment have taken place between supporters of consequentialism and retributivism. However, the impact of these discussions on practice is limited. Issues most important to practitioners, such as the question of how much punishment should be imposed on a given offender, are frequently not found to be so important by penal philosophers. Numerous recent reforms of criminal justice systems in the United States and European countries do not fit into any normative framework because they are populist in nature and aim to achieve mainly political goals. As a result, sentencing in the United States is still criticized for being "unprincipled." In Europe, establishing common sentencing principles for all Council of Europe countries has turned out to be difficult owing to their diverse legal traditions and sentencing practices. More interdisciplinary discussion and research that takes into account both the theoretical and practical problems of punishment are necessary in order to ensure an appropriate normative framework for criminal justice systems.

Keywords: consequentialism, retributivism, sentencing.

Streszczenie

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Teoria kary i praktyka wymiaru sprawiedliwości w sprawach karnych

W naukach penalnych we współczesnej Polsce dominuje analiza dogmatyczna. Penologia, rozumiana jako interdyscyplinarna dziedzina badań nad karą kryminalną oraz innymi reakcjami prawnymi i społecznymi na czyny zabronione pod groźbą kary, nie należy do dynamicznie rozwijających się dziedzin nauki. Istniejąca luka w wiedzy skłania do refleksji nad teorią kary i jej wpływem na praktykę wymiaru sprawiedliwości w sprawach karnych. Przez stulecia teorie kary były głównie przedmiotem debat filozofów prawa. W ostatnich dekadach większość dyskusji dotyczących teorii kary toczyła się pomiędzy zwolennikami konsekwencjalizmu i retrybutywizmu. Jednak wpływ tych dyskusji na praktykę jest ograniczony. Zagadnienia najważniejsze dla praktyków, takie jak kwestia rodzaju i wysokości kary, jaką należy wymierzyć danemu przestępcy, przez filozofów karania często uważane są za nieistotne. Liczne niedawne reformy systemów wymiaru sprawiedliwości w sprawach karnych w Stanach Zjednoczonych i krajach europejskich nie wpisują się w żadne ramy normatywne, ponieważ mają charakter populistyczny, a ich celem jest osiągnięcie głównie celów politycznych. W rezultacie wymierzanie kar w Stanach Zjednoczonych jest nadal krytykowane za „brak zasad". W Europie ustalenie wspólnych zasad wymiaru kar dla wszystkich krajów Rady Europy okazało się trudne ze względu na zróżnicowane tradycje prawne i praktyki karania. Aby zapewnić odpowiednie ramy normatywne dla systemów wymiaru sprawiedliwości w sprawach karnych, konieczne są dalsze interdyscyplinarne dyskusje i badania, uwzględniające zarówno teoretyczne, jak i praktyczne problemy karania.

Słowa kluczowe: konsekwencjalizm, retrybutywizm, wymierzanie kary.