Gdańskie Studia Prawnicze

Rok XXIX — Nr 4(69)/2025

Rozważania penologiczne. Miscellanea

Redakcja naukowa
Jadwiga Królikowska
Wojciech Zalewski

Wydawnictwo Uniwersytetu Gdańskiego
Gdańsk 2025

Czasopismo finansowane przez: Wydział Prawa i Administracji Uniwersytetu Gdańskiego, Wolters Kluwer Polska Sp. z o.o.

Numer został przygotowany we współpracy z Europejskim Ośrodkiem Studiów Penologicznych im. prof. Genowefy Rejman

Adres redakcji:
ul. Bażyńskiego 6, 80-952 Gdańsk

Wydawnictwo Uniwersytetu Gdańskiego

ISSN 1734-5669

Wydawnictwo Uniwersytetu Gdańskiego
ul. Armii Krajowej 119/121, 81-824 Sopot
tel. (+48) 58 523 11 37
e-mail: wydawnictwo@ug.edu.pl
wydawnictwo.ug.edu.pl

Księgarnia internetowa: https://wydawnictwo.ug.edu.pl/ksiegarnia-online/

Druk i oprawa
Zakład Poligrafii Uniwersytetu Gdańskiego
ul. Armii Krajowej 119/121, 81-824 Sopot
tel. (+48) 58 523 14 49

Rozważania penologiczne. Miscellanea

Spis treści

ARTYKUŁY

GLOSY

Penological Deliberations. Miscellanea

Table of contents

ARTICLES

COMMENTARIES

Artykuły

Penny Darbyshire
Kingston University, United Kingdom
p.darbyshire@kingston.ac.uk
ORCID: 0009-0007-6700-5366

https://doi.org/10.26881/gsp.2025.4.01

Judicial Independence in General and in England and Wales[1]

I have been asked to write about judicial independence. This topic is a central element of the rule of law. The first paragraph of the EU's *2023 Rule of Law Report*[2] reflects a current, international problem.

> The rule of law stands alongside democracy and fundamental rights as founding values of the Union. It is common to all Member States and a bedrock of the Union's identity. It is a core factor in Europe's political stability and economic prosperity. In recent years, these founding values have come under attack around the world, testing the resilience of the EU and its Member States. The Russian war of aggression against Ukraine serves as a tragic reminder that these values can never be taken for granted. Constant proactive action is needed to safeguard these values and protect European society in the face of evolving challenges.

Poland was in trouble with the European Commission since 2017 because of its disregard for judicial independence. At last, the *2024 Rule of Law Report* announced that "The Commission concluded that there is no longer a clear risk of a serious breach of the rule of law by Poland and withdrew its reasoned proposal of December 2017, thereby closing the Article 7(1) TEU procedure for Poland."[3]

As requested, I will explain, in outline:

- important points about the English legal system, especially the criminal courts;
- the radical reforms under the Constitutional Reform Act 2005, remedying defects in the separation of powers and strengthening *collective* judicial independence;
- the Act's role in further professionalising judicial recruitment, selection, and appointment and in enhancing the safeguarding of *individual* judicial independence. I will also explain what is generally required, internationally, in terms of judicial independence;
- the relationship between the three organs of government since the 2005 Act;
- the modernised judicial appointment system and the current diversity statistics.

---

[1] The article was written in January 2025.

[2] European Commission COM (2023) 800 final, Brussels, July 2023, eur-lex.europa.eu [accessed: 2025.01.12].

[3] European Commission, Country Chapter on the rule of law situation in Poland, Brussels, 24.7.2024 SWD (2024) 821 final, p. 1.

At the end is a brief section, describing the methods of my own empirical, wide and deep research project on the working lives of judges (2002–2014), which remains unique worldwide.[4]

1. The English legal system – main, relevant points

The English legal system is very old.[5] A unified "common law" was under development in England prior to the Norman invasion of 1066. England is the mother of all common law legal systems, the globe's biggest family. Daughter systems, English speaking countries, apply their own law alongside their interpretations of common law. The United Kingdom state contains two other domestic legal systems, in Scotland and Northern Ireland. Scottish law is a hybrid between the common law and the civil (Romano-Germanic) law, which applies throughout Europe.

UK judges are highly outward looking and proactive in understanding and absorbing foreign legal concepts and in developing the common law, international law, and European human rights law. They are very influential, internationally. Furthermore, it is no accident that London is one of the world's pre-eminent centres of international law, legal services, and dispute resolution. Thanks to the stability of the common law and the reputation for incorruptibility of English judges and their respect for the rule of law, the UK has the largest legal services market in Europe, and second largest in the world, after the USA.[6] There are 200 foreign law firms with UK offices. Parties from 78 countries used the commercial courts in 2022–2023.

Uniquely in the world, over 80 per cent of defendants to criminal charges are dealt with in magistrates' courts, where most cases are determined by almost 15,000 unpaid lay magistrates, non-lawyers who sit in twos and threes, or alone in some minor matters, always advised by a professional legal adviser. Almost anyone may apply to be a magistrate. You do not need to be a citizen but to have lived here for five years. There are 194 professionally legally qualified magistrates called district judges (magistrates' courts) and 90 part-time deputies. They sit alone, also advised by a professional adviser. Magistrates are very powerful. They are arbiters of fact and law and they do the sentencing and control procedure. Magistrates are not confined to trivial cases, especially in the youth court. Only grave youth crimes may be sent up to the Crown Court, or those where a child is charged with an adult, so the youth court will hear such cases as multi-handed gang robberies and gang rapes. Lengthy cases are heard

---

[4] Reported in: P. Darbyshire, *Sitting in Judgment – the working lives of judges*, Oxford 2011.

[5] This basic information is taken from P. Darbyshire, *Darbyshire on the English Legal System*, 15th ed., London 2025.

[6] The City UK, *Legal excellence, internationally renowned: UK legal services 2023*, https://www.thecityuk.com/media/0didtzlm/legal-excellence-internationally-renowned-uk-legal-services-2023.pdf [accessed: 2025.01.12] and The City UK, *Legal excellence, internationally renowned: UK legal services 2024*, https://www.thecityuk.com/our-work/uk-legal-services-2024/?utm_source=chatgpt.com [accessed: 2025.01.12].

by district judges. Like all youth courts, it sits privately. Its work is seldom reported so I have always called it "out of sight and out of mind."

Serious cases are heard in the Crown Court, by a recorder (part-timer) or circuit judge, or a High Court judge travelling on circuit from the Kings Bench Division. In contested cases, guilt must be determined by a jury of 12. A defendant may not request a trial by judge alone, which is permitted in some of England's common law daughter jurisdictions, such as North America. I have argued that defendants should be able to request a judge alone trial.[7]

There are three main categories of criminal case: indictable, triable either way, and summary. Indictable cases must be heard in the Crown Court. Summary offences must be heard in the magistrates' courts. The large middle category of either-way cases includes some very serious offences, such as theft and most offences against the person. In this group, the defendant may opt for a Crown Court trial. Most defendants choose a summary trial in the magistrates' court but the magistrates may send the case up to the Crown Court if they consider it too complex and/or serious for their bench. It is much cheaper to hear a case in the magistrates' court and for decades now, magistrates have been continually reminded that they should keep either-way cases in their court. They are reminded of their power to send a case up to the Crown Court if, having heard it, they consider their sentencing power of six months for a single offence to be too limited. They are also reminded that many of the cases they send up to the Crown Court for trial are ultimately sentenced within the powers open to the magistrates. Criminal appeals lie, as of right, from the magistrates' court to the Crown Court and from the Crown Court, with leave, to the Court of Appeal (Criminal Division), staffed by High Court judges and CA judges. The High Court can judicially review proceedings of the lower courts and hear some appeals from magistrates' courts. The UK Supreme Court, staffed by 12 judges, serves the three UK legal systems, determining appeals on points of law of general public importance. From England and Wales, these include criminal appeals.

2. The Constitutional Reform Act 2005, in force 2006[8]

I have spent my student years and career, since 1971, trying to draw attention to defects in the English legal system, because I was brought up on the mantra "British justice is the finest in the world." The same supercilious complacency has supported the ancient, unwritten UK constitution. The Act dismantled the controversial office of

[7] For instance, in *An essay on the importance and neglect of the magistracy*, "Criminal Law Review" September 1997, pp. 627–643.

[8] The Act, its background and outcomes and the information here are explained in depth in *Darbyshire on the English Legal System*…, chapter 6 part 5 on the UK Supreme Court and chapter 14 on judges. Like all modern UK legislation, it can be found at legislation.gov.uk and in annotated form on the UK versions of *Westlaw* and *Lexis.*

Lord Chancellor, created a new UK Supreme Court, and changed the judicial selection and appointment system.

3. The Lord Chancellor, the UK Supreme Court, and collective judicial independence

Prior to this Act, the UK had little to brag about in terms of formal separation of powers and independence of the judiciary as a separate organ of Government, even though the independence of *individual* judges had been safeguarded by the Act of Settlement 2001. Constitutional lawyers had long criticised the lack of separation of powers. The main problems in this context were the lack of a physically separate UK Supreme Court and the blatant breach of the separation of powers in the 1,400-year-old office of the Lord Chancellor. The law lords (top court) were members of the House of Lords, the upper House of Parliament, even though they were apolitical career judges and seldom spoke in Parliament. Their courtroom was in the Parliament building. Just as bad, the Lord Chancellor played a powerful part in all three organs of government. He was the very *head* of the judiciary, with power to sit as top judge in the top court and had a very important role in selecting judges; he was the *speaker* of the House of Lords and he was a member of the *Cabinet* Government and a member of multiple Cabinet committees and the chair of some.

Strident public speeches urging reform were made in 2002 by South African law lord, Lord Steyn, and Senior Law Lord, Lord Bingham, an intellectual giant, internationally renowned and respected and the most brilliant UK judge of the twentieth century. Lord Steyn said the LC's job was "not consistent with even the weakest principle of separation of powers […] or rule of law […] in no other democracy does the judiciary have a 'representative' in cabinet […]." Most of Prime Minister Tony Blair's New Labour government were already intent on reform but the last straw was an attack by the Parliamentary Assembly of the Council of Europe, the watchdog for the European Convention on Human Rights (not an EU institution). In April 2003, they reported "continuation of the current system creates real problems of lack of transparency and thus a lack of respect for the rule of law." The report's author, the Council's rapporteur Eric Jurgens, had just appeared before the UK Parliament and expressed his exasperation:

> Every day […] I am in in confrontation with new democracies from central and Eastern Europe, who I tell they should not do certain things and they say "What about the British?"

Tony Blair was left with no option but to announce proposed legislation to create a UK Supreme Court and abolish the job of Lord Chancellor. New Labour had introduced the Human Rights Act 1998 and "brought Convention rights home", as they said, by making them enforceable in domestic law and the UK courts, so they could hardly ignore the blatant breach of Art. 6 in the Lord Chancellor's job. Thanks to fierce opposition, his

job was kept, in the shape of a new Minister of Justice, but other parts of his job were dismantled and redistributed. The Bill, now Act, also further reformed the selection and appointment system for judges.

The Government said the new top court would not be like the US Supreme Court, with a power to strike down legislation, because Parliament is supreme in the UK constitution. They did, however, set out questions for consultation. The announcement caused years of powerful debate but at last, in October 2009, the UK Supreme Court opened in its own elegant building, in a converted courthouse and former council chamber, facing the Parliament building across Parliament Square. The twelve judges have a President, who makes its rules, "simple and simply expressed" with a view to securing that the court is "accessible, fair and efficient." The Justices devise their own practice rules and these were originally drafted after a series of private seminars with academics (including me), judges, and practising lawyers. The most striking outcome reflects the aim that the court should be accessible to the public and it is probably the most transparent and user-friendly court in the world. They actively welcome drop-in visitors and they value their 4.5 star Trip Advisor rating. The court attracts thousands of visitors a year, including school groups. Guided tours can be booked, as can online sessions with a Justice. Children can watch from behind a glass wall at the back of one of the courtrooms. There is an attractive public café in the basement, next to informative displays about law and the Court, for children and adults. Students and visitors can dip in and out of the courtrooms or watch proceedings on the TV in the basement. They have an informative website, with details of upcoming cases, and excellent press releases summarising their judgments, as well as a large selection of educational resources. They have a dedicated YouTube channel and any media in the world can make free use of the continuous online TV feed. A UKSC blog is run by lawyers.

The 2005 Act places great emphasis on judicial independence. The Lord Chancellor ceased to be head of the judiciary. The Lady Chief Justice is now head. Judiciary related functions are divided between her and the reformed Lord Chancellor, now also called the Minister of Justice. The LC is not required to be a judge or even a lawyer, which is very controversial. Crucially, the LC and all ministers are now under a statutory duty to uphold judicial independence. They must not seek to influence judicial decisions. The LC must "have regard to" the support judges need and for the public interest to be represented in matters relating to the judiciary or administration of justice. (Under the Courts Act 2003, the LC has a duty to ensure an efficient and effective system to support court business). The LC is responsible for the framework of the courts, including jurisdictional and geographical boundaries, and the allocation of court business; for providing and allocating money and resources for the administration of justice; for judges' pay, terms, conditions and training resources and for determining the number of judges.

The Lady Chief Justice has responsibility for representing judges' views to Parliament and Government; for judicial welfare and guidance; for deployment of judges and for allocation of work within the courts. She is responsible for allocating jobs for individual

judges; authorising them to do particular work; making rules for deploying magistrates; allocating work within courts of one level and appointing judges to specific posts, such as managing and training roles. This work was all transferred by the Act from the LCJ so 60 civil servants were installed in the Royal Courts of Justice to run the Judicial Office and the Judicial Communications Office. The Lady Chief Justice runs the judiciary with the help of the Heads of Division, such as the President of the Family Division and Head of Civil Justice.[9] She can delegate to them the power to make practice directions.

4. The separation of powers and judicial review

Constitutional theorists, notably the Englishman Locke in the seventeenth century and the Frenchmen Montesquieu in the eighteenth praised the separation of powers as a guarantee of democracy. The concentration of governmental power of more than one type – legislative, executive, and judicial – in the hands of one person or body is considered dangerous. In the unwritten UK constitution there is no point in looking for a pure separation of powers. All we can hope for is a balance of power, a system of checks and balances. All the Act of Settlement 1701 did was to guarantee *individual* judicial independence, not the *collective* independence of the judicial bench. Thanks to Parliamentary supremacy, judges' job is to carry out the will of Parliament. The Supreme Court does not have the power to review primary legislation and declare it to be unconstitutional, like the US Supreme Court. Nevertheless, when the UK was in the EU, they did have a power to declare a UK Act, or part of an Act, to be incompatible with EU law. Furthermore, the Human Rights Act 1998 says that "so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." UK top court judges are all brilliant, however. History shows them to have been ingenious in interpreting statutes and the will of Parliament so that it accords with their own versions of ancient, immutable common law concepts which would elsewhere be entrenched in a written constitution. Also, using their power to judicially review the legality of executive action, judicial boldness has grown out of recognition since 1960, escalated by simplifying the procedure from 1981.[10] The Human Rights Act simply added to judges' toolkit of review. Whenever governments have tried to oust the power of the courts by legislation, the judges have circumvented it.

[9] Judicial roles are explained on the judiciary website and in the judges chapter of my textbook.

[10] In The Judicial Review and Courts Act 2022, the Conservative Government sought to curtail review powers but lawyers campaigned for two years to remove some of the worst restrictions. The Law Society claimed a victory for the Rule of Law; lawsociety.org.uk [accessed: 2025.01.12].

5. Individual judicial independence

This has been protected in the UK since the Act of Settlement 1701, so for instance a High Court or Court of Appeal judge can only be removed by the monarch, following a petition by both houses of Parliament. This is now embodied in the Senior Courts Act 1981.

Independence and impartiality are fundamental principles of the UN Basic Principles on the Independence of the Judiciary and the European Convention on Human Rights, art. 6. Judicial independence in the UK seems to contain or have contained these elements, some of which are conventions or lapsed conventions.

1. Security of tenure: under the 2005 Act, discipline for the lower judiciary was transferred to the Lady Chief Justice and a scheme was established. The Judicial Conduct Investigations Office[11] was established by regulations, to assist the LCJ in handling complaints. With the agreement of the LC (Minister of Justice), she may advise, warn or reprimand any judge and she can informally speak to any judge on a matter of concern. Under the Courts Act 1971, the LC may remove a circuit judge on the grounds of incapacity or misbehaviour, subject to the LCJ's consent. The Judicial Appointments and Conduct Ombudsman, a lawyer, considers complaints about the handling of disciplinary cases. The Judges' Council has published a *Guide to Judicial Conduct*.[12] It was established in 2003, applying the principles of judicial independence, impartiality and integrity, modelled on the six fundamental values set out in the Bangalore Principles of Judicial Conduct,[13] endorsed by the UN. It was revised in 2023 to reflect changes in judicial and public life.
2. High Salaries: in 1825, when judicial salaries were fixed at £5,500 (the equivalent of over £644,000 in 2025), it was thought this would discourage corruption but this principle seems to have been forgotten. Since September 2024, the Lady Chief Justice is paid £312,510. Even in 2016, the highest paid primary school head teacher was paid £330,000. A High Court judge is paid £225, as of September 2024. Most are recruited from the Bar and many take a drop in income, on appointment as a judge. Indeed, most senior judges (High Court and above) are King's Counsel, some of whom earned millions of pounds as lawyers. Thanks to this and to poor pension levels, recruitment of judges has been a struggle in recent years, with many High Court and circuit positions remaining unfilled.
3. Judges cannot be MPs (a statutory prohibition) and should not engage in politics. It was common before 1950 for judges in England and Wales to have been MPs. A political career was seen as a good background for life on the bench. Even in 1960, one third of judges had been Parliamentary candidates or MPs.[14] Nowadays,

[11] Judicial Conduct Investigations Office, complaints.judicialconduct.gov.uk [accessed: 2025.01.12].
[12] On the Courts and Tribunals Judiciary website: judiciary.uk [accessed: 2025.01.12].
[13] United Nations Office on Drugs and Crime, unodoc.org [accessed: 2025.01.12].
[14] R. Stevens, *Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World*, "Legal Studies" 2004, vol. 24, no. 1–2, pp. 1–35.

serving judges are scrupulously apolitical, in a party political sense, the absolute opposite of the USA. In doing my research with judges (2002–2014), the one question I was not permitted to ask judges was what their party politics were and in my years of spending hundreds of days with judges all round England and Wales, I never heard a party political remark.[15]

4. Judges cannot be sued for remarks in court. This is the same protection as parliamentary privilege. Parties do complain about judges of course. Court buildings are festooned with notices about how to complain about a judge. In 2022–2023 there were 1,620 complaints. 41 per cent were rejected because they were outside the JCIO's remit, such as "I lost my case." 46 per cent were rejected for a range of reasons.[16]
5. Parliamentarians do not criticise judicial decisions. This occurs occasionally. Judges were criticised in Parliament in 2011 for granting super-injunctions to protect public figures such as footballers.
6. Politicians should refrain from criticising judges out of court. To my disappointment, Government ministers[17] sometimes have to be reminded that they have a *duty* to defend judicial independence under the 2005 Act, s. 3(1).

   > The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

   For five years beforehand, and during and immediately after the passing of the 2005 Act, judges were repeatedly and vociferously criticised by two top cabinet ministers, who were Home Secretaries, and then Prime Minister Tony Blair himself. Judges had indeed lobbied for this duty to be included in the Act.
7. The media should refrain from criticising judges out of court. Examining media coverage over the centuries, I doubt that this was ever a Convention and in recent years newspaper campaigns by *The Sun* and *The Daily Mail* against groups of judges have reached a scandalous level, with the *Daily Mail* screaming ENEMIES OF THE PEOPLE, as its front-page headline, attacking the three judges sitting in the High Court, who ruled against the Government in a 2016 case about Brexit. J.K. Rowling made fun of the idiocy of the attack on Twitter. Appearing in Parliament in front of the House of Lords Constitution Committee in 2017, The Lord Chief Justice was highly critical of the then Lord Chancellor, Liz Truss, for refusing to defend the judges and the following week, the President of the UK Supreme Court reminded the Committee of the Lord Chancellor's duty to correct and criticise the newspapers.
8. Freedom from interference with decision making. It is a hallmark of undemocratic regimes that the government tells judges how to judge. A lengthy spat went on

[15] P. Darbyshire, *Sitting in Judgment…*

[16] Judicial Conduct Investigations Office, *JCIO Annual Report 2021–2022*, https://www.complaints.judicialconduct.gov.uk/JCIOAnnual%20Report21-22?utm_source=chatgpt.com [accessed: 2025.01.12].

[17] Currently 111, of whom 23 are in the Cabinet.

in 2003–2004 between Lord Chief Justice Woolf and Home Secretary David Blunkett, over sentencing and whether the executive or the judiciary should decide on the minimum sentence for murder, for example, and who should decide when to release prisoners. Blunkett suffered a series of defeats in the European Court of Human Rights and the UK's top court, under art. 6 of the Convention.

9. The rule against bias. At English common law, the rules of natural justice are meant to guarantee a fair trial and they apply to anyone acting in a judicial capacity, including lay magistrates and lay members of tribunals. They comprise *nemo judex in causa sua* (no person a judge in their own cause) and *audi alterem partem* (hear the other side). They were confirmed in Magna Carta 1215 and are reflected in Article 6 of the European Convention, which was drafted by UK lawyers. Anyone acting in a judicial role must act fairly. The *Guide to Judicial Conduct* says:

   > judicial office holders should, so far as is reasonable, avoid extra-judicial activities that are likely to cause them to have to refrain from sitting because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.

   The rule against bias is not confined to actual bias but, as the guide explains,

   > Judicial office holders must recuse themselves from any case where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that they would be biased. This hypothetical observer is taken to know that judges take an oath to administer justice without fear or favour, but also to know that the taking of the oath, by itself, is not sufficient guarantee to exclude all legitimate doubt.

   This is a summary of the common law, as developed over the years and set out in case law, in cases such as *Locabail* (2000). In my textbook, I give two embarrassing modern examples of bias.

10. A politically independent appointments system. This was provided for by the 2005 Act, as described below. In the nineteenth and early twentieth centuries, political appointments by the Lord Chancellor were fairly unusual and criticised by the newspapers, lawyers, and opposing political parties. By 2005, they were heavily frowned on, but I gave famous examples of governments appointing judges whose political notoriety, as lawyers, was diametrically opposed to the government.
11. Impartiality. The *Guide* treats the rule against bias as "impartiality." The 26-page *Guide* spells out judges' obligations in respect to "integrity", as required by the Bangalore principles, and sets out guidance on specific issues in their non-judicial activities, such as contact with the legal profession. Importantly, judges also receive equal treatment training and are directed to read the 352-page *Equal Treatment Bench Book*, which has been continually updated over many decades now. It is on the Judiciary website.[18] It was last revised in July 2024.

[18] Court and Tribunals Judiciary, judiciary.uk [accessed: 2025.01.12].

6. The relationship between the executive government, the legislature and the judiciary since the Constitutional Reform Act 2005

The 2005 Act struggled slowly through Parliament because it was so controversial and it was heavily debated outside Parliament in 2003–2005. Some top judges were concerned that as the Lord Chancellor would lose the job as top judge, and no judges would be allowed to speak in the two parliamentary chambers, there would be no-one in the Cabinet government or Parliament to protect judicial interests. I never thought that this argument could or should trump the dire need for a strict separation of powers, as required by the Council of Europe. In any event, the judges have a stronger Judges' Council now to represent their views and they, especially the Lady Chief Justice, regularly appear before parliamentary select committees, the all-party watchdogs over executive action, to represent the judiciary and lawyers and to criticise the underfunding of the chaotic courts. Furthermore, retired judges can be appointed to the upper parliamentary chamber, the House of Lords, and they regularly speak on legal issues in that chamber. Lawyers and retired judges were indeed "the largest single professional group in the Lords" by 2010, as pointed out by Gee et al, below. There has been an ongoing fight since before the 2005 Act between the judiciary and governments about judicial salaries and pensions and it is argued that this puts lawyers off from applying to be judges. Nevertheless, as the authors of *The Politics of Judicial Independence in the UK's Changing Constitution*[19] argue, judges' protests about the loss of relative value in their pensions is never going to attract sympathy because they are in the top one percentile of earners. Executive power will always trump judges' complaints because the executive holds the purse strings. There is an independent body, The Senior Salaries Review Board, whose duty it is to advise Government on judges' salaries but not their pensions. In 2024, they remarked on the worsening shortage of judges, caused by a salary freeze: "In the last District (Civil) Judge recruitment campaign only 49 out of 100 vacancies were filled"[20] and they recommended a 6 per cent pay rise, implemented in September. One thing that does bother me nowadays, is that ministers have to be reminded of their statutory duty to defend judicial independence, as described above. My second serious worry is the lack of stability and informed intelligence in the occupants of the job of Minister of Justice. It used to be the case that Lord Chancellors, all lawyers, served for years, sometimes repeatedly. Nowadays, especially during the Conservative administration that was at last voted out in 2024, anyone could have a go at being the Minister of Justice for a few months, even the ridiculed Liz Truss, whose Prime Ministership lasted for less time than a Tesco lettuce. This applied to all Conservative ministerial appointments, which have

[19] G. Gee, R. Hazell, K. Malleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge 2015. This book is a must read for anyone interested in judicial independence.

[20] Review Body on Senior Salaries, *Forty-Sixth Annual Report on Senior Salaries 2024. Report No. 97*, p. 61, https://assets.publishing.service.gov.uk/media/66a7a3c849b9c0597fdb066e/SSRB_Annual_Report_2024_Accessible.pdf [accessed: 2025.01.12].

been allocated in the fashion of an ever-faster game of musical chairs. I am hoping for more stability under the current Labour administration.

7. The judicial appointments system[21]

The selection and appointments system and the composition of the judiciary has been widely criticised since at least the early 1970s. It has been progressively reformed and professionalised since the 1990s and was significantly enhanced by the 2005 Act. Judges from UKSC Justices down to district judges are appointed by the King. Lay magistrates are appointed by the Senior Presiding Judge.

UKSC Justices have to be selected from persons who have held high judicial office for two years or who have been a qualifying legal practitioner for 15 years. When a Justice is needed, a selection commission is appointed. It consists of a lay chairperson, the Deputy President of the Court, and one member from each of the three Judicial Appointment Commissions, for Scotland, Northern Ireland, and England and Wales. At least one must be a non-lawyer. Vacancies are advertised on the UKSC website and elsewhere. Once selected, the Lord Chancellor (Minister of Justice) can accept the selection, or ask the Commission to reconsider or reject it, but the Act severely curtails his/her discretion and limits the acceptable grounds for rejection. (Most appointees have been members of the Court of Appeal or its equivalent in Northern Ireland or Scotland). The Commission is then dissolved. Unsurprisingly, there have been calls for American-style public selection hearings, but usually these have provoked horror. In my experience, UK television viewers, judges, and lawyers have a morbid fascination with the hilarious and sad spectacle of US Supreme Court selection hearings.[22] The more comedic and sinister party politics becomes in the USA, the more UK lawyers and judges become fixated that *all* judges should be strictly aloof from and unconnected with politics.

Other court and tribunal judges, up to and including the High Court but excluding lay magistrates, are *selected* by the Judicial Appointments Commission, which was provided for by the 2005 Act.[23] It consists of a lay chairperson and 14 commissioners (six judicial members, two lawyers of different types, five lay people, and one non-legally qualified judicial member, such as a lay magistrate). They have a statutory duty to select candidates on merit, who are of good character. They must "have regard to the need to encourage diversity in the range of persons available for selection for appointments." They hold selection competitions, which are widely advertised and explained in detail on their website. They publish annual reports and statistical data on

[21] Facts, analysis and critique are explained in much greater depth in my textbook.

[22] See for example, my story in my 2011 book (*Sitting in Judgment*…), of the hilarity such hearings caused among the law lords (in the chapter on the law lords/UK Supreme Court).

[23] Everything is explained in plain English on its website, judicialappointments.gov.uk [accessed: 2025.01.12].

appointments, and equality and diversity information. Their website includes a lot of guidance and help in preparing applicants. Individual selection panels are convened for members of the Court of Appeal. Selection competitions for recorders (part-time circuit judges), and district and circuit judges, have been held since before 1994, but their job specifications and competition details have been placed online since 1994. High Court competitions have been online since 1998. Now all positions are online and advertised widely online and elsewhere, including those of the UKSC. Every judicial job has to be applied for, in open competition, even the position of trainer judge, for example. All details and competitions are on the JAC website.

The UK does not have a career judiciary, unlike European "Civil Law" systems, which are a different family of legal systems. By statute, judges can only be selected from among those qualified lawyers who have statutory rights of audience (rights to argue a case in court) at the level of court in which they are applying to sit as a judge.

8. Who can apply to be a judge?

The answer to the question is: lawyers with rights of audience in court and with post qualification experience (usually five years). My criticism is this: because most solicitors do not have rights of audience above the County Court and the magistrates' courts, this means that they are excluded from applying to be a judge in the Crown Court and above unless they have passed the examination to gain rights of audience and/or are already a judge. Consequently, barristers dominate the middle and top of the judicial pyramid. When a High Court judge is needed, it is common for there to be only six or so appropriately qualified barristers. Circuit judges can be appointed to the High Court but most are recruited direct from the Bar. There are ten times as many solicitors as barristers, and they come from a more diverse demographic pool. They dominate the numbers of district judges and tribunal judges. Naturally, if they could apply for senior appointments the available pool would be much bigger and more diverse. Similarly, academics are excluded, unless they are professionally legally qualified.

It is normal practice, not law, that judges must sit part time, as fee-paid judges, before applying, usually for five years. I think this is invaluable because it enables the judicial candidate to practise her skills and for her and those around her to assess whether judging is the right job for her.

9. Diversity

The main critique of the judiciary is its lack of diversity, in terms of class, gender, and ethnicity. Although Lord Chancellors and now the JAC have bent over backwards since 1990 to try and attract more candidates and make it easier for underrepresented groups such as solicitors and women to apply, progress has been hopelessly slow and

bears no relation to the typical pattern of diversity in a country with a career judiciary, as can be seen.

Only 37 per cent of all court judges in England and Wales are women (see the diversity statistics tables, the 2023 Excel spreadsheet, on the judiciary website). Men outnumber women at every rank. Women comprise:

- 2 of 12 UKSC Justices;
- 12 of 38 Court of Appeal judges;
- 30 of 99 High Court judges;
- 240 of 664 circuit judges;
- 196 of 437 County Court district judges;
- 52 of 138 District Judges (Magistrates' Courts).

But, 54 per cent of new entrants to the courts judiciary were women and of 1809 lawyer-judges in tribunals, 52 per cent are women.

10 per cent of all court judges are minority ethnic. 13 per cent of lawyer-judges in tribunals are minority. This reflects the demographic spread of the population much more closely than it did a few years ago. Judges do not reflect the population at large of course. This can never happen because they have to be lawyers.

10. What causes lack of diversity?

Causes are:

- the statutory exclusion of most solicitors from eligibility for most judicial jobs;
- the difficulties in recruiting solicitors;
- the hopeless historic and current lack of gender diversity in the legal profession, especially at the Bar.

Why does diversity matter? Because it is an international embarrassment, as I have called it, *not* because women judges would reach different decisions. That would be wrong and it is not supported by empirical research evidence.

11. Finally: a very brief synopsis of the methods of my research into the working lives of judges, reported in my 2011 book (I was asked to include this)

My aims were to find out what judges were like and what they did in their working day, and this is what the book reported. It has been likened to a wide and deep anthropology of judges. With the help and backing of the judiciary, especially the Lord Chief Justice, and funding by The Nuffield Foundation, I was able to spend my non-teaching time in 2002–2010 work-shadowing 40 judges at every level of court, in criminal, family and civil proceedings, throughout at least four working days each, in as broad a range of their work as possible. I travelled throughout the country, on all six circuits of England

and Wales, to a wide variety of courts. On my travels, I interviewed 37 further judges and met hundreds more. When travelling on circuit with High Court judges, I was able to stay in their lodgings. Throughout the working day, I was in and out of the courtroom with each judge, sitting next to her on the bench, and I would encourage her to describe and comment on her work, workload and facilities, all day. I was given unlimited access to case papers. All courts and judges were anonymised. Judges were able to read and comment on drafts of the book sections in which they appeared. The LCJ read multiple drafts of the chapters. No judge sought to censor my work. As well as describing their working lives, I also described the judges' characteristics, as I observed them, their backgrounds, motivation in applying, their selection process, training and attitudes towards their work and the relationships between judges. The book has sold in 34 countries and has been translated into Chinese. In 2011–2012, I went back into 10 more Crown Courts to report on judicial management of serious criminal cases.[24]

Literature

The City UK, *Legal excellence, internationally renowned: UK legal services 2023*, https://www.thecityuk.com/media/0didtzlm/legal-excellence-internationally-renowned-uk-legal-services-2023.pdf [accessed: 2025.01.12].

The City UK, *Legal excellence, internationally renowned: UK legal services 2024*, https://www.thecityuk.com/our-work/uk-legal-services-2024/?utm_source=chatgpt.com [accessed: 2025.01.12].

Darbyshire P., *Darbyshire on the English Legal System*, 15th ed., London 2025.

Darbyshire P., *An essay on the importance and neglect of the magistracy*, "Criminal Law Review" September 1997, pp. 627–643.

Darbyshire P., *Judicial Case Management in Ten Crown Courts*, "Criminal Law Review" 2014, no. 1, pp. 30–50.

Darbyshire P., *Sitting in Judgment – The Working Lives of Judges*, Oxford 2011.

Gee G., Hazell R., Malleson K., O'Brien P., *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge 2015.

Judicial Conduct Investigations Office, *JCIO Annual Report 2021–2022*, https://www.complaints.judicialconduct.gov.uk/JCIOAnnual%20Report21-22?utm_source=chatgpt.com [accessed: 2025.01.12].

Review Body on Senior Salaries, *Forty-Sixth Annual Report on Senior Salaries 2024. Report No. 97*, https://assets.publishing.service.gov.uk/media/66a7a3c849b9c0597fdb066e/SSRB_Annual_Report_2024_Accessible.pdf [accessed: 2025.01.12].

Stevens R., *Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World*, "Legal Studies" 2004, vol. 24, no. 1–2, pp. 1–35.

[24] The *Criminal Law Review* 2014, no. 1, is on the database *Westlaw* and most of my career articles are there or in the *Cambridge Law Journal*. My textbook, *Darbyshire on the English Legal System* (15th ed., London 2025), is also on *Westlaw*.

Online sources

British and Irish Legal Information Institute, bailii.org.
Court and Tribunals Judiciary, judiciary.uk.
EUR-lex, eur-lex.europa.eu.
European Commission, commission.europa.eu.
Judicial Appointments Commission, judicialappointments.gov.uk.
Judicial Conduct Investigations Office, complaints.judicialconduct.gov.uk.
The Law Society, lawsociety.org.uk.
Official UK legislation website, legislation.gov.uk.
United Nations Office on Drugs and Crime, unodoc.org.

Summary

Penny Darbyshire

Judicial Independence in General and in England and Wales

The article concerns judicial independence. It is a fundamental element of the rule of law. A recent disregard for these ancient requirements of democracy in some countries, including some EU Member States, has caused international concern. This chapter explains the following issues:
– important points about the English legal system, especially the criminal courts;
– the radical reforms to the UK's ancient, unwritten constitution, under the Constitutional Reform Act 2005, remedying defects in the separation of powers and strengthening collective judicial independence;
– the Act's role in further professionalising judicial recruitment, selection and appointment and enhancing the safeguarding of individual judicial independence. I also explain the international standards for judicial independence;
– the relationship between the three organs of government since the 2005 Act;
– the modernised judicial appointment system and the current diversity statistics.
At the end is a very brief section, describing the methods of my own empirical, wide and deep research project on the working lives of judges (2002–2014), which remains unique worldwide.

Keywords: rule of law, separation of powers, judicial independence, UK constitutional reform, judicial appointments.

Streszczenie

Penny Darbyshire

Niezawisłość sądów w ujęciu ogólnym oraz na przykładzie Anglii i Walii

Artykuł dotyczy niezawisłości sądów, będącej fundamentalnym elementem rządów prawa. Niedawne lekceważenie tych odwiecznych wymagań demokracji w niektórych krajach, w tym

w wybranych państwach członkowskich UE, wywołało międzynarodowe zaniepokojenie. Opracowanie przedstawia:
– najważniejsze zagadnienia dotyczące angielskiego systemu prawnego, w szczególności sądów karnych;
– radykalne reformy starodawnej, niepisanej konstytucji Wielkiej Brytanii wprowadzone ustawą o reformie konstytucyjnej z 2005 r., naprawiającą wady podziału władzy i wzmacniającą zbiorową niezależność sądownictwa.
– rolę ustawy w dalszej profesjonalizacji procesu rekrutacji, selekcji i powoływania sędziów oraz we wzmocnieniu ochrony niezależności poszczególnych sędziów, a także międzynarodowe standardy niezawisłości sędziowskiej;
– relacje między trzema organami rządowymi od czasu wejścia w życie ustawy z 2005 r.;
– aktualny system mianowania sędziów oraz bieżące statystyki dotyczące parametrów różnorodności w sądownictwie.
W końcowej części artykułu zaprezentowano metody autorskiego empirycznego, szerokiego i dogłębnego projektu badawczego na temat życia zawodowego sędziów (2002–2014), który pozostaje unikalny w skali światowej.

Słowa kluczowe: praworządność, podział władzy, niezawisłość sędziowska, reforma konstytucyjna Zjednoczonego Królestwa, nominacje sędziowskie.

Barbara Stańdo-Kawecka
Jagiellonian University, Poland
barbara.stando-kawecka@uj.edu.pl
ORCID: 0000-0002-7296-1260

https://doi.org/10.26881/gsp.2025.4.02

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

---

[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]

---

[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

---

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

---

[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.

---

[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

---

[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]

---

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.

---

[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.

Literature

Ashworth A., *Towards European Sentencing Standards*, "European Journal on Criminal Policy and Research" 1994, no. 2(1), pp. 7–11.

Duff R.A., *Penal Communications: Recent Work in the Philosophy of Punishment*, "Crime and Justice" 1996, no. 20, pp. 1–97.

Duus-Otterström G., *Why Retributivists Should Endorse Leniency in Punishment*, "Law and Philosophy" 2013, no. 32(4), pp. 459–483.

Frase R.S., *Limiting Retributivism* [in:] *The Future of Imprisonment*, ed. M. Tonry, New York–Oxford 2004, pp. 83–119.

Grasso A., *Broken Beyond Repair: Rehabilitative Penology and American Political Development*, "Political Research Quarterly" 2017, no. 70(2), pp. 394–407.

von Hirsch A., *Doing Justice: The Principle of Commensurate Deserts* [in:] *Sentencing*, eds. H. Gross, A. von Hirsch, New York–Oxford 1981, pp. 243–256.

von Hirsch A., *Penal Theories* [in:] *The Handbook of Crime and Punishment*, ed. M. Tonry, New York–Oxford 1998, pp. 659–682.

von Hirsch A., *Proportionality in the Philosophy of Punishment*, "Crime and Justice" 1992, no. 16, pp. 55–98.

Janicka D., *Kodeks Makarewicza w opiniach niemieckich autorów* [in:] *Nil nisi veritas. Księga dedykowana Profesorowi Jackowi Matuszewskiemu*, eds. M. Głuszak, D. Wiśniewska-Jóźwiak, Łódź 2016, pp. 501–516.

Janicka D., *O pionierach nauk kryminologicznych w Polsce*, "Czasopismo Prawno-Historyczne" 2016, no. 68(1), pp. 29–50.

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

Krajewski K., *Teorie kryminologiczne a prawo karne*, Warszawa 1994.

Królikowski M., *Sprawiedliwość karania w społeczeństwach liberalnych. Zasada proporcjonalności*, Warszawa 2005.

Lacey N., Pickard H., *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, "The Modern Law Review" 2015, no. 78(2), pp. 216–240.

Lernell L., *Podstawowe zagadnienia penologii*, Warszawa 1977.

Lernell L., *Współczesne zagadnienia polityki kryminalnej. Problemy kryminologiczne i penologiczne*, Warszawa 1978.

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

Morris N., *Punishment, Desert and Rehabilitation* [in:] *Sentencing*, eds. H. Gross, A. von Hirsch, New York–Oxford 1981, pp. 257–271.

Reitz K.R., *Sentencing* [in:] *The Handbook of Crime and Punishment*, ed. M. Tonry, New York–Oxford 1998, pp. 542–562.

Slobogin C., *A Defence of Modern Risk-Based Sentencing* [in:] *Predictive Sentencing: Normative and Empirical Perspectives*, eds. J.W. de Keijser, J.V. Roberts, J. Ryberg, Oxford–Chicago 2019, pp. 107–125.

Tonry M., *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. 3–29.

Tonry M., *Preface* [in:] *Retributivism Has a Past. Has it a Future?*, ed. M. Tonry, New York 2011, pp. vii–ix.

Tonry M., *Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America*, "Crime and Justice" 2018, no. 47, pp. 119–157.
Tyszkiewicz L., *Zarys rozwoju kryminologii w Polsce w latach 1945–1969*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1970, no. 32(3), pp. 61–74.
Utrat-Milecki J., *Kara. Teoria i kultura penalna. Perspektywa integralnokulturowa*, Warszawa 2010.
Utrat-Milecki J., *Penologia ogólna. Perspektywa integralnokulturowa*, vol. 1–2, Warszawa 2022.
Weigend T., *"Neoklassizismus" – ein transatlantisches Missverständnis*, "Zeitschrift für die gesamte Strafrechtswissenschaft" 1982, no. 94(3), pp. 801–814.
Wiak K., Gądzik Z., *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.
Widacki J. (ed.), *Od szkoły klasycznej do neoklasycznej w prawie karnym*, Kraków 2016.
Wróblewski B., *Naukowa racjonalizacja w prawie kryminalnym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1939, vol. 19, no. 3, pp. 264–273.
Wróblewski B., *Penologja. Socjologja kar*, vol. 1–2, Wilno 1926.

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

Barbara Stańdo-Kawecka

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.

Francesco Parisi
University of Palermo, Italy
francesco.parisi@unipa.it
ORCID: 0000-0002-6493-1272

https://doi.org/10.26881/gsp.2025.4.03

Restorative Justice in Criminal Cases: The Italian Reform

1. Introduction: paths towards the recognition of restorative justice in the Italian criminal justice system

With the approval of Legislative Decree No. 150 of 10 October 2022, the Italian criminal justice system developed an organic discipline of restorative justice (hereafter RJ). In line with international and supranational indications, RJ is defined by Article 42 of the decree as "any program that allows the victim of the crime, the person named as the offender, and other persons belonging to the community to participate freely, consensually, actively and voluntarily, in the resolution of issues arising from the crime, with the help of an impartial, adequately trained third party called a mediator."[1] RJ practices, if implemented through the modalities indicated by the Italian legislature, are, thus, recognized as legitimate tools for dealing with crimes. Modalities of access to the programmes and their legal effects are expressly regulated by law, as I discuss below (section 3.1).

In the Italian legal system, the first applications of RJ occurred within the juvenile jurisdiction from the mid-1990s, with pioneer experiments, mainly thanks to the particular cultural sensibility of a part of the judiciary and among scholars of criminal law. Even in the absence of an *ad hoc* rule, a broad interpretation of the juvenile trial law allowed for the activation of criminal mediation procedures (in offices established mainly through the work of the private social sector) and the possibility of attributing value to them in criminal cases. By contrast, RJ experiences in adult criminal justice have been slow and fragmentary.

The first explicit normative recognition took place in the jurisdiction of the so-called "justice of peace," which is competent to judge crimes deemed to be of low negative value and/or reduced social negative impact. Within the ordinary jurisdiction, it is especially since 2014 that provisions of a restorative nature have been introduced. The "suspension of proceedings with probation of the defendant" (Article 168 bis Penal Code), the "extinction of the crime due to restorative conduct" (Article 162 ter Penal Code), and the "exclusion of punishment for particular tenuousness of the

[1] All translations unless otherwise indicated are by me.

fact" (Article 131 bis Penal Code) have allowed some experiments of RJ in criminal proceedings. During the imprisonment phase, RJ programs have sometimes been implemented and have found normative recognition through the institutions of probation to community service and conditional remission of sentence.

Nevertheless, so far these have been, in adult justice especially, only slight phenomena, hampered by two orders of factors. On the one hand, from a regulatory point of view, such restorative provisions have a limited scope of application, rather limited effects, and structural characteristics of a prescriptive type that are sometimes hardly compatible with RJ programmes (which are based instead on the assumption of voluntary participation). On the other hand, on a strictly practical level, the lack of specific regulation of access to RJ services and their accreditation within national territory engendered operational difficulties, low cultural sensitivity of justice workers, mistrust, and ambiguity.

With Legislative Decree 150/2022 the picture changed significantly and RJ fully entered the Italian system. An acceleration towards the recognition of RJ was likely prompted by the particular sensitivity of the proposing minister (Marta Cartabia) to this issue. In any case, a fertile ground for the development of RJ in the Italian system already existed: the increasing theoretical and cultural awareness of the topic and the attention given to the growing enhancement of restorative programmes in many European states.[2] Earlier suggestions for reform advanced already some years earlier by other governmental bodies to increase the use of RJ paths can all be considered traces of a gradual and continuous tendency towards recognition of RJ within the Italian legal system. Above all, the introduction of specific legislation was also motivated by the need to comply with Italy's explicit commitments in Europe, in particular: Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime; the Council of Europe (CoE) Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters (adopted by the Committee of Ministers on 3 October 2018); and the "Venice Declaration," adopted by the Conference of Ministers of Justice of the Council of Europe on 13 December 2021, during the six-month Italian Presidency.

In light of the significant -European influence on the Italian national reform, before examining the new decree, it is appropriate to briefly recall the normative development of RJ in Europe and the theoretical debate that accompanied it.

2. Restorative justice in Europe: notions, frameworks and common enforcement mechanisms

European law today clarifies what is to be meant by the term RJ. We find two normative definitions. The first, which has matured within European Union (EU) law, defines it

[2] F. Dunkel, J. Grzywa-Holtern, P. Horsfield, *Restorative Justice and Mediation in Penal Matters*, Mönchengladbach 2015.

as "any process that allows the victim and the offender to actively participate, if they freely consent to it, in the resolution of issues resulting from the crime with the help of an impartial third party" (Article 2(1)(d) of Directive 2012/29/EU). The second, which is enshrined in the law of the Council of Europe , identifies RJ as "any process that enables persons who suffer injury as a result of a crime and those responsible for such injury, if they freely consent to it, to actively participate in the resolution of issues resulting from the crime, through the help of a trained and impartial third party" (Article 2 of Recommendation CM/Rec(2018)8, which within the CoE framework is the most up-to-date document after the earlier Recommendation No. R (99)19).

These are definitions that have a common ground. More generally, the two regulatory documents have significant elements of convergence about the framework that Member States are asked to adopt to implement RJ practices. These are mainly: application assumptions, operational standards and training of mediators/facilitators, evaluation of the outcomes of restorative paths, and their normative recognition. Within the limits of this article, I cannot analyse in detail the provisions of the European legislation. I will, however, recall its essential elements through a brief description of the mechanisms for applying RJ in Europe.

To understand how RJ can affect the criminal justice system, it is necessary to clarify what is meant by initiating a process, programme, or practice of RJ and giving it normative implementation. The most widely used RJ practices in Europe are criminal mediation (applied mainly on the Continent) and family group conferencing or simply conferencing (a tool used mainly in the United Kingdom and Ireland). Criminal mediation involves a confrontation between offender and victim in the presence of a third party called a mediator (that is, a facilitator); conferencing is a kind of mediation extended to parental groups and support persons.

Focusing exclusively on the common aspects of these practices, I can say that the enforcement mechanism works as follows. The RJ office, which in some countries may also be simply a specialized section of the police, while in others it is an *ad hoc* structure, comes into contact with the offender and the victim, usually following a decision of the judicial authority that refers the case to it. The RJ office conducts preliminary interviews to ascertain whether the main conditions are met in order to begin an RJ programme: the first and foremost condition is voluntary participation. Having acquired the informed consent of both subjects and the recognition of the so-called basic facts by the offender, the office organizes the meetings. Communication between offender and victim takes place through a sensitive and in-depth analysis of the actual motivation for committing the crime, the harm (including psycho-emotional harm) concretely suffered, the pain actually felt as a result of the crime, and the victims' restorative expectations. In some models, the path can also take place with indirect victims (that is, between offender and those who indirectly suffer the consequences of the offence, such as the parents or children of the deceased victim), surrogates, or non-specifics (that is, between the offender and the victim who suffered an offence of a similar nature, but carried out by a different person). If the confrontation so allows, the content of the agreements aimed at repairing the consequences of the offence

is identified. In the absence of a specific restorative agreement, a mutually beneficial dialogue, which has resulted in a recomposition of points of view, a new balance between the parties based on mutual recognition, can be considered a positive outcome, especially in humanistic models of criminal mediation, that is, models that aim at the transformation of the conflict as the ultimate goal.[3]

With respect to the concrete effects of restorative programmes on the criminal justice system, in the event of an interruption or negative outcome of the procedure, the judicial authority does not have to take this into account in the continuation of the criminal proceedings. If, according to the assessment of the mediator/facilitator, a positive result is achieved instead, this is likely to favourably influence the response of the system towards the offender, albeit with a diversity of effects because of the specificities of the systems, and depending on whether the restorative programme intervenes at a pre-trial, trial or post-trial stage. During the pre-trial phase, it may constitute the prerequisite for a dismissal of the proceedings or for establishing other forms of diversion; during the cognitive phase, it will be evaluated by the judge via the criteria of making a sentence commensurate or through other suitable instruments to calibrate the sanction in a sense favourable to the offender. Also, with more radical effects, the result of mediation may justify a verdict of acquittal; during the executive phase, it will possibly be evaluated as a useful element for the granting of *lato sensu* benefits to the convicted person.

The process thus outlined in its essential features is the result of a tendency towards an affirmation of the so-called restorative justice movement, which developed mainly from the 1970s in North America and then enjoyed extensive expansion. RJ is one of the major trends of the last four decades in criminological thought. It is a trend that in some ways competes with, and in other ways complements, other tendencies in criminal law with seemingly opposite aspects.[4] Moving from different theoretical perspectives (abolitionist, victimological, communitarianism), RJ advocates propose models of crime management that are characterized by a focus on listening to the parties in conflict (the victim, the offender, and the community) and meeting their expectations.

Models of RJ have been implemented in many jurisdictions; usually through successful pilot experiments that have been followed by specific regulatory recognition. In Europe, the Council of Europe (COE) Recommendation No. R (99) and the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings of the Council of the European Union were the first reference documents; subsequent normative sources, namely the previously noted Directive 2012/29/EU and CoE Recommendation CM/Rec(2018)8 have continued to promote the use of RJ programmes, although they also dwell on the need to identify specific safeguards (especially for the victim of a crime) so that the fundamental rights of those taking part in RJ are protected. Some specific cautions are then suggested for the application

[3] J. Morineau, *L'esprit de la Médiation*, Toulose 1998.

[4] J. Pratt, *Penal Populism*, New York 2007, p. 124.

of RJ in crimes that present structural power imbalances between subjects, such as in domestic violence.

2.1. The gradual establishment of RJ on the cultural and normative level

There are many reasons for the interest in RJ, as well as for its slow but growing diffusion in individual legal systems. There are four important factors:

(a) First, its aptitude to present itself as a radical alternative to criminal law, one capable of overcoming the limitations of criminal law in managing the conflict arising from crime. Especially in its first theoretical formulations, RJ stands as a wide-ranging tool: not only as something different, but also as something better than criminal law. Some theoretical positions state that the goal of RJ is the creation of relationships and communities based on mutuality, respect, harmony, and peace.[5]

Indeed, *prima facie* RJ has alternative characteristics to the criminal justice system. If public punishment emphasizes the vertical dimension of the crime, as it places the agent subject in relation to the norm and the state, RJ highlights its horizontal and interpersonal dimension.[6] It is a justice of the concrete case, in line with a pragmatic-empirical philosophical tradition.[7] Centrality of the victim and the community of reference, listening to emotional experience, satisfaction of expectations and needs, healing of wounds, and conflict transformation: these are the categories used by RJ and ones that seem to outline the signs of a new semantics of crime. What is relevant is not so much the normative dimension, and, thus, the legal interest protected by the incriminating norm, but the human dimension: the consequences suffered by flesh-and-blood people, and emotional components related to the lived experience. It is, therefore, not surprising that RJ is generally presented as a paradigm shift in the criminal justice system.[8]

(b) A second factor concerns language. RJ uses a vocabulary very different from that in use in criminal law. Words such as "dialogue," "forgiveness," and "conciliation," are an important part of restorative vocabulary. One of the fathers of RJ, Howard Zehr, speaks of a "change of lens" through which to view crime.[9] Expressions such as "harm," "conflict," "prejudice," and "problematic situation" are used instead of those of offence/crime; there is a focus on the need to establish communicative channels between those who suffer (victims) and those who act (offenders) in such situations; it is a matter of "putting things right" and not of applying a "punishment."[10] The conflict is returned to the people, who had been "dispossessed" of it.[11]

---

5 M. Umbreit, M. Peterson Armour, *Restorative Justice Dialogue*, New York 2011, p. 67.

6 J.M. Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal*, Barcellona 2018, p. 21.

7 R.A. Duff, *Restorative Punishment and punitive restoration* [in:] *Restorative Justice. Critical Concepts in Criminology*, vol. 4, ed. C. Hoyle, London–New York 2010, p. 431.

8 B.D. Meier, *Restorative Justice – A New Paradigm in Criminal Law?*, "European Journal of Crime, Criminal Law and Criminal Justice" 1998, vol. 6, no. 2, pp. 125–139.

9 H. Zehr, *Changing Lenses*: *A New Focus for Crime and Justice*, Scottdale 1990.

10 J. Pratt, *Penal Populism*…, p. 124.

11 N. Christie, *Conflict as Property*, "British Journal of Criminology" 1977, vol. 17, no. 1, pp. 1–15.

If the judge is "impartial," the mediator/facilitator, on the other hand, is "equidistant" or rather "equi-close," not so much equally distant from, but equally close to the parties. This is evocative language, especially when compared to the "cold expressions" of criminal law.

(c) Another driving force is the ability of RJ to offer benefits to all parties to the conflict, so much so that it has established itself as "therapeutic justice." Much research has been conducted to ascertain the degree of satisfaction of those who take part in RJ. The rates of fulfillment regarding initial expectations are generally high. Victims appear to be more satisfied, less fearful, and less angry after participating in an RJ programme than in a traditional criminal process.[12] Also in relation to psychological trauma resulting from the crime, RJ paths strengthen their coping skills.[13] As for the offender, there appears to be an increased awareness of his/her actions and a significant reduction in recidivism rates.[14]

(d) One reason for interest in RJ, thus, stems from a growing dissatisfaction of penal doctrine with punishment. The need is strong to find an alternative solution to the mere affliction of suffering, to mitigate the pain[15] that criminal law is structurally, inevitably, meant to bring. There is a dissatisfaction that concerns the functions concretely exercised by punishment and that is projected onto the ideal purposes traditionally attributed to it. In this brief article I certainly cannot retrace the stages of a debate rooted in foundational issues within criminal law. I can only recall in a somewhat severe summary its main problematic nodes, referring to the relevant literature for appropriate insights.[16] Criminal doctrine is well aware of the weaknesses in the epistemological status of traditional theories of punishment. The retributive conception is challenged by the logical and moral untenability of what is termed a "doubling of evil"[17]; the preventive-consequentialist conception is challenged by a lack of empirical evidence about the real deterrent and orienting force of penal norms;[18] re-educative finalism is questioned by the punitive illusion, that is, the enormous distance between the affirmed ideal of just punishment and the reality of the unequal distribution of punishments, as well as by the structural inability of treatment models to reduce the re-entry of the offender into the criminal world.[19]

---

[12] A.M. Nascimento, J. Andrade, A. Castro Rodriguez, *The Psychological Impact of Restorative Justice Practices on Victims of Crimes – a Systematic Review*, "Trauma, Violence & Abuse" 2022, vol. 24, no. 3, pp. 1–19.

[13] A. Pemberton, F.W. Winkel, M. Groenhuijsen, *Evaluating Victims Experiences in Restorative Justice*, "British Journal of Community Justice" 2008, vol. 6, no. 2, p. 99.

[14] G. Robinson, J. Shapland, *Reducing Recidivism: A task for Restorative Justice?*, "British Journal of Criminology" 2008, vol. 48, no. 3, pp. 337–358.

[15] J.M. Silva Sánchez, *Malum passionis*…

[16] B.L. Apt, *Do we know how to punish?*, "New Criminal Law Review" 2016, vol. 19, no. 3, pp. 437–472.

[17] M. Donini, *Pena agita e pena subita. Il modello del delitto riparato* [in:] *Studi in onore di Lucio Monaco*, ed. A. Bondi, Urbino 2020, pp. 389–424.

[18] G. Fiandaca, *Prima lezione di diritto penale*, Roma–Bari 2017, p. 21.

[19] D. Fassin, *Punir. Une Passion Contemporaine*, Paris 2017.

Turning from this overall feeling of disenchantment, an important scholarly trend calls for "rethinking punishment," imagining a punishment that "is not suffered" but "acted upon."[20] RJ is seen as the main tool, although one that is not sufficient by itself, through which it is possible "to overcome the model of the response to crime conceived in terms of correspondence in order to access a design dimension of that response."[21]

2.2. Some problematic issues in the relationship between RJ and the criminal justice system

The growing affirmation of RJ cannot exempt us from assessing the problematic issues that some authors believe would result from its grafting into the criminal justice system.

(a) The enhancement of the interpersonal dimension of the crime may be considered an undue form of the privatization of justice, which is all the less desirable the more it involves crimes of serious negative import: it would bring with it the risk of generating dissimilarities in application dissimilarities and amplifying power imbalances, and it would clash with the public dimension of *ius dicere*, which in the penal sphere is deemed constitutionally necessary.[22]

(b) The evocative language of RJ itself may be one of the main factors resisting its dissemination. It is precisely its marked difference from the traditional categories with which we are used to view the victim, the perpetrator, and the crime that would end up provoking a certain amount of mistrust and scepticism and distance the possibility of public support for its development.[23] Compassion, which is undoubtedly endowed with a seductive force, could not possess normative role-guidance, since it would lend itself to overly differentiated and potentially arbitrary applications: suffering is not measurable by an objective yardstick, but through the feeling, the sensations that we ourselves attribute to those who suffer.[24]

(c) Regarding the positive effects that would result from participation in RJ practices, the results do not always seem unambiguously and easily interpretable.[25] Victims' reparative needs do not necessarily replace the need for revenge, especially in more serious crimes; there is the risk of a so-called. "bubble effect," that is, there is a sense of satisfaction that is only temporary and that dissipates over time.[26] The results about

---

[20] M. Donini, *Pena agita e pena subita*…

[21] L. Eusebi, *Strategie preventive e nuove risposte al reato*, "Rivista italiana diritto e procedura penale" 2021, no. 3, p. 829.

[22] A. Ashworth, *Some doubts about restorative justice* [in:] *Restorative Justice. Critical Concepts in Criminology*…, vol. 1, p. 70.

[23] J. Pratt, *Penal Populism*…, p. 142.

[24] A. Acorn, *Compulsory Compassion. A critique of Restorative Justice*, Toronto 2004.

[25] A. Hartmann, *Victims and restorative justice. Bringing theory and evidence together* [in:] *Routledge International Handbook of Restorative Justice*, ed. T. Gavrielides, London–New York 2018, p. 127.

[26] P. McCold, *Protocols for evaluating restorative justice programmes*, "British Journal of Community Justice" 2008, vol. 6, no. 2, p. 17.

the reduction of recidivism rates are not very different from those obtained through other treatment interventions well calibrated to the offender's characteristics,[27] and, in any case, they do not always seem to calculate the variable of so-called self-selection (that is, that those willing to participate already present personal inclinations so that future abstention from crime can be presumed).

(d) RJ would fail to fulfill the social purposes attributable to punishment. The main obstacle is whether or not it can be considered a just response to crime according to collective perception.[28] In some ways, from a symbolic-functional point of view reparation falls into the same class of acts as punishment, since it is capable of expressing recognition of the violated norm and giving rise to an effect of consolidating social trust in the functioning of the legal system.[29] Nevertheless, it seems to be characterised by a quantitative insufficiency, which can be understood as a deficit of expressive intensity and effectiveness, which prevents it from rising to the functional equivalent of state punishment.[30] The relations with the principle of rehabilitation may be complex. While it is true that the dialogic-reparative path can certainly increase the offender's awareness of the negative value of his or her conduct, the risks of discriminatory applications should not be overlooked. Distinctions would be interposed between categories of convicts, those capable or incapable of performing meaningful acts of reparation.

Indeed, critical objections come even from the supporters of RJ themselves. Thus, the recognition of RJ in the penal system might take place via undesirable trends.[31] These are: (a) the focus on an increasing bureaucratization of the mediator, which would also be witnessed by a particular interest in practice monitoring procedures; (b) the limitation of RJ to the criminal context alone, excluding its broader applicative potential in other spheres of social interaction; and (c) the idea of RJ understood as a "product service," as witnessed by the emphasis in international standards on terms such as "services," "processes," "practices," and "programmes," which are followed by specific "outcomes." In developing thus, RJ would move away from its origins. It would run the risk of being engulfed by criminal justice, replicating its flaws, of producing an "imitator paradox."[32] As it is gradually absorbed into the meshes of traditional criminal justice, it would find itself in the paradox of following the same tendencies, the same flaws.

---

[27] J. Doak, D. O'Mahony, *Evaluating the success of restorative justice conferencing based approach* [in:] *Routledge International Handbook of Restorative Justice*…, pp. 211–223.

[28] J. Pratt, *Penal Populism*…, p. 143.

[29] C. Daly, *Restorative Justice: The real story* [in:] *Restorative Justice. Critical Concepts in Criminology*…, vol. 1, pp. 281–308.

[30] J.M. Silva Sánchez, *Malum passionis*…, p. 124.

[31] B. Pali, G. Maglione, *Discursive representations of restorative justice*, "European Journal of Criminology" 2023, vol. 20, issue 2, pp. 507–527.

[32] G. Pavlich, *Governing Paradoxes of Restorative Justice*, London 2005, p. 14.

2.3. Summary: balance

The reasons that discourage the recognition of RJ in the criminal justice system, especially when viewed as complementary rather than alternative, can perhaps be seen as less convincing.

(a) RJ is not a mere privatization of justice, dealing with conflict-processing practices that, once explicitly recognised, take place under the banner of the law. What matters, above all, is that the burden of the reparative path and its meaning be brought to the attention of the public authority (the judicial authority) and thus, through it, of the community.

(b) Restorative language is part of a process of rediscovery of emotions and feelings, which has long been encouraged in the humanities.[33] There is nothing to prevent valuing the more emotional dimension of the conflict of crime, if this does not result in the injury of the rights of those who take part in the reparative process.

(c) While it is true that in the evaluation of restorative programmes one must take into account the many variables capable of modifying their outcomes, it is also true that at least two basic values must be recognized: the effects appear to be able to be evaluated in a positive sense overall; RJ does, however, have the merit of having submitted itself to a level of empirical verification to which traditional criminal justice remains reluctant to submit itself.

(d) Finally, the alleged incompatibilities between RJ and the purposes of punishment do not seem to be convincing. According to some, RJ operates in synergy with the traditional purposes of punishment.[34] Regarding the relationship with retribution, RJ is also "backward-looking," like the retributive position. There remains a close connection between past actions (the offending conduct) and obligations arising from them (reparation).[35] The key difference lies in the fact that in RJ there is no focus on the suffering of the offender, but a positive obligation is required. There is an activism on behalf of the victim or the community. RJ complements and supplements retribution, but does not cancel it. With reference to preventive theories, on the one hand, it has been pointed out that RJ can have preventive effects in the long run, according to the paradigms of "procedural justice" (the more satisfied protagonists are, the more willing they are to refrain from crime) and "reintegrative shaming."[36] On the other hand, the "communicative" components of RJ programmes have been emphasized: despite the differences that obviously exist between punishment in the strict sense and the RJ path, the latter, once emancipated from its representations as "soft justice,"

---

33 M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Cambridge 2001.

34 H. Dancig-Rosenberg, T. Gal, *Characterizing multi-door criminal justice: A comparative analysis of three criminal justice mechanisms*, "New Criminal Law Review" 2020, vol. 23, no. 1, pp. 139–166.

35 Z.D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, "Journal of Dispute Resolution" 2005, issue 2, p. 376.

36 J. Braithwaite, *Crime, shame and reintegration*, New York 1989.

should not be seen as a radical alternative to punishment, but as an alternative form of punishment.[37]

From this perspective, RJ would retain the ability to send both a deterrent and guiding message to the community. At the same time, offender management that can be oriented in a restorative-reconciliatory rather than a retributive direction is anything but historically unprecedented.[38]

3. The "Cartabia reform"

As mentioned at the beginning of this article, the reasons pushing for the recognition of RJ within the criminal justice system have found a gradual acceptance in Italy: first through pilot experiments in the 1990s in juvenile justice, then through some timid normative recognition in adult justice, and, finally, with Decree 150/2022 (otherwise known as the "Cartabia reform," named after the minister proposing it), RJ officially entered the system.

Two directions were followed by the Cartabia reform. With the first (see 3.1 below), the Italian legal system introduces an "organic discipline of RJ"[39] (Articles 42–67 of Decree 150/2022), that is, RJ is given identity and form by identifying its principles, by specific implementation methods, and by the creation of RJ offices throughout the country. With the second guideline (see 3.2 below), the law defines through which regulatory tools and with what legal effects RJ programmes are grafted onto the system.

3.1. The "organic discipline" of RJ

With the "organic discipline of RJ," Italian law: (i) provides the reference coordinates for the implementation of RJ ("definitions, principles, objectives," conditions of "access to programmes," "guarantees and duties for participants and mediators," and "types of eligible programmes, potential outcomes and their evaluation by the judicial authority"); and (ii) devotes a specific regulatory section to the creation of the structures competent to manage, organise, and monitor the RJ programs, as well as to the identification of the rules for the training and qualification of criminal mediators.

In (i), the decree complies with the indications coming from European sources on RJ, transposing into domestic law norms, practices, procedures, and guarantees long established on the international and supranational level. However, the Italian provision is characterized by some peculiarities.

---

37 R.A. Duff, *Punishment, Communication, and Community*, Oxford 2001, p. 97.

38 A. Bottoms, *Some sociological reflections on restorative justice* [in:] *Restorative Justice and Criminal Justice: Competing or Reconcilable Programs?*, eds. A. von Hirsch, J. Roberts, A. Bottoms, K. Roach, M. Schiff, Oxford 2003, pp. 79–113.

39 Una "disciplina organica della giustizia riparativa" (Comprehensive Regulation of Restorative Justice).

With regard to potential participants in RJ programmes (Articles 42 and 45 of the decree), in addition to the "victim" and the "person indicated as the perpetrator of the offence," "other subjects belonging to the community," as well as "anyone else who has an interest in it," are included. The victim of the offence is defined broadly, including in this formulation not only a "family member," but also legal entities. The offender is defined with terminology that does not exactly correspond to that ("offender") in use in the international context. It speaks of "the person indicated as the author of the offence." This is a lexical choice that, according to the promoters of the reform, "balances the due respect for the presumption of innocence until eventual final conviction, on the one hand, and the need to maintain the equal consideration of the victim of the crime and of the one who, although definitively held responsible for the same crime, is not forever diminished by the experience of guilt and offence."

With respect to permissible RJ "programmes" (Article 53 of the decree), two aspects should be stressed. The first is that, in addition to proposing the models commonly indicated on the international level, namely "author-victim mediation," "family group conferencing," and "circles," the decree includes in this notion, through an open formula, "any other dialogic programme led by mediators." The second is that the legislature expressly states that mediation can also take place between perpetrators and surrogate or nonspecific victims, "that is, with victims of crimes other than the one for which they [perpetrators] are being prosecuted."

With respect to "access" to RJ programs (Article 44 of the decree) it is provided that access is allowed "at every state and level of the proceedings and that there is no preclusion by reason of the offences or their seriousness"; and that "in the case of offences prosecutable on complaint, access may be granted even before the complaint is brought."

Italian regulations to ensure safe and guaranteed participation in RJ programmes are mostly in line with international standards. The decree dictates regulations aimed at making effective the right of participants to receive adequate information about the right to access the programmes and to express an informed consent to participation, including through the right to language assistance. The law, moreover, stipulates that information about the right to access RJ programs be provided not only by the judicial authority, but also by all other public agencies that in any capacity are in contact with the same individuals. As for the guarantees of mediators, the "duty of confidentiality" is stipulated, and specific rules are provided to make effective the "non-usability of statements" and the "protection of secrecy" in relation to the contents of the activity carried out. In any case, a peculiarity of the Italian regulations is that neither in the section on "guarantees of RJ programs" (Articles 47–52 of the decree), nor in the section on "preliminary activities" (Article 54 of the decree), is the recognition of the "basic facts" by the perpetrator required. This is despite the fact that this is a requirement under European law (see 3.4 below), both within the framework of the European Union (Article 12 of European Directive 2012/29/EU) and within the framework of the Council of Europe (rule number 30 of Recommendation CM/Rec(2018)8 of the Committee of Ministers).

As for the "restorative outcome," this is defined as "any agreement, resulting from the RJ programme, aimed at repairing the offence and capable of representing the mutual recognition that has taken place and the possibility of rebuilding the relationship between the participants." It is clarified that the outcome can be both material ("compensation for the damage, restitution, working to eliminate the harmful or dangerous consequences of the offence") and symbolic ("formal declarations or apologies, behavioral commitments including public ones or those addressed to the community, agreements regarding the attendance of persons or places").

(ii) The second strand of the "organic discipline" is devoted to the creation of the structures responsible for managing, coordinating and monitoring RJ programmes, as well as the identification of standards to ensure the training and licensing of criminal mediators.

The system is designed as follows. A "National Conference for RJ" is established at the Ministry of Justice, which indicates the essential and uniform levels of performance and annually monitors the results. A "Local Conference for RJ," established at each district of the Court of Appeals in the national territory (in Italy there are twenty-six districts of the Courts of Appeals), identifies one or more local authorities to be entrusted with the establishment and management of "Centres for RJ." The latter are the (public) structures that concretely ensure the carrying out of the service through the figure of the "expert mediator": a qualification that can be acquired at the end of a period of practical and theoretical training curated by the RJ Centres themselves and by universities, the passing of a final test, and the inclusion of the applicant on the "list of expert mediators" established at the Ministry of Justice. RJ programmes are then concretely implemented by the Centres for RJ, which are able to make use of "expert mediators" from the local authority of reference or external "expert mediators," who will be entrusted with the task of mediation through a contract.

3.2. The regulatory changes to the criminal justice system

The changes made by Decree 150/2022 to the existing criminal justice system are aimed at ensuring complementarity between RJ and "conventional criminal justice." As noted above, the Italian legislature operates on multiple fronts through amendments to the Penal Code, the Code of Criminal Procedure, laws on justice of the peace jurisdiction, juvenile trial law, and prison law. The central ligatures through which the complementary relationship is articulated are the rules regarding access to RJ programmes and those governing the legal value of their outcomes.

With regard to access, the Italian legislature has embraced a strong "referral" model designed to ensure ample opportunities for RJ. First, access is allowed "at every stage and level of the proceedings." Second, with regard to methods of access, new regulations have been introduced, in the ordinary criminal trial, in the penitentiary phase, in the juvenile proceedings, through which it is provided that the judicial authority may order, even *ex officio*, a referral to the Centres for RJ of the victim and the accused, as well as the convicted person. That is, in these regulations, the subjects

are obliged to present themselves at the centres, although they obviously remain at complete liberty, without detrimental consequences, to decide whether or not to begin, continue, or possibly discontinue a RJ path. With reference to the criteria through which the judicial authority assesses whether or not to send the case to mediation, Article 129 bis of the Code of Criminal Procedure stipulates that the judicial authority must assess: first, the "usefulness" of the RJ path for the resolution of issues specifically arising from the crime; second, "the absence of concrete danger to the persons concerned and to the establishment of the facts."

With reference to the evaluation of the outcomes of restorative paths, Decree 150 confirms the well-established rule of assurance, in force internationally, that any negative outcome or failure to carry out the programme cannot have unfavourable effects (Article 58 of the decree). With respect to a positive outcome, the most significant changes are as follows.

First, and as a general rule, the reform affirms the rule that the judicial authority evaluates the conduct of the programme, including for the purpose of sentencing (Article 58 of the decree). This, thus, applies to all types of offence, regardless of their severity.

Second, "participation in an RJ programme concluded with a restorative outcome" is considered by the Italian legislature as: i) a new mitigating circumstance (Article 62, first paragraph, No. 6, Penal Code); ii) an element that allows the judge to suspend the execution of the sentence (Article 163, last paragraph, Penal Code); and iii) a factor that determines the tacit remission of the complaint (Article 152, second paragraph, Penal Code). In all these three cases, therefore, RJ programmes are explicitly mentioned by the Italian legislature and independently determine the above legal effects.

Third, the legislature amends the text of Article 131 bis of the Penal Code, which regulates the "exclusion of punishment due to particular tenuity of the act" in crimes for which a prison sentence not exceeding a minimum of two years or a fine, are provided for. The reform provides that the character of tenuousness of an offence can be assessed not only according to the ordinary parameters, but also "in consideration of conduct subsequent to the crime." RJ paths undoubtedly fall within this. The potential application of this innovation should not be exaggerated, however. In fact, while it is true that it is now possible to enhance the value of RJ programmes in order to recognize a tenuousness of the offence, it is also true that they are relevant in an indirect way and do not have an autonomous extinguishing effect: other elements (related to the modality of the conduct and the exiguity of the danger) are necessary to arrive at the exclusion of criminal liability. In addition, the decree significantly expands the catalogue of offences for which the offence cannot in any case be considered of particular tenuity: for example, certain offences covered by the Istanbul Convention on Violence against Women and Domestic Violence (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, signed in Istanbul on 11 May 2011) are explicitly excluded. For the latter types of crime, therefore, RJ tools will not be applicable, even indirectly, as factors in establishing the tenuousness of the act, which may exclude criminal liability.

3.3. The new model of complementarity between RJ and criminal justice in the Italian legal system

In addition to the normative novelties introduced by Decree 150/2022, other pre-existing normative instruments, not changed by the reform, can provide the legal framework to accommodate RJ paths and to attribute value to it in the criminal justice system. If one wishes to sketch an overall summary, one can therefore analyse the current intertwining between RJ and the penal system in the Italian legal system according to whether the restorative program intervenes in a pre-trial, trial, or post-trial phase.

During the pre-trial phase, the successful outcome of RJ programmes may result in the tacit dismissal of the complaint. For crimes prosecuted *ex officio*, the reform does not introduce specific mechanisms. For example, the decree does not take up the proposal to introduce the institution of a "deserved dismissal" formulated by the Lattanzi Commission. Nevertheless, it is possible to activate RJ paths at this early stage through the institution of "suspension of proceedings with probation" (Article 168 bis Penal Code), which operates for crimes punishable by a prison sentence not exceeding a maximum of four years and for other crimes specifically provided for by law. With probation, the offender must follow a treatment programme, among the prescriptions of which is "conduct aimed at promoting, where possible, mediation with the offended person and the conduct of RJ programmes" (Article 464 bis, fourth paragraph, Penal Code). The successful outcome of probation determines the extinction of the crime. It should be pointed out, however, that although this instrument has been used to date in some cases to initiate paths of criminal mediation, it is ill-suited to perform conciliatory-reparative functions in the strict sense. This is mainly because of the requirement of public utility work, which continues to be inescapably required by the norm and which orients the institution toward objectives quite different from those underlying criminal mediation and restorative dialogue.

With regard to the trial phase, a positive outcome will be seen in three different possible effects: i) for any type and gravity of crime, it permits the sanctioning response to be graduated in a direction that is favourable for the offender, either through the criteria for making punishment commensurate (Article 133, Penal Code), or through the application of the new common mitigating factor (Article 62, first paragraph, no. 6, Penal Code); ii) it can justify the granting of a suspended sentence (Article 163, ult. paragraph, Penal Code); iii) more radically, it can be taken into account in order to exclude criminal liability, both for crimes prosecuted on complaint (for which Article 152 Penal Code will be applicable), and for crimes prosecuted *ex officio* (for which the previously mentioned Article 168 bis Penal Code, as well as Article 131 bis Penal Code as amended by the reform, are applicable). Nonetheless, as I have already suggested, in the latter cases the positive restorative result will not be independently assessable: it will be able to determine the total exclusion of criminal liability only if supported by other elements, which come together to determine a favourable judgment on the probationary course or on the tenuous nature of the offence.

Finally, during the post-trial phase, the restorative outcome may be evaluated, for adult offenders, for the purposes of "assignment to work outside, the granting of premium permits and alternative measures to detention […], as well as conditional release" (Article 15 bis, second paragraph, Law 354/1975). For juvenile offenders it may be evaluated "for the purposes of the adoption of community-based criminal measures, other alternative measures and conditional release" (Article 1 bis Legislative Decree 121/2018).

To sum up, some regulatory options are new; others were already in existence. What should be highlighted is that the legislature not only enhances these normative channels through explicit and even more extensive recognition of RJ programmes, but also makes access to such programmes easier today than in the past. Such access is possible thanks to massive reforming initiatives aimed at ensuring the operation of RJ centres throughout the country.

3.4. Provisional assessment of the reform

In Italy, a reform that affirms without hesitation, ambiguity, or wavering, the recognition of RJ within the criminal justice system is long overdue. Decree 150/2022 certainly lays the legal foundation for a coexistence between the dialogical principles of RJ and those of conventional criminal justice.

Generally speaking, the reform has been well received in by Italian doctrinal commentators, although some of its specific aspects have raised some concerns. Some of the most debated issues include, on the one hand, the mechanism of access to RJ programmes, and, on the other hand, the absence of a specific rule that considers the recognition of "basic facts" as a prerequisite for the conduct of the programmes.

Regarding access, the choice of providing the judicial authority with the power to order, even *ex officio*, the referral of the victim and the accused to the RJ Centres has stimulated much discussion. Indeed, the provision could attract some criticism, since it seems to imply some form of pressure to participate in the RJ programme, contrary to the principle of voluntariness. Nevertheless, it should be pointed out that in the system devised by the legislature there is no lack of forms of protection of voluntariness, both upstream and downstream of the reparative pathway. On the one hand, in fact, it is an absolute prerequisite for starting, conducting, and completing a RJ program. On the other hand, refusal to participate or continue the reparative pathway cannot ever be taken into consideration by the criminal judge. While there remain perhaps some critical issues on the ethical-political level (insofar as RJ ends up imposing interpersonal contact between offended and offender), it should nevertheless be pointed out that the norm has a primarily practical role. It is more a norm-incentive than anything else, which can perhaps be justified because of the considerable administrative, organizational, and financial effort required for the creation of RJ Centres, their updating, and their monitoring; an effort that would likely be unmotivated if such public structures ended up being placed at the service of only those cases, probably few in number, coming from private initiative.

With reference to the lack of the recognition of "basic facts" as a prerequisite for restorative programmes, the Italian legislature seems to have been motivated by the intention to guarantee the "person named as the perpetrator of the crime" against the violation of the presumption of innocence, provided for in Article 27, second paragraph, of the Italian Constitution. Nonetheless, this is a choice at odds with European legislation,[40] potentially a forerunner of risks of secondary victimization, and actually difficult to implement on the actual paths of RJ. In fact, the idea is unrealistic that mediators may be able to manage communication between the parties without their recognizing themselves in the "basic facts."

Other aspects of the reform also prompt critical reflections and perhaps require future corrective action. Within the limits of this article, I indicate them in summary fashion.

On the level of "organic discipline," in the notion of "restorative outcome" (Article 42) great emphasis is placed on elements such as "mutual recognition," the "possibility of rebuilding the relationship." Thus, according to the normative text, an agreement aimed at reparation of the offence that is not, however, "capable of representing" both the first and second elements could not be positively assessed. In fact, one should not *a priori* exclude the possibility of positively judging programmes that settle for something less and/or different. One cannot exclude the possibility of positively assessing the benefits of an agreement also from an individual, and not necessarily relational, perspective, or programmes that consider the successful reparative outcome on the basis of the fulfillment of personal expectations as represented by the offending protagonists themselves, rather than on the basis of the possibilities of conflict transformation.

With respect to participants, the involvement of the community in managing the consequences of a crime is one of the hallmarks of RJ, especially in transitional justice experiences and in conflicts between ethnic or cultural groups.[41] Nonetheless, especially in ordinary crime scenarios, the identification of the target community is not always an easy task. This suffers from a structural deficit of predictability and discretion. Who should be involved? How? To what end? The reform says little about this. Moreover, the Italian legislature not only uses the notion of community but also employs that of stakeholder. These are concepts marked by ambiguity. They are not devoid of ethical elements and lend themselves to being instrumentalised, potentially engendering widespread social-disciplinary systems of control.[42] It will, thus, be

[40] In particular, rule number 30 of Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters states: "[t]he basic facts of a case should normally be acknowledged by the parties as a basis for starting restorative justice. Participation in restorative justice should not be used as evidence of admission of guilt in subsequent legal proceedings." A similar provision is provided by the European Directive 2012/29/EU, which in the context of Article 12 (Right to safeguards in the context of restorative justice services), sub-paragraph (c), establishes as a precondition for the programme that "the offender has acknowledged the basic facts of the case."

[41] *Transitional Justice*, eds. J. Elster, R. Nagy, M.S. Williams, New York 2012.

[42] L. Ferrajoli, *Il paradigma garantista. Filosofia e critica del diritto penale*, Napoli 2016, p. 51.

necessary to test in practice how to succeed in involving the community or other stakeholders in a virtuous deliberative-participatory mechanism,[43] without incurring the risks structurally inherent in such notions.

On the organizational-operational level, two aspects of the reform require some corrective action. The first concerns the lack of cooperation between RJ Centres, on the one hand, and victim support services, on the other. It is true that sometimes precisely the involvement of services, associations, and support groups specifically dedicated to the protection of only one of the two parties risks producing exacerbation of conflict rather than conflict mitigation.[44] Nevertheless, especially in some situations (for example, those characterized by a particular power imbalance, as in the paradigmatic case of domestic violence), the possibility of exercising the right to access "safe and competent RJ services" (Article 12 of Directive 2012/29/EU) does, indeed, seem to call for such inclusive and collaborative strategies: structural cooperation between mediation offices, on the one hand, and victim support services, on the other, as well as the inclusion of accompanying services for the perpetrator, could facilitate the psychological empowerment of those who decide to engage in such a communicative dialogue. The second aspect concerns the model devised by the legislature for the coordination of services and the identification of essential levels of RJ services. The Italian regulations aim to achieve the meritorious goal of providing adequate restorative programmes throughout the entire country. However, they should not end up crystallizing RJ paths in rigid forms of technical-operational bureaucratization. Excessive formalization of restorative processes would risk transforming RJ into an institutional agency of social control, attentive more to compliance with the rules of the game than to the uniqueness and specificity of personal experiences.

With respect, then, to the overall normative impact on achieving a positive restorative outcome, the reform was more cautious than could have been imagined. RJ processes are likely to influence the severity of punitive reaction, affecting the quantum of punishment, but not to exclude the criminal liability. From this point of view, the Italian legislator could have been more challenging. The Italian legal system already values reparative activities, such as work in the public interest or other different types of treatment activities, for the recognition of an exclusion of criminal liability. RJ processes are not comparatively less relevant activities than the latter. Nothing would actually prevent the introduction of an autonomous cause of non-punishability, more explicitly calibrated to the specificities of RJ and subject to application limits similar to those established for other restorative conduct.

Finally, with reference to the changes made in the penitentiary stage, they acquire substantial value not so much because of substantive or procedural innovations, but because they are assisted by the regulatory compartment that governs the organic regulation of RJ services, which will facilitate their implementation. Value also accrues from the important novelty of having also placed in the hands of prison

[43] S. Benhabib, *The Claims od Culture: Equality and Diversity in the Global Era*, Princeton 2002.
[44] D. Garland, *The Culture of Control*, Oxford 2001, p. 121.

directors an obligation to provide information regarding the possibility of accessing RJ paths. Nonetheless, some clarifications should be made to clear the field of possible misunderstandings. A first misunderstanding could stem from the idea that the reform is sufficient in itself to allow a large-scale spread of restorative programmes in prisons. In reality, the same obligation to provide information risks remaining sterile if not accompanied by a more general reconsideration of the way of understanding prison sentencing. The current state of Italian prisons (not unlike that of other countries) seems, in fact, more likely to nurture processes of infantilisation of inmates, rather than to nurture an empowering redemption. One should start from the idea that "penal mediation should not act as the party of a criminal law that in its ordinary days maintains a retributive character."[45]

A second misunderstanding, in some ways symmetrically contrary in nature to the first, may instead arise from the idea that forms of offender-victim dialogue in the executive phase end up being considered privileged modes over others, or even worse, irreplaceable, for the granting of conditional release or rewards and benefits to the prisoner. The spread of RJ paths in the prison environment is certainly desirable. This should not give rise to the idea that the inmate, in order to prove his/her resocialization must do more than what is normally expected of him/her.

4. Conclusions

Although not all aspects of the Cartabia reform seem immune to criticism, Decree 150/2022 opens a new and promising course in Italian criminal justice. RJ is a vision that is among the most advanced spearheads of a "criminology of trust."[46] Of course, it is not the only tool that takes this perspective. It is not necessarily the most effective one. Likely, combinations of models, tools, and practices can coexist and increase the chances of success in crime response strategies focused more on the inclusion and support of conflict actors, rather than their social exclusion or control.[47] While RJ programmes cannot be expected to become a panacea for all ills,[48] it can certainly be assumed that, once the system of regulatory and organizational intersections I have briefly described has been tested, the community will be offered more flexible and, in many cases, overall more personally satisfying solutions[49] than those currently provided by punitive justice alone.

---

45 L. Eusebi, *Strategie preventive*…, p. 852.

46 L. Walgrave., T. Ward, E. Zinsstag, *When restorative justice meets the Good Lives Model: Contributing to a crimonology of trust*, "European Journal of Criminology" 2021, vol. 18, no. 3, p. 455.

47 H. Dancig-Rosenberg, T. Gal, *Characterizing multi-door criminal justice*…

48 L. Walgrave, *Restorative Justice is Not a Panacea Against All Social Evils* [in:] *Critical Restorative Justice*, eds. I. Aertsen, B. Pali, Oxford 2017, pp. 107–108.

49 A.M. Nascimento, J. Andrade, A. Castro Rodriguez, *The Psychological Impact of Restorative Justice*…

Literature

Acorn A., *Compulsory Compassion. A critique of Restorative Justice*, Toronto 2004.

Angel C.M., Sherman L.W., Ariel B., Bennet S., Inkpen N., Keane A., Richmond T.S., *Short-term effects of restorative justice conferences on post-traumatic stress symptoms among robbery and burglary victims: A randomized controlled trial*, "Journal of Experimental Criminology" 2014, vol. 10, no. 3, pp. 291–307.

Apt B.L., *Do we know how to punish?*, "New Criminal Law Review" 2016, vol. 19, no. 3, pp. 437–472.

Ashworth A., *Some doubts about restorative justice* [in:] *Restorative Justice. Critical Concepts in Criminology*, vol. 1, ed. C. Hoyle, New York 2010, pp. 65–80.

Benhabib S., *The Claims od Culture: Equality and Diversity in the Global Era*, Princeton 2002.

Bottoms A., *Some sociological reflections on restorative justice* [in:] *Restorative Justice and Criminal Justice: Competing or Reconcilable Programs?*, eds. A. von Hirsch, J. Roberts, A. Bottoms, K. Roach, M. Schiff, Oxford 2003, pp. 79–113.

Braithwaite J., *Crime, shame and reintegration*, New York 1989.

Christie N., *Conflict as Property*, "British Journal of Criminology" 1977, vol. 17, no. 1, pp. 1–15.

Daly C., *Restorative Justice: The real story* [in:] *Restorative Justice. Critical Concepts in Criminology*, vol. 1, ed. C. Hoyle, London–New York 2010, pp. 281–308.

Dancig-Rosenberg H., Gal T., *Characterizing multi-door criminal justice: A comparative analysis of three criminal justice mechanisms*, "New Criminal Law Review" 2020, vol. 23, no. 1, pp. 139–166.

Doak J., O'Mahony D., *Evaluating the success of restorative justice conferencing based approach* [in:] *Routledge International Handbook of Restorative Justice*, ed. T. Gavrielides, London–New York 2018, pp. 211–223.

Donini M., *Pena agita e pena subita. Il modello del delitto riparato* [in:] *Studi in onore di Lucio Monaco*, ed. A. Bondi, Urbino 2020, pp. 389–424.

Duff R.A., *Punishment, Communication, and Community*, Oxford 2001.

Duff R.A., *Restorative Punishment and punitive restoration* [in:] *Restorative Justice. Critical Concepts in Criminology*, vol. 4, ed. C. Hoyle, London–New York 2010, pp. 431–447.

Dunkel F., Grzywa-Holtern J., Horsfield P., *Restorative Justice and Mediation in Penal Matters*, Mönchengladbach 2015.

Elster J., Nagy R., Williams M.S. (eds.), *Transitional Justice*, New York 2012.

Eusebi L., *Strategie preventive e nuove risposte al reato*, "Rivista italiana diritto e procedura penale" 2021, no. 3, pp. 823–854.

Fassin D., *Punir. Une Passion Contemporaine*, Paris 2017.

Ferrajoli L., *Il paradigma garantista. Filosofia e critica del diritto penale*, Napoli 2016.

Fiandaca G., *Prima lezione di diritto penale*, Roma–Bari 2017.

Gabbay Z.D., *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, "Journal of Dispute Resolution" 2005, issue 2, pp. 349–397.

Garland D., *The Culture of Control*, Oxford 2001.

Hartmann A., *Victims and restorative justice. Bringing theory and evidence together* [in:] *Routledge International Handbook of Restorative Justice*, ed. T. Gavrielides, London–New York 2018, pp. 127–144.

McCold P., *Protocols for evaluating restorative justice programmes*, "British Journal of Community Justice" 2008, vol. 6, no. 2, pp. 9–28.

Meier B.D., *Restorative Justice – A New Paradigm in Criminal Law?*, "European Journal of Crime, Criminal Law and Criminal Justice" 1998, vol. 6, no. 2, pp. 125–139.

Morineau J., *L'esprit de la Médiation*, Toulose 1998.
Nascimento A.M., Andrade J., Castro Rodriguez A., *The Psychological Impact of Restorative Justice Practices on Victims of Crimes – a Systematic Review*, "Trauma, Violence & Abuse" 2022, vol. 24, no. 3, pp. 1–19.
Nussbaum M., *Upheavals of Thought: The Intelligence of Emotions*, Cambridge 2001.
Pali B., Maglione G., *Discursive representations of restorative justice*, "European Journal of Criminology" 2023, vol. 20, issue 2, pp. 507–527.
Pavlich G., *Governing Paradoxes of Restorative Justice*, London 2005.
Pemberton A., Winkel F.W., Groenhuijsen M., *Evaluating Victims Experiences in Restorative Justice*, "British Journal of Community Justice" 2008, vol. 6, no. 2, pp. 98–119.
Pratt J., *Penal Populism*, New York 2007.
Robinson G., Shapland J., *Reducing Recidivism: A task for Restorative Justice?*, "British Journal of Criminology" 2008, vol. 48, no. 3, pp. 337–358.
Silva Sánchez J.M., *Malum passionis. Mitigar el dolor del Derecho penal*, Barcellona 2018.
Umbreit M., Peterson Armour M., *Restorative Justice Dialogue*, New York 2011.
Walgrave L., *Restorative Justice is Not a Panacea Against All Social Evils* [in:] *Critical Restorative Justice*, eds. I. Aertsen, B. Pali, Oxford 2017, pp. 95–110.
Walgrave L., Ward T., Zinsstag E., *When restorative justice meets the Good Lives Model: Contributing to a crimonology of trust*, "European Journal of Criminology" 2021, vol. 18, no. 3, pp. 444–460.
Zehr H., *Changing Lenses*: *A New Focus for Crime and Justice*, Scottdale 1990.

Summary

Francesco Parisi

Restorative Justice in Criminal Cases: The Italian Reform

Through legislative decree 150/2022, restorative justice has properly entered the Italian penal system. the introduction of a specific regulation was motivated by the necessity to comply with explicit obligations assumed by Italy under European law. After reviewing the notion, models, and application mechanisms of restorative justice, and the reasons for a progressive implementation of it in Europe, the author analyses the new model of complementarity between RJ and the penal system in the Italian jurisdiction, focusing on scenarios that may be opened up because of this important reform.

Keywords: restorative justice, European RJ models, Italian reform.

Streszczenie

Francesco Parisi

Sprawiedliwość naprawcza w sprawach karnych – reforma włoska

Dzięki dekretowi ustawodawczemu 150/2022 sprawiedliwość naprawcza na dobre wkroczyła do włoskiego systemu karnego. Wprowadzenie szczegółowej regulacji było również motywo-

wane koniecznością wypełnienia wyraźnych zobowiązań, jakie Włochy przyjęły na mocy prawa europejskiego. Po omówieniu pojęć, modeli, mechanizmów stosowania i powodów stopniowego wdrażania sprawiedliwości naprawczej w Europie autor analizuje nowy model komplementarności między sprawiedliwością naprawczą a systemem karnym w jurysdykcji włoskiej, skupiając się na scenariuszach, które mogą się pojawić dzięki tej ważnej reformie.

Słowa kluczowe: sprawiedliwość naprawcza, europejskie modele SN, reforma włoska.

Natalija Lukić
University of Belgrade, Serbia
natalija.lukic@ius.bg.ac.rs
ORCID: 0000-0001-5761-2444

https://doi.org/10.26881/gsp.2025.4.04

Crime and Penal Policy of Courts in Serbia

1. Introduction

When considering crime trends and the reaction of formal authorities, it is necessary to look briefly at the history of Serbia in recent decades. After the breakup of the Socialist Federal Republic of Yugoslavia during the 1990s, Serbia went through a turbulent period marked by wars, sanctions by the international community, and NATO bombing in 1999. At the same time, the country was going through a period of transition from a socialist to a capitalist socio-economic system. After 2000 and the change of government, gradual stabilization and reforms took place in society, and in 2012, Serbia was granted the status of a candidate country for EU membership.

This article first provides an overview of the basic criminal law solutions in Serbia along with a review of recently adopted new legal solutions in that field. Then, the state of crime in Serbia and trends are discussed with reference to certain types of crime and specific criminal offences. Finally, I discuss the penal policy of the courts in the country and the situation in Serbian prisons.

2. Criminal law provisions

The current Criminal Code of Serbia entered into force on 1 January 2006 and since then it has been amended several times. The age of criminal responsibility in Serbian law is fourteen years. Adulthood is acquired at the age of eighteen and the Criminal Code applies to those persons, with the possibility of applying the Law on Juvenile Criminal Offenders and Criminal Legal Protection of Juveniles in certain cases (Articles 40 and 41 of the Law). The Criminal Code foresees several categories of criminal sanctions: penalties, warning measures, and security measures. For juvenile offenders, a category of sanctions is provided in the Law on Juvenile Criminal Offenders and the Criminal Legal Protections of Juveniles, which are called educational measures. Older juveniles (sixteen to seventeen years old at the time of committing the crime) may also be sentenced to juvenile prison.

The Criminal Code recognises several types of punishments: prison sentence, fine, community service, and revocation of a driver's licence. A prison sentence cannot be shorter than thirty days or longer than twenty years. Exceptionally, for the most serious crimes, the legislator foresees the possibility of life imprisonment. Before 2019, when life imprisonment was introduced, instead of it there was a possibility for the most serious crimes of the court's imposing a sentence of thirty to forty years, which represented a kind of substitute for the death penalty, which was abolished by Serbia in 2002. The Criminal Code also recognizes house arrest as a modality of execution of a prison sentence that can be imposed (the CC stipulates what circumstances the court should assess when making a decision) if a person is sentenced to a prison sentence of up to one year (Article 45, paragraphs 3–5)

Since its adoption, the Criminal Code has undergone numerous amendments.[1] All those amendments were basically repressive in nature, and criminal law was often used for populist purposes to score political points.[2] At the same time, the position of public opinion and various "experts" was taken into account, while the academic study of criminal law was marginalized. This results in new and often unnecessary incriminations, because existing ones could already be applied to provide criminal protection, increase in prescribed sentences, bans on mitigating sentences for certain crimes, stricter conditions for parole, a ban on parole for some serious crimes, etc. Thus, for example, the possibility of parole for a person convicted of rape resulting in the death of the victim is excluded (death is seen as the result of negligence and not intent, because otherwise there is a concurrence of the crimes of murder and rape), but the same rule does not apply to a person who would be sentenced to life imprisonment for, for example, genocide.[3]

While the changes to the criminal legislation that applies to adult offenders are continuously repressive, the Law that applies to juvenile offenders, on the other hand, has not gone through any changes.[4] The reason for this may be the fact that the proportion of juvenile delinquency is not high and is around 5% of total delinquency; there is also an attitude that it is better to avoid juveniles' stigmatization in the process of maturation. However, although there are justifications for using the

---

[1] In 2025, the new proposal of amendments to the Criminal Code was made, which, based on the 2024 draft, introduces significant changes in the special part by establishing a number of new criminal offenses and increasing penalties for certain crimes (murder, crimes against sexual freedom, crimes against the environment, the unauthorized possession and carrying of firearms, etc.).

[2] M. Škulić, N. Lukić, *The explanation of the main characteristics of penal populism and examples of penal populism in some criminal law provisions and planned amendments of the Criminal Code of Serbia*, "Crimen" 2025, vol. 16, no. 1, pp. 3–40.

[3] G.P. Ilić, *Marginalije o kazni doživotnog zatvora, uslovnom otpustu i ljudskim pravima* [in:] *Kaznena reakcija u Srbiji XII*, ed. Đ. Ignjatović, Beograd 2019, pp. 123–142; D. Kolarić, *Višestruki povrat u krivičnom pravu Srbije – osvrt na Zakon o izmenama i dopunama Krivičnog zakonika iz 2019. godine* [in:] *Kaznena reakcija u Srbiji XII*…, Beograd 2020, pp. 208–217.

[4] A draft version of amendments to this Law has been created and it introduces several changes in respect to substantive and procedural regulations, but it still has not been passed. Further reading: M. Škulić, *Reforma maloletničkog krivičnog prava u Srbiji* [in:] *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, ed. I. Stevanović, Beograd 2015, pp. 39–68.

strictest sanctions against juveniles, such as juvenile prison, as a last resort when other sanctions have not achieved results, in many situations this creates delays. Namely, numerous examples from practice show that sometimes it is better to pronounce an institutional sanction and start treatment on time, than to wait until the moment when resocialization is much more difficult to achieve. Also, analyses of violent crime among juveniles in Serbia show an increase in these crimes, which is worrisome.

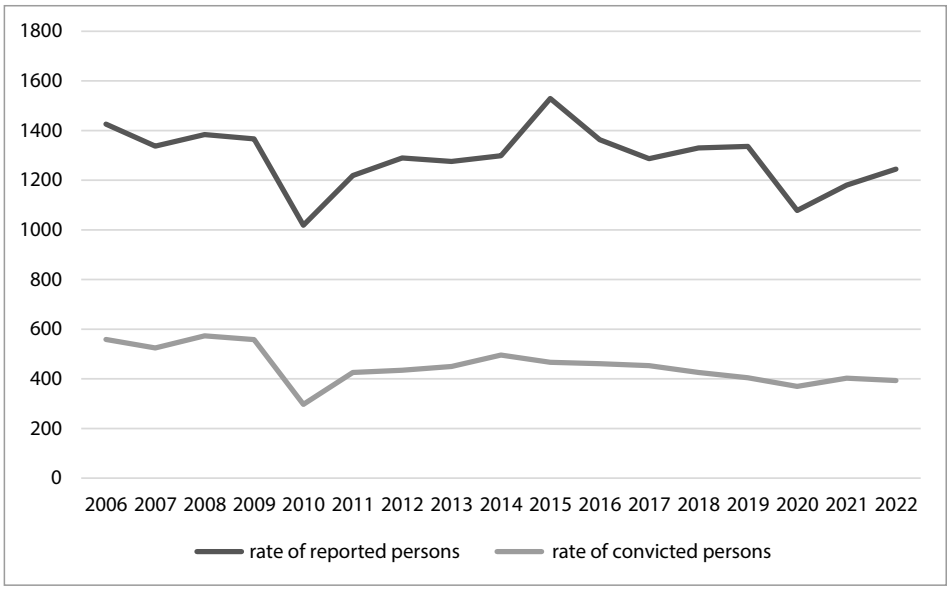
In addition to the Criminal Code, laws in the field criminal matters include the following legal acts: the Criminal Procedure Code, the Law on Execution of Criminal Sanctions, the Law on Juvenile Perpetrators of Criminal Offenses and Criminal Protection of Juveniles, the Law on Liability of Legal Entities for Criminal Offenses, the Law on Organization and Competences of State Authorities in Combating Organized Crime, Terrorism, and Corruption, the Law on the Organization and Competence of State Authorities for Combating High-Tech Crime, the Law on the Organization and Competences of State Authorities in War Crime Proceedings, the Law on Execution of Extrajudicial Sanctions and Measures, and the Law on Prevention of Domestic Violence.

3. Crime trends and problems

3.1. Adult crime

Data on crime in Serbia can be found in police and judicial statistics. Another source of data is available on the website of the Statistical Office of the Republic of Serbia, and it includes the total number of reported, accused, and convicted persons in Serbia. Also, much additional data is available about perpetrators of crimes and sanctions imposed, which is discussed later in my text. However, what is missing are studies of self-reporting and victimization studies, which would help to obtain a more complete overview of crime in Serbia, especially certain criminal offences that are assumed to be committed more often than registered crime shows (for example, criminal acts of corruption). Graph 1 shows the trend of reported and adjudicated crime by adult citizens in Serbia (the rate is calculated per 100,000 inhabitants) from 2006 to 2022, when the latest statistical data were published. I take 2006 as the baseline year because the current Criminal Code entered into force at that time, which enables a more precise monitoring of crime trends. It can be concluded that the trend of both reported and convicted persons in the observed period is stable. The exception is the year 2010, when there was a drop in both reports and convictions, which can be explained by the reform of the judiciary that made its usual work impossible. Also, it can be noted that there was a slight decrease in crime in 2020, caused by the COVID-19 pandemic.

Table 1 shows the percentage of the most frequently reported crimes in 2022. As a rule, every year the largest number of reports is submitted for criminal offences against property, among which the most common are theft, aggravated theft, and fraud. These crimes account for almost half of all reported crimes in Serbia. Next in order of frequency are criminal offences against the family, and among them, almost



Graph 1. Rate of reported and convicted persons in 2006–2022

Source: Graph is based on the data of the Statistical Office of the Republic of Serbia.

70% are the criminal offence of domestic violence, and about 20% are the criminal offence of not paying alimony. With the adoption of new legal regulations in the field of suppression of domestic violence, an increased media campaign, and the activities of non-governmental organizations in Serbia, there has been a noticeable increase in reports of domestic violence over the past decade.[5] The introduction of a new criminal offence – femicide – is also under consideration,[6] but for now there are no official statistics on the context in which women are killed. The Statistical Office of the Republic of Serbia only publishes the total number of murdered women, while the analysis of the context is currently being conducted only by non-governmental organizations and academics. With the adoption of the Law on Prevention of Domestic Violence in 2017, the possibility of imposing restrictive/emergency measures on "possible" perpetrators of domestic violence was introduced, namely the temporary removal of the perpetrator from the shared apartment and the temporary ban on the perpetrator from communicating and approaching the victim. The goal of these measures was to stop the violence immediately, bearing in mind that criminal proceedings last a certain amount of time and that the victim feels threatened if the defendant is not

[5] Advocacy for legal protection of women in Serbia started already in the 1980s and intensified during the following decades. More in: S. Ćopić, *Razvoj zakonodavnog okvira za zaštitu žena žrtava od nasilja u Srbiji*, "Temida" 2019, vol. 22, no. 2, pp. 143–168.

[6] For example: A. Batrićević, *Krivičnopravna reakcija na femicid*, "Temida" 2016, vol. 19, no. 3–4, pp. 431–451.

in custody.[7] However, despite this legal solution, it still happens that people against whom emergency measures have been issued kill their family members, which is why there are also proposals to introduce electronic surveillance along with emergency measures.[8]

Table 1. Structure of the most reported crimes in 2022

Crime category	[%]
crimes against property	47.25
crimes against family	9.3
crimes against public traffic	8.9
crimes against human health	8.4
forgery crimes	3.4
crimes against life and body	3.1

Source: Table is based on the data of the Statistical Office of the Republic of Serbia.

Crimes against public traffic are also common (8.9%). In the group of crimes against people's health, the crime of unlawful possession of narcotics is the most represented (77%), followed by the unlawful production and distribution of narcotics (around 20%). As far as crimes against life and body are concerned, light and serious injuries dominate (around 80% of all reported persons in this group), while homicides make up a smaller percentage of this group of crimes (around 8%). Graph 2 below shows the long-term trend of homicides in Serbia. Several points can be concluded from the data in the graph:

a) The homicide rate decreased over time. After a decline in the 1980s, there was an increase in the 1990s, which can be explained by the collapse of the social system caused by the civil war and the economic sanctions of the international community.
b) Similar trends in the rate of men and women are present, which is important to take into account when planning a policy to combat violence. To be specific, it is difficult to achieve suppression of violence against women, if the general level of violence in society is ignored.
c) The decrease in the homicide rate can be explained on the basis of several factors: civilizational progress, reduction of the young population, better techniques for detecting and proving crimes, better medical protection, and suppression of blood feuds, which in the analysed period was especially present in the first decades after the Second World War.[9]

---

[7] Further reading: D. Kolarić, S. Marković, *Komentar Zakona o sprečavanju nasilja u porodici*, Beograd 2019.

[8] T. Pavlov, V. Lacmanović, *Karakteristike i prevencija slučajeva femicida – suicida počinjenih vatrenim oružjem u intimnom partnerskom odnosu. Istraživački izveštaj*, Beograd 2023, p. 61.

[9] N. Lukić, *Stopa ubistava u Srbiji (1951–2019) u poređenju sa drugim evropskim državama* [in:] *Kaznena reakcija u Srbiji XII*…, Beograd 2021, pp. 292–311; Đ. Ignjatović, N. Lukić, *O povezanosti alkohola*

Graph 2. Rate of females and males killed (vital statistics)

Source: Graph is based on the data of the Statistical Office of the Republic of Serbia.

For certain criminal acts, official statistics are not a sufficiently precise indicator. This is, for example, the case with the crimes of corruption and crimes that are defined in criminology as white-collar/corporate crimes. Crimes against the environment can also be added to this. Serbian law recognizes the criminal liability of legal entities for criminal acts since 2008, but these regulations are extremely rarely applied in practice. Instead, companies that pollute the environment pay fines for economic offences committed. This is a category of delict that was introduced in the former SFRY after the Second World War and only in Serbia was this not abolished. The proceedings are conducted before commercial and not criminal courts, but it is interesting that the indictment is represented by a public prosecutor, which is a combination of commercial and criminal law. However, court practice shows that the imposed fines are not high (on average EUR 1,500–2,500 for legal entities), which is an incidental expense for large and successful companies, and it is difficult to achieve special and general prevention in this way. What is also problematic is the fact that in this way companies avoid the stigma associated with a criminal sanction, especially with penalties, which is why it is cheaper for company management to pay a fine than, for example, to buy new air purifiers. Although investments are important, especially for less developed countries like Serbia, it does not mean that investors should not and are not able to respect environmental protection regulations. Criminal acts against the environment that

i ubistava u uzorku osuđenih u Beogradu, "Anali Pravnog fakulteta u Beogradu" 2022, vol. 70, no. 3, pp. 765–792.

appear in the practice of criminal courts in 95% of cases are the killing and abuse of animals and theft from forests, and the perpetrators of these acts are natural persons.[10]

Another big problem is corruption. At the same time, one should distinguish the perception of corruption, which is always higher depending on personal experiences. According to the results of research conducted by the Anti-Corruption Agency of the Republic of Serbia from 2012, 18% of respondents from a representative sample of 1,000 citizens participated in bribery. Translated into absolute numbers in the entire population, this would mean that in the year before the survey was conducted, 1,350,000 people gave bribes. In the first place, citizens gave bribes to healthcare workers, then to clerks at shop counters, and then to police officers.[11] The 2016 research results (research done for 2015) on a representative sample of 1,508 citizens indicate that 39% of citizens believe that corruption is the third most important problem in the country (behind unemployment and the economy). The number of citizens who gave bribes is 22%. However, these are cases of so-called petty corruption. Detecting cases of corruption at a high level is difficult, and as a rule, those cases are not covered by court verdicts, of which there are a few dozen for giving bribes each year. The only encouraging thing is that in over 50% of cases, a prison sentence is imposed for accepting a bribe.[12]

The proportion of reported women in crime is about 15%.[13] In terms of age, the thirty to thirty-nine age group (21%) is the most represented among the total number of known registered men, followed by the twenty-one to twenty-nine age group and the forty to forty-nine age group. Among women, the age group of thirty to thirty-nine is also the most represented (21%).

When it comes to convicted adults, the structure of criminal offences is somewhat different compared to reported crime (Table 2). The share of criminal offences against property is significantly lower, which can be explained by the fact that there is not enough evidence for a large number of these offences or there is a diversification of the criminal procedure , that is, the public prosecutor defers the criminal prosecution and the defendant fulfils some obligation (for example, payment of damages, humanitarian work or community service, submission to alcohol or drug treatment, etc). This is possible for criminal offences which are punishable by a fine or a term of imprisonment of up to five years (Article 283 of the Criminal Procedure Code).

---

[10] N. Lukić, *Zelena kriminologija*, Beograd 2023, pp. 133–162; *eadem*, *Zaštita životne sredine i privredni prestupi – prednosti i nedostaci*, "Glasnik advokatske komore Vojvodine"2024, vol. 96, no. 4, pp. 1300–1341.

[11] *Istraživanje percepcije javnog interesa u oblasti sprečavanja i borbe protiv korupcije i mesta i uloge Agencije za borbu protiv korupcije*, Agencija za borbu protiv korupcije Republike Srbije, maj 2012, p. 13, https://acas.rs/storage/page_files/Ciljna%20grupa%20Gra%C4%91ani.pdf [accessed: 2024.07.19].

[12] More in: *Istraživanje i analiza specifičnosti i oblika korupcije u Srbiji*, Agencija za borbu protiv korupcije, Republika Srbija, jul 2019, p. 6, https://www.acas.rs/storage/page_files/Istra%C5%BEivanje%20i%20analiza%20specifi%C4%8Dnosti%20i%20oblika%20korupcije%20u%20Srbiji_2.pdf [accessed: 2024.07.19].

[13] N. Lukić, B. Cruz, S. Strand, *Gender Perspective of Victimization, Crime and Penal Policy* [in:] *Gender Competent Legal Education*, eds. D. Vujadinović, M. Fröhlich, T. Giegerich, Cham 2023, pp. 467–504.

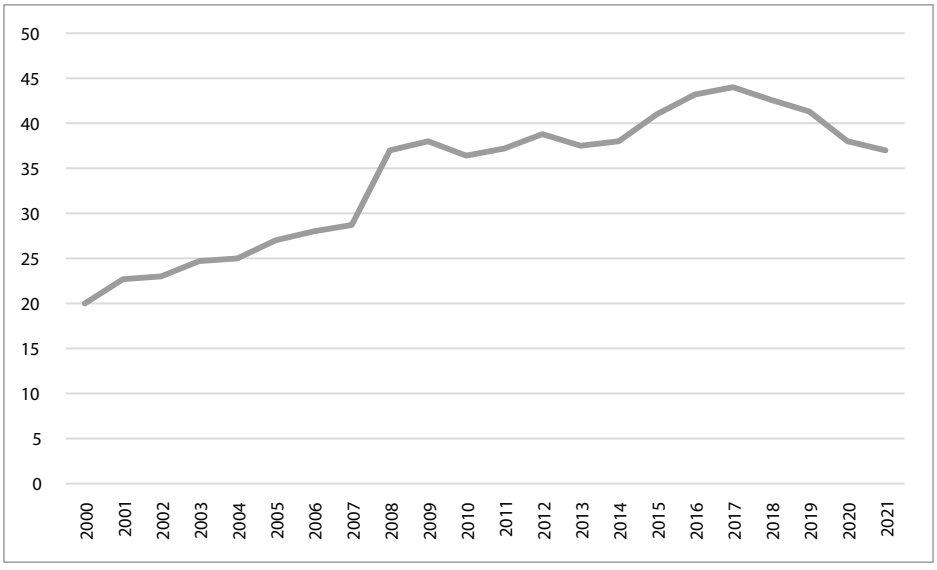
Table 2. Structure of convicted crimes in 2022

Crime category	[%]
crimes against property	24.25
crimes against family	12.7
crimes against public traffic	9.4
crimes against human health	20
forgery crimes	4.6
crimes against life and body	5

Source: Table composed based on the data of the Statistical Office of the Republic of Serbia.

The proportion of women among convicted persons is slightly lower (around 10%), and the structure of age groups of women and men is the same as in the case of reported crime. Data on employment, professional training, and marital status are also available for convicted persons. In 2022, there were about 55% employed, 25% unemployed, 7.6% inactive (pensioners, housewives, students); there is no such data for the remainder as for marital status, most convicted persons are unmarried (41%); 37% is married and 12.5% is divorced. Finally, in terms of education, the largest number of convicted persons have finished high school (56%), followed by elementary school (21.6%). About 7.2% have completed high school and college, and 5.6% have not finished elementary school.

It is also necessary to point out that the share of recidivists has been between thirty-five to 40% for a decade or more; that means that that percentage of convicted persons have been convicted of a criminal offence at least once before. The amendments to



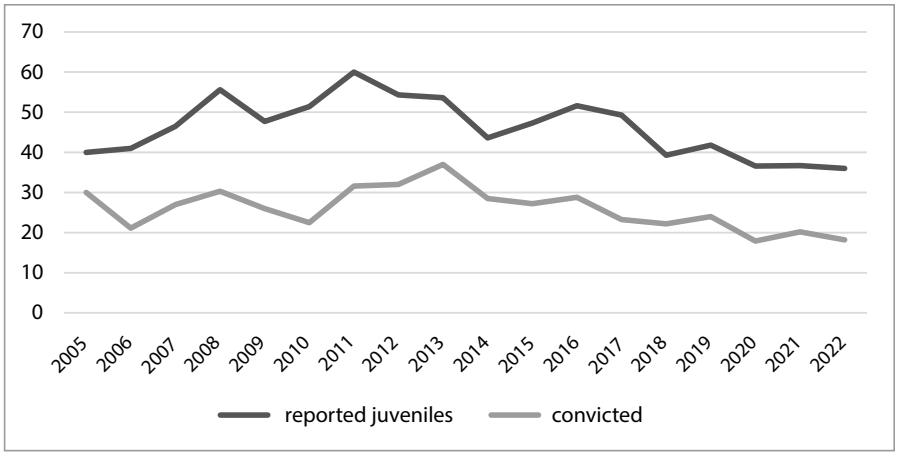
Graph 3. Percentage of recidivism of all convicted adult offenders in Serbia

Source: Graph composed based on the data of the Statistical Office of Serbia.

the Criminal Code in the last decade, which are predominantly repressive in nature, certainly contribute to this.[14] The following graph shows the trend of recidivism in the last two decades and it can be noted that the trend is upward and that compared to, for example, 2006 the percentage of recidivists increased by 15%. There is no precise data on the number of the previously convicted in prisons, but the assumption is that recidivism is even more pronounced within that population.

3.2. Juvenile crime

Graph 4 shows the rate of reported juveniles and juveniles who were sanctioned. The trend has been analysed since 2005, when the Law on Juvenile Criminal Offenders and Criminal Legal Protection of Juveniles came into force.[15] Both trends indicate that both the reported rate and the rate of convicted juveniles are decreasing. However, it is important to note that the rate was calculated in relation to the entire population in the country and not only in relation to the age of juveniles. More detailed analyses of the juvenile crime rate indicate that crimes with elements of violence are on the rise.[16]



Graph 4. Trend of reported and convicted juvenile offenders 2005–2022

Source: Graph composed based on the data of the Statistical Office of the Republic of Serbia.

[14] Amendments to the Criminal Code in 2019 introduced Article 55a with new rules for determination of punishment in cases of repeated criminal offences. According to this, for a criminal offence committed with premeditation, and for which imprisonment has been prescribed, the court shall pronounce a punishment above the half of the range of the prescribed punishment under the following conditions: 1) if the perpetrator has been twice convicted for criminal offences committed with premeditation, to imprisonment of at least one year; 2) if, from the date of release of the perpetrator, from serving a punishment, until the commission of a new criminal offences, five years have not passed.

[15] In 2025, a draft proposal was issued for a new Law on juvenile offenders and the criminal-law protection of minors in criminal proceedings.

[16] N. Lukić, *Juvenile Crime in Serbia and Penal Policy – Is there a Relation?* [in:] *Archibald Reiss Days: Proceedings of Thematic Conference of International Significiane 10*, Belgrade 2020, https://eskup.kpu.

Taking into account the structure of the most common crimes for which juvenile offenders were sentenced in 2022 (Table 3), we see that the criminal offences against property are dominant (the most common are grand larceny and theft, which make up 75% of those crimes, followed by unauthorized use of other persons' motor vehicle). From the group of crimes against human health, juveniles most often commit the criminal offence of unlawful possession of narcotics. Among the crimes against life and body, the most common are physical injuries, light and serious (they account for 83% of all crimes in that group), followed by participation in a fight, and the least common is homicide (in 2022, a total of two juveniles were sentenced for homicide and aggravated homicide). When crimes against life and body are added to crimes from the group against the freedoms and rights of citizens (endangering security and abuse and torture, which accounted for 3% of all convictions of juveniles in 2022), domestic violence, and the crime of violent behaviour from the group of crimes against public order and peace, we come to the conclusion that more than a third of all convictions include crimes with elements of violence. Also, this should be supplemented by criminal acts against sexual freedom (around 1.5% of all convictions) and endangering the safety of public traffic, which often results in at least minor bodily injury (2.5% of all convictions). Therefore, not only long-term trends, but also the structure of crime indicate that violent crimes are present when talking about this age category of perpetrators.

In the criminal law studies, there is currently a debate of whether the age of criminal responsibility for juveniles should be lowered,[17] bearing in mind the case of mass murder at the "Vladislav Ribnikar" Elementary School in Belgrade, when a thirteen-year-old boy killed nine students and a school guard, and injured five students and one teacher. There are various opinions on this topic; however, this is another example that shows that more detailed research is needed before any legislative changes happen. Even if the killer was fourteen years old at the time of committing the crime, all the court could do is impose an educational measure of sending him to a correctional facility, which can last for a maximum of four years. Meanwhile, the Institute for Social Protection publishes statistical data on the number of children "in conflict with the law," which show that the number of children who are suspected of having committed a crime or misdemeanour is around 800–1,000 per year,[18] while the number for juveniles aged fourteen to eighteen is eight to nine times higher. A detailed study that included both children and juveniles in Serbia, indicated that the largest number of them commit

edu.rs/dar/article/view/183 [accessed: 2024.07.03]; Đ. Ignjatović, *Kriminalitet maloletnika: stara tema i nove dileme* [in:] *Maloletnici kao učinioci…*, pp. 19–38; Z. Ilić, M. Maljković, *Izvršenje krivičnih sankcija prema maloletnicima* [in:] *Maloletnici kao učinioci…*, pp. 105–120.

[17] S. Ćopić, *Snižavanje granice krivične odgovornosti: večita dilema?*, "Crimen" 2023, vol. 14, no. 3, pp. 235–247; V. Bajović, *U prilog snižavanja starosne granice krivične odgovornosti – drugačiji pogled na "večitu dilemu"*, "Crimen" 2024, vol. 15, no. 1, pp. 82–105.

[18] This is about the number of children and juveniles on the register, and this does not necessarily mean that a criminal offence was committed in that year; persons can be on the register for a longer period.

their first criminal offence at the age of fourteen to eighteen. However, this study is much more valuable because it points out the numerous problems that this group of offenders faces (failure in school, running away from school, aggression, conflicts with peers and teachers, developmental problems, and mental health), and then assessed the presence of protective and risk factors in several important dimensions: skills and abilities, family, previous criminal behaviour, and substance abuse.[19] All the conclusions indicate that criminal law solutions, no matter how repressive they may be, cannot independently achieve a result without adequate work on prevention programmes that would direct attention towards identified risk factors.

Table 3. Structure of most often convicted crimes of juvenile offenders in 2022 [in %]

Crime category	[%]
crimes against property	41.7
crimes against human health	17.4
crimes against life and body	14.7
crimes against freedoms and rights	4.3
violent behaviour	10.8
domestic violence	2.8

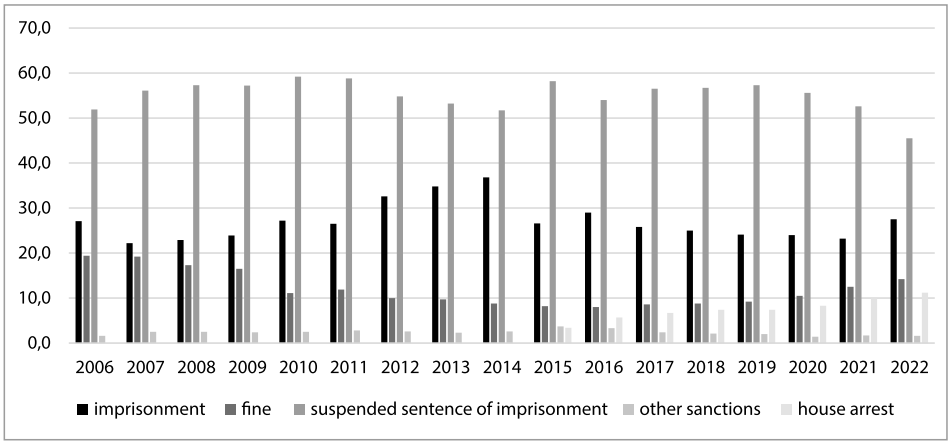
Source: Table composed based on the data of the Statistical Office of the Republic of Serbia.

The proportion of girls among juvenile offenders is around 10%. As far as age is concerned, there are more older juveniles who are sixteen and seventeen years old (55%) than younger juveniles (fourteen and fifteen years old).

4. Penal policy of the courts

Graph 5 shows the structure of criminal sanctions imposed in the period 2006–2022. It is obvious that the courts in Serbia most often choose a suspended sentence. This is understandable if we take into account that the largest number of crimes fall into the category of crime against property, and among those crimes is theft. Furthermore, as a rule, the courts will choose a suspended sentence if the perpetrator is a person with no previous convictions. Interestingly, in the last analysed year, for the first time in the last seventeen years, the proportion of suspended sentences was below 50% of all criminal sanctions imposed. An explanation should also be sought in amendments to the Criminal Code, in which the condition for imposing a suspended sentence was tightened a few years ago. While according to the previous legal solution, such a possibility was excluded if a prison sentence of ten or more years could be imposed for

[19] Đ. Stakić, *Istraživanje o statusu i kvalitetu tretmana dece u sukobu sa zakonom u Srbiji*, Beograd 2022, pp. 18–32.



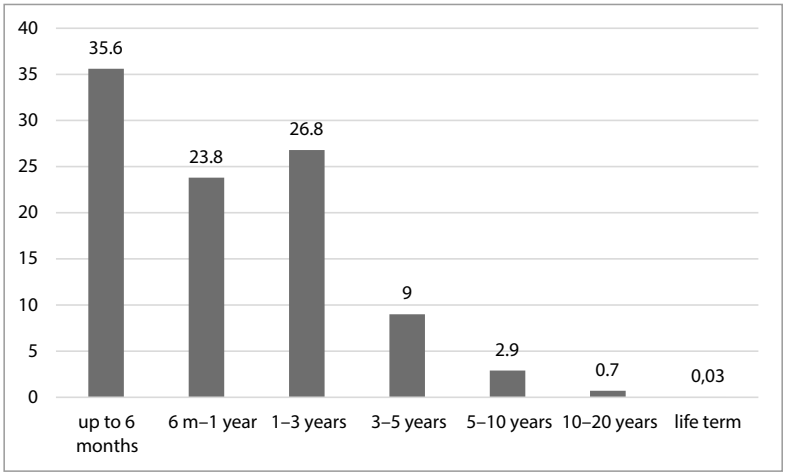
Graph 5. Structure of penal sanctions 2006–2022

Source: Graph composed based on the data of the Statistical Office of the Republic of Serbia.

a specific crime, now a suspended sentence cannot be imposed if there is a possibility of imposing a sentence of eight or more years of imprisonment.

A prison sentence is imposed in about 25% of cases. Until 2015, that share was higher, but it should be noted that since that year, data on house arrests has also been recorded in official reports, which had an impact on this decrease. In 2022, the combined proportion of prison and house arrest amounted to 38.5%. But, if one looks at house arrest as an alternative to prison,[20] then definitely this modality of prison sentence has reduced the number of people in penal institutions. As a rule, fines do not exceed a proportion of 10%. Other criminal sanctions, including alternatives to prison such as community service, have not been broadly applied in practice since the adoption of the Criminal Code. The same applies to probation with protective supervision. This modality of conditional sentence is regulated in Articles 71–76 of the Criminal Code. Namely, when pronouncing a suspended sentence, the court can determine some measure of protective supervision (abstaining from the use of alcohol and drugs, undergoing treatment, fulfilling family obligations, eliminating or mitigating the damage caused, etc.) taking into account the age of the convict, his/her lifestyle, preferences, health condition, motives, previous life, behaviour after the crime, and personal and family circumstances. However, even though these obligations can have a decisive effect on factors related to the committing of a crime (for example, alcohol abuse in domestic violence), the courts do not opt for this modality of conditional sentence because of the high possibility that there will be a recall if the convicted person does not adhere to the measures, which causes additional work. Another reason is the weak connection with organizations and institutions where these measures could be implemented.

[20] Đ. Ignjatović, *Kriminologija*, Beograd 2023, p. 203.



Graph 6. The length of prison sentences in 2022 [in %]

Source: Graph is based on the data of the Statistical Office of the Republic of Serbia.

Graph 6 shows the length of prison sentences imposed in 2022 in percentages. Almost 60% of all prison sentences do not exceed the duration of one year, which is the usual penal policy of the courts in the past decades, although in earlier years the proportion of short-term prison sentences of up to one year was 70%. That trend is changing so that now a greater proportion of sentences have a duration of one to three years in prison. As for sentences longer than ten years, their proportion is below 1%, while life imprisonment, or previously imprisonment for a duration of thirty to forty years, is imposed as a rule in only a few cases a year.

The analysis of the penal policy of the courts for certain criminal offences certainly gives a clearer picture. If, for example, we look at the sentences imposed for the most serious crimes, such as aggravated murder, we see that sentences were tightened during the previous decades. Table 4 provides an overview of the percentage of long-term prison sentences for homicide in the last four decades.[21] We can conclude that the proportion of the most severe prison sentence is the highest in the last two decades, and especially in the last decade. The percentage of sentences of fifteen to twenty years has also increased.

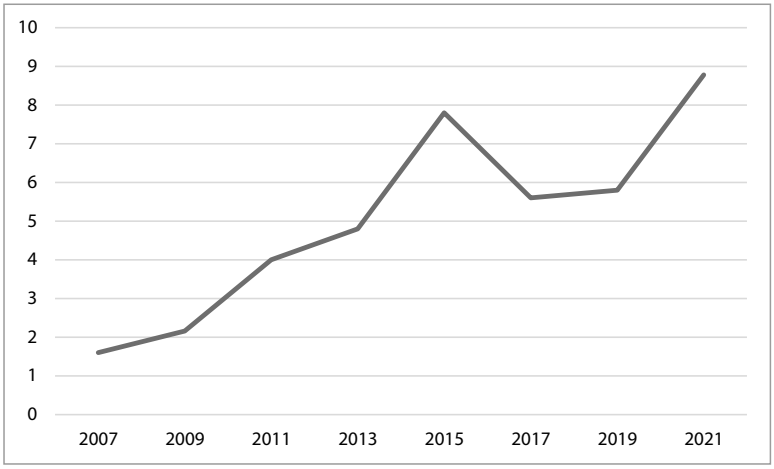
Another example that shows the tightening of penal policy is related to the criminal offence of the illegal production of and trade in narcotics. Graph 7 shows the share of sentences of five to ten years in prison for the crime of unlawful production and distribution of narcotics. Penalties of more than ten years are not that common, which is why I examine this category; it is also the most severe in terms of frequency. In general, in most cases, sentences of up to five years are imposed for this type of crime.

[21] Table from: N. Lukić, *Porast stope zatvaranja* [in:] *Kaznena reakcija u Srbiji XII*…, Beograd 2022, pp. 259–276.

Table 4. Percentage of long-term prison sentences for homicide, aggravated homicide and manslaughter[22]

Imprisonment for homicide, aggravated homicide and manslaughter in %	30–40 years or death penalty	15–20 years	10–15 years
period of the 80s	0.375	4	20.2
period of the 90s	0.1	0.99	18.3
until 2010	4.66	3.34	21.5
until 2019	7.7	7.76	18.32

Source: Table composed based on the data of the Statistical Office of Serbia.



Graph 7. The length of prison sentence between 5 and 10 years for unlawful production of and trade in drugs (% of all prison sentences imposed for this criminal offence)

Source: Graph composed based on the data of the Statistical Office of the Republic of Serbia.

4.1. Penal policy of the courts towards juvenile offenders

Unlike adult perpetrators of criminal acts that face a more repressive approach of the legislator and, accordingly, the courts, the same cannot be claimed for perpetrators of criminal offences between the ages of fourteen and eighteen. Namely, as has already been mentioned, the Law on Juvenile Crime Offenders and Criminal Legal Protection of Juveniles foresees the possibility of imposing educational measures and the sentence of juvenile prison. Educational measures are divided into three

[22] The reason for the aggregate overview of several forms of homicide is the fact that in the bulletins of the Statistical Office of the Republic of Serbia, until the entry into force of the current Criminal Code, data were published together for homicide, aggravated homicide, and manslaughter.

categories. The first consists of educational measures of warning and guidance, which are court reprimands and special obligations. The second group consists of educational measures of increased supervision by parents, adoptive parents, and guardians, increased supervision in a different family, increased supervision by a social worker, and increased supervision with day care in the appropriate institutions for the education and care of juveniles. The third category consists of educational facilities of an institutional nature. According to the legal solution, the court should opt for institutional measures only as a last resort and only to the extent necessary to achieve the purpose of the sanction. In practice, courts usually opt for the first two categories of educational measures, while institutional measures are rarely imposed. As a rule, the court decides on deprivation of liberty in cases of multiple repeated offenders or when serious crimes have been committed.

The 2022 data indicate that in 9% of the sanctions imposed on younger juveniles, the courts opted for institutional measures, while for older minors that share is lower and amounts to 5%. Juvenile prison was imposed on older juveniles in a total of four cases out of 740 juveniles who were sentenced to some sanction in 2022. The trend of weak application of institutional measures has been evident for a long time. Compared to previous decades (for example, during the 1980s), when the proportion of juvenile prison sentences was over 10%, now it is usually less than 1%, and the only prison for juveniles in Valjevo houses mostly younger adults. It is interesting that in this matter, Serbia belongs to the ranks of countries that have an extremely lenient penal policy towards juvenile offenders.[23]

5. Discussion

Crime in Serbia in the last two decades shows that there are no major fluctuations. The rate of reported crime is around 1,300, while the rate of convicted persons is around 400. However, these are only indicators of registered crime, and to some extent this is also an indication of citizens' trust in the work of the criminal justice system and willingness to report crimes. For some crimes, these official statistics are not a relevant indicator, and we can only assume the extent of juvenile crimes such as petty theft. Also, even when it comes to some violent crimes, we cannot know for sure how widespread they are. While there has been a significant increase in reports of domestic violence, which is caused by public support for victims, patriarchal patterns continue to affect victims and lead to the underreporting of these crimes. For example, according to the data of the study on femicide,[24] it was stated that approximately one third of the victims reported violence before the murder, which means that the remaining two thirds did not report anything. Corruption-related crimes are also within a "dark figure."

[23] M. Aebi *et al.*, *European Sourcebook of Crime and Criminal Justice Statistics*, Göttingen 2021, p. 236.
[24] T. Pavlov, V. Lacmanović, *Karakteristike i prevencija slučajeva femicida*…, p. 38.

Although crime is not on the rise, the Criminal Code has been amended several times in a repressive direction. Mostly, media campaigns and moral panics are caused by violent crimes committed against children or juveniles. At the same time, the fact that crime in Serbia is not on the rise, and that other factors contribute to it, is ignored. For example, because of the aging population and bearing in mind that the average age of a man in 2022 was 42.2, one cannot expect that the crime rate will increase. In addition, certain improvements in terms of employment and poverty reduction can serve as an explanation of a slight drop in crime.[25] According to the data of the Statistical Office of the Republic of Serbia, employment was around 42% in 2005, and around 50% in 2022. The risk of poverty is also reduced from 24.5% in 2013, to 20.5% in 2022.[26]

The result of repressive legal changes also leads to an increase in the prison population. In this respect, according to the data of the Council of Europe (SPACE I), Serbia is classified in the group of countries with a high rate of prisoners. In Serbia, about 10,500 persons have been deprived of their freedom, but prison capacity has not yet been exceeded.[27] However, a comparative analysis of the data shows that the average number of custodial staff in relation to the number of prisoners is higher compared to the European average (in Serbia this ratio is one custodian solely dedicated to custody per 4.5 prisoners, while the European average is 1 per 3.8 and in half of countries is no higher than 3.1), that the death rate of prisoners is higher, and also that the number of prisoners per cell is higher than the European average.[28] Amendments to the Criminal Code made it impossible for judges to choose between a suspended sentence and a prison sentence in certain cases, since they must impose a prison sentence. At the same time, an increase in the prison population without simultaneous increase in the number of employees in treatment facilities is not taken into account and this situation cannot lead to the achievement of great results in terms of resocialization.

Unlike adult delinquency, juvenile delinquency is treated very mildly, and institutional measures are used only as a last resort. Although it could be argued that such an approach should be taken towards juveniles in order to avoid labelling and provide opportunities for the juveniles to improve, the question is whether this is always justified. The analysis of statistical data shows that the share of crimes with elements of violence is not negligible, and a mild punitive reaction can not only encourage juveniles not to think about the sanction for the criminal act they have committed, but it also affects the adults who can abuse them to commit criminal acts on their behalf and incur an incomparably milder sanction. This is especially the case

[25] Statistical Office of the Republic of Serbia, *Anketa o radnoj snazi*, https://www.stat.gov.rs/sr-cyrl/oblasti/trziste-rada/anketa-o-radnoj-snazi [accessed: 2024.07.18].

[26] Statistical Office of the Republic of Serbia, https://data.stat.gov.rs/Home/Result/01020501?languageCode=sr-Cyrl [accessed: 2024.07.18].

[27] Council of Europe Penal Statistics – SPACE I 2023, p. 31. The reason for this is newly built blocks in some prisons and a new prison in Kragujevac.

[28] Council of Europe Penal Statistics – SPACE I 2023, pp. 73, 86, 112.

with organized criminal groups whose activities are severely punished under Serbian criminal legislation.

6. Conclusions

This article presents data on the state of crime in Serbia in the last two years and the punitive reaction of the courts in the same period. I also focus on the situation of juvenile delinquency. All the previously mentioned data allow certain conclusions to be drawn. First, crime in Serbia has had similar rates in the last two decades with a noticeable slight decline. This decline is also noted in violent crimes, including homicide. However, it is precisely these criminal acts that attract the most public attention, lead to moral panics and to amendments in criminal laws. At the same time, the opinion of the academic community is not important, while various "experts" and politicians who foster and thrive on public sentiment come to the fore. The consequence of this is to endanger the basic principles of criminal law. On the other hand, many problems are not approached strategically and with precise plans, with the implementation of extensive interdisciplinary research that could be of help. Domestic violence is just one example, and the success in its suppression is evaluated based on quantitative indicators of the number of emergency measures imposed. The lack of victimization surveys makes it impossible to realistically see the problem of crime, especially criminal acts where there is a consensus between the parties involved to commit a crime. The increase in academic research by individuals, associations, and institutes is encouraging, as well as the support of people in state institutions who provide data and make the research possible. What remains to be done is the mutual association of scholars dealing with criminology and related disciplines and finding ways to further intensify research that will not have the purpose of confirming the *status quo* but of moving matters in a positive direction.

Literature

Aebi M. *et al.*, *European Sourcebook of Crime and Criminal Justice Statistics*, Göttingen 2021.

Bajović V., *U prilog snižavanja starosne granice krivične odgovornosti – drugačiji pogled na "večitu dilemu"*, "Crimen" 2024, vol. 15, no. 1, pp. 82–105.

Batrićević A., *Krivičnopravna reakcija na femicid*, "Temida" 2016, vol. 19, no. 3–4, pp. 431–451.

Ćopić S., *Razvoj zakonodavnog okvira za zaštitu žena žrtava od nasilja u Srbiji*, "Temida" 2019, vol. 22, no. 2, pp. 143–168.

Ćopić S., *Snižavanje granice krivične odgovornosti: večita dilema?*, "Crimen" 2023, vol. 14, no. 3, pp. 235–247.

Ignjatović Đ., *Kriminalitet maloletnika: stara tema i nove dileme* [in:] *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, ed. I. Stevanović, Beograd 2015, pp. 19–38.

Ignjatović Đ., *Kriminologija*, Beograd 2023.

Ignjatović Đ., Lukić N., *O povezanosti alkohola i ubistava u uzorku osuđenih u Beogradu*, "Anali Pravnog fakulteta u Beogradu" 2022, vol. 70, no. 3, pp. 765–792.

Ilić G., *Marginalije o kazni doživotnog zatvora, uslovnom otpustu i ljudskim pravima* [in:] *Kaznena reakcija u Srbiji XII*, ed. Đ. Ignjatović, Beograd 2019, pp. 123–142.

Ilić Z., Maljković M., *Izvršenje krivičnih sankcija prema maloletnicima* [in:] *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, ed. I. Stevanović, Beograd 2015, pp. 105–120.

Kolarić D., *Višestruki povrat u krivičnom pravu Srbije – osvrt na Zakon o izmenama i dopunama Krivičnog zakonika iz 2019. godine* [in:] *Kaznena reakcija u Srbiji XII*, ed. Đ. Ignjatović, Beograd 2020, pp. 208–217.

Kolarić D., Marković S., *Komentar Zakona o sprečavanju nasilja u porodici*, Beograd 2019.

Lukić N., *Juvenile Crime in Serbia and Penal Policy – Is there a Relation?* [in:] *Archibald Reiss Days: Proceedings of Thematic Conference of International Significiane 10*, Belgrade 2020, https://eskup.kpu.edu.rs/dar/article/view/183 [accessed: 2024.07.03].

Lukić N., *Porast stope zatvaranja* [in:] *Kaznena reakcija u Srbiji XII*, ed. Đ. Ignjatović, Beograd 2022, pp. 259–276.

Lukić N., *Stopa ubistava u Srbiji (1951–2019) u poređenju sa drugim evropskim državama* [in:] *Kaznena reakcija u Srbiji XII*, ed. Đ. Ignjatović, Beograd 2021, pp. 292–311.

Lukić N., *Zaštita životne sredine i privredni prestupi – prednosti i nedostaci*, "Glasnik advokatske komore Vojvodine"2024, vol. 96, no. 4, pp. 1300–1341.

Lukić N., *Zelena kriminologija*, Beograd 2023.

Lukić N., Cruz B., Strand S., *Gender Perspective of Victimization, Crime and Penal Policy* [in:] *Gender Competent Legal Education*, eds. D. Vujadinović, M. Fröhlich, T. Giegerich, Cham 2023, pp. 467–504.

Pavlov T., Lacmanović V., *Karakteristike i prevencija slučajeva femicida – suicida počinjenih vatrenim oružjem u intimnom partnerskom odnosu. Istraživački izveštaj*, Beograd 2023.

Škulić M., *Reforma maloletničkog krivičnog prava u Srbiji* [in:] *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, ed. I. Stevanović, Beograd 2015, pp. 39–68.

Škulić M., Lukić N., *The explanation of the main characteristics of penal populism and examples of penal populism in some criminal law provisions and planned amendments of the Criminal Code of Serbia*, "Crimen" 2025, vol. 16, no. 1, pp. 3–40.

Stakić Đ., *Istraživanje o statusu i kvalitetu tretmana dece u sukobu sa zakonom u Srbiji*, Beograd 2022.

Summary

Natalija Lukić

Crime and Penal Policy of Courts in Serbia

In this article, I discuss the state of crime in Serbia and the reaction of the criminal courts to it. Data are presented separately for adult and juvenile offenders. In addition to crime trends in the last two decades, I also point out certain problems present in the Serbian society in that period, such as corruption, environmental crime, domestic violence, and juvenile violence. Key criminal legal solutions in Serbian law and trends that have been present during the last decade, which are predominantly directed towards more repressive legal solutions, are also discussed. This is

inevitably reflected in the decisions of the courts and in the prison population, which is on the rise.

Keywords: Serbia, crime trends, crime problems, penal policy of courts, criminal law legislation.

Streszczenie

Natalija Lukić

Przestępczość a polityka karna sądów w Serbii

W artykule zwrócono uwagę na stan przestępczości w Serbii i reakcję sądów karnych. Dane przedstawiono osobno dla przestępców dorosłych i nieletnich. Oprócz trendów w przestępczości w ostatnich dwóch dekadach wskazano także na inne problemy występujące w społeczeństwie serbskim w tym okresie, takie jak korupcja, przestępczość przeciwko środowisku, przemoc domowa i przemoc wobec nieletnich. W opracowaniu omówiono również najważniejsze rozwiązania prawa karnego w Serbii oraz tendencje obserwowane w ostatnim dziesięcioleciu, które w przeważającym stopniu zmierzają ku bardziej represyjnym regulacjom. Znajduje to nieuchronne odzwierciedlenie w decyzjach sądów i rosnącej populacji więziennej.

Słowa kluczowe: Serbia, trendy w przestępczości, problemy przestępczości, polityka karna sądów, ustawodawstwo karne.

Luciana Romano Morilas
University of São Paulo, Brazil
morilas@usp.br
ORCID: 0000-0001-9318-2058

https://doi.org/10.26881/gsp.2025.4.05

Transparency, Accountability, and Judicial Independence in Brazil's Fight against Corruption: Lessons for Latin America from the Car Wash Operation

1. Introduction

Corruption and impunity pose significant challenges to democracies globally. The engagement of political leaders or public officials – often connected to unpunished private bribers – in corrupt practices without facing consequences undermines the rule of law and erodes public trust in state institutions.

The perception of high impunity related to corruption has led to the election of populist leaders, perceived as part of "the good people" and invested in the heroic task of combatting a "corrupt elite," offering an oligarchic mode of ruling.[1] Ironically, these anti-establishment figures have themselves become subjects of corruption investigations.[2]

The question is: Is there a disconnect between perceived impunity and the actual effectiveness of integrity systems in curbing corruption?

To answer this question, I take the cases of young democracies in Latin America. They are more vulnerable and have witnessed massive corruption cases recently, such as Brazil with the Car Wash Operation, *La Estafa Maestra* (The Master Swindle), in Mexico, and the Notebooks Case in Argentina. I explore the Brazilian case, studying the Integrity System in Brazil, which caused major political developments, such as the imprisonment of two ex-presidents of Peru, the resignation of Ecuador's vice-president, the incrimination of politicians from Colombia, Panama, Dominican Republic, and Argentina, and the bankruptcy of the Latin American giant conglomerate Odebrecht.[3]

---

[1] M.A. Cameron, *The Return of Oligarchy? Threats to Representative Democracy in Latin America*, "Third World Quarterly" 2021, vol. 42, no. 4, pp. 775–792, https://www.tandfonline.com/doi/epdf/10.1080/01436597.2020.1865794?needAccess=true [accessed: 2024.09.14].

[2] J. Mendilov, *Introduction* [in:] *The Fight against Systemic Corruption: Lessons from Brazil (2013–2022)*, eds. M.E. Trombini, E. Valarini, V.E. de Oliveira, M. Pohlmann, Wiesbaden 2024, pp. 1–7.

[3] Conselho, Nacional de Justiça, *Justiça criminal, impunidade e prescrição*, Brasília 2021.

It is crucial to emphasize the importance of studying Latin America from a Latin American perspective. Evaluating issues such as impunity and perception of corruption through external frameworks can lead to misinterpretations, especially since different legal systems and regulations apply. For instance, research into corruption perception in Latin America notes: "Additionally, there has been a notable decrease in the percentage of Brazilians who believe that laws such as the Foreign Corrupt Practices Act (FCPA) have effectively reduced corruption risk (50 per cent of respondents in 2024, down from 74 per cent in 2020)."[4] However, as the FCPA is a U.S. law and not enforceable within Brazil, it is reasonable for Brazilians to view it as having limited influence on corruption within their own borders. While the FCPA may indirectly impact cases involving Brazilian agents – such as during the Car Wash Operation[5] – it remains an external mechanism, underscoring the need for research grounded in the region's own legal and institutional realities.

Indexes that focus on the perception of corruption are considered a good proxy since data on corruption itself may not be reliable or complete. However, perception-based indexes overlook possible mechanisms that shape citizens' perceptions of corruption, which mean that they do not measure the actual level of corruption.[6] While global indices, international organizations, and foreign governments often focus on curbing corruption in young democracies, external perspectives may lead to misinterpretations of local realities and the imposition of ineffective solutions. Latin American countries, in particular, face distinct challenges that require context-specific approaches to corruption and impunity. External frameworks, such as the FCPA or international benchmarks like the Corruption Perceptions Index (CPI), provide a broad understanding of corruption, but they often fall short in recognizing the complex socio-political dynamics within each country.

This article studies Latin American democracy from a Latin American perspective, which we believe provides a more coherent framework, while acknowledging international contributions and perceptions in this field. By addressing anti-corruption efforts within the local context, Latin American countries can more effectively tackle deeply rooted issues of impunity and corruption, while preserving the integrity and resilience of their democratic institutions.

My article is structured as follows: first, I examine democracy and corruption in the Latin American context; next, I conduct a detailed analysis of the Brazilian case; finally, I discuss the broader role of integrity systems in promoting accountability.

---

[4] R. Rincon, A. Sultan, *Top five takeaways on corruption perception in Latin America: Insights from professionals across the region*, International Bar Associatio 2024, https://www.ibanet.org/top-five-takeaways-on-corruption-perception-in-latam [accessed: 2024.09.14].

[5] The Car Wash Operation (*Operação Lava Jato* in Portuguese) was an anti-corruption investigation that originated Brazil (2014–2021) saw developments in other Latin American democracies. It was initially named after a car wash business used for money laundering. The operation uncovered a massive corruption scheme involving politicians, executives, and the state oil company Petrobras, resulting in over 165 convictions.

[6] G. Rodríguez-García, *Measuring the Risk of Corruption in Latin American Political Parties. De Jure Analysis of Institutions*, "Data & Policy" 2022, vol. 4, e42.

2. Democracy and corruption in Latin America

Democracy thrives on transparency; transparency is a principle that ensures accountability by making government actions visible and understandable to the public Lindstedt and Naurin[7] argue that while transparency can reduce corruption, as it is generally understood, in itself transparency is not sufficient. Effective transparency requires robust systems of publicity and accountability.

This raises the question: What is the state of transparency in Brazil, the main case under examination here?

From the 1950s to the late 1980s, many Latin American countries endured violent dictatorships characterized by widespread human rights violations (for example, Paraguay, 1954–1989; Bolivia, 1964–1982; Brazil, 1964–1985; Chile, 1973–1990; Uruguay, 1973–1985; and Argentina, 1976–1983). While democratization marked the end of these regimes, it did not immediately eliminate human rights abuses. On the contrary, anti-systemic guerilla movements persisted into the early 2000s, perpetuating cycles of violence and human rights violations.[8] Despite the establishment of democratic systems across the region, accountability for these past abuses remains largely absent. To this day, many human rights violations from both the dictatorship and post-dictatorship periods have not been adequately addressed or punished.[9]

In Brazil, democracy and transparency were formally institutionalized with the 1988 Constitution. Although the Constitution does not explicitly use the term "transparency," it enshrines the principle of "publicity" as a fundamental human right (Art. 5, LX[10]). Rodrigues[11] argues that while "publicity" and "transparency" are often used interchangeably, the former has roots in political discourse and decision-making in ancient Athens, whereas the latter is more closely associated with modern notions of accountability. Publicity, along with legality, impersonality, morality, and efficiency, is one of the guiding principles of public administration in Brazil[12].

---

[7] C. Lindstedt, D. Naurin, *Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption*, "International Political Science Review/Revue internationale de science politique" 2010, vol. 31, no. 3, pp. 301–322, https://www.jstor.org/stable/25703868 [accessed: 2024.09.14].

[8] R. Stavenhagen, *Human Rights, Democracy and Development in Latin America*, "Economic and Industrial Democracy" 1991, vol. 12, no. 1, pp. 31–41.

[9] A. Chaves Jr., B.A. Machado, T.A. de Pádua, *The judgment of crimes against humanity in Brazil: Analysis through the critical criminological lens of Lola Aniyar*, "International Journal of Development Research" 2021, vol. 11, no. 11, pp. 47135–47145; S.R. Pinto, *Direito à memória e à verdade: Comissões de verdade na América Latina*, "Revista Debates" 2010, vol. 4, no. 1, pp. 128–143.

[10] Art. 5, LX, of the Brazilian Federal Constitution declares that the law may only restrict the disclosure of proceedings if the restriction is required to protect privacy or the interest of society. In Portuguese, the word used instead of "disclosure" is best translated as "publicity".

[11] T.M. Rodrigues, *The Role of the Media in the Impeachment Processes of Dilma Rousseff (2016) and Michel Temer (2017)*, "Contracampo" 2018, vol. 37, no. 2, pp. 36–57.

[12] Efficiency was included in the text in 1998, by Constitutional Amendment no. 19.

Transparency, as defined by Schudson,[13] involves making information accessible to the general public, often achieved through mechanisms of publicity. In Brazil, this principle is upheld through the publication of every administrative act, including public contracts, judicial decisions, annual budgets, and agency accounts. Historically, these documents were distributed via printed official gazettes; nowadays, they are available in digital formats, enhancing accessibility and reducing costs.

Publicity alone is insufficient for achieving true transparency.[14] Transparency also requires accessibility and a free press. In 2011, the Access to Information Act[15] established clear rules to ensure that any citizen can access public information, a tool frequently utilized by the media and researchers to expose and disseminate critical information. In 2010, Brazil's Supreme Court ruled the Press Law[16] – enacted during the dictatorship to control information – unconstitutional in the judgment Direct Action of Unconstitutionality No. 130/2008. Furthermore, since 1988, the confidentiality of journalistic sources has been guaranteed as a fundamental human right under the Constitution.[17]

Brazil's strong and protected media landscape exemplifies the robustness of its democratic framework. For instance, the recent case involving the platform X (formerly Twitter), which was banned from the country for not complying with Brazilian laws,[18] illustrates the judiciary's commitment to upholding the rule of law. Despite criticism from certain politicians and media figures, the judiciary complied with due process according to constitutional rule[19] and ensured transparency by making public all the proceedings involved.

Judicial transparency in Brazil is particularly notable. Every single judicial act, including court hearings, is public unless restricted to protect "privacy or the interest of society" (Art. 5, LX). In stark contrast to countries like France, which have criminalized the publication of statistics about judicial decisions,[20] Brazil's National Justice Council publishes comprehensive data on decisions across its more than 100 courts (twenty-seven state courts, plus labour courts, electoral courts, military courts, and federal courts).

---

13 M. Schudson, *The Shortcomings of Transparency for Democracy*, "American Behavioral Scientist" 2020, vol. 64, no. 11, pp. 1670–1678.

14 *Ibid.*

15 Law No. 12,527/2011.

16 Law No. 5250/1967.

17 The Brazilian Federal Constitution, Art. 5, XIV, demands that access to information of public interest be ensured to everyone; the confidentiality of a source shall be safeguarded whenever necessary for professional practice.

18 T. Phillips, *Brazil's Supreme Court Upholds Ban on Elon Musk's X over 'Illegal Conduct'*, "The Guardian" 2 September 2024, https://www.theguardian.com/technology/article/2024/sep/02/brazils-supreme-court-upholds-x-ban-over-conduct [accessed: 2024.09.14].

19 The Brazilian Federal Constitution, Art. 5, LV, requires that parties in judicial or administrative proceedings and defendants in general be ensured an adversary system and a full defence, with the means and resources inherent to such defence.

20 F. McCann, *France bans analytics of judges' decisions*, Lexology, 2019, https://www.lexology.com/library/detail.aspx?g=ff53dfbe-0fe6-4dee-8a1d-990bf8459020 [accessed: 2024.09.14].

Transparency in Brazil, encompassing publicity, accessibility, and understandability, is well established. These elements align with Lindstedt and Naurin's criteria for a settled democracy.[21] Thus, we can affirm that transparency, as a fundamental pillar of democracy, is both clearly defined and effectively implemented in Brazil, thus answering the first question that we asked above.

2.1. The corruption landscape in Latin America

Corruption is still a challenge for Latin American democracies. According to the 2024 Corruption Perceptions Index, Latin America scores 42 out of 100, just below the global average of 43.[22] This indicates that the region still faces significant challenges, but should not be characterized as exceptionally corrupt. One should also take into account that this index measures "perception" and, as mentioned previously, the actual "risk" of corrupt activities at the country level may not be captured by it. Rodríguez-García[23] creates a Risk of Corruption Index (ROC) but realises that perception of corruption does not usually match risk of corruption; high perception usually accords with low risk and vice-versa. Both indexes measure different things, which might mean that countries with a low perception of corruption worry less about controlling its risks, while a higher perception of corruption might lead to more regulation to control those risks.[24]

The countries involved in the Car Wash Operation – Brazil (107th), Ecuador (121th), Peru (127th), and Mexico (140th) – scored respectively 34, 32, 31, and 26 in the perception index,[25] while the position of the same countries in the risk index is: Mexico (1st), Peru (3rd), Brazil (4th), and Ecuador (15th) (from shorter to higher risk).[26] This striking discrepancy exemplifies how perception-based indices may misrepresent the actual corruption landscape in Latin America, potentially leading to misguided policy interventions based on external frameworks rather than regional realities.

Because of the nature of the region, corruption is not usually characterized as a matter of isolated incidents, but crosses borders of multiple countries and involves both public officials and private corporations. The transnational nature of corruption in the region became starkly evident through the Car Wash Operation, which evolved into what the BBC has called "the largest foreign bribery case in history."[27] Two main Brazilian multinational companies were involved in the case: Petrobras, the state oil

---

21 C. Lindstedt, D. Naurin, *Transparency Is Not Enough*…

22 *Corruption Perceptions Index 2024*, Transparency.org, 2025, https://www.transparency.org/en/cpi/2024 [accessed: 2024.11.9].

23 G. Rodríguez-García, *Measuring the Risk of Corruption*…

24 *Ibid.*

25 *Corruption Perceptions Index 2024*…

26 G. Rodríguez-García, *Measuring the Risk of Corruption*…

27 E. Gonzalez-Ocantos, V. Baraybar Hidalgo, *Lava Jato beyond borders: The uneven performance of anticorruption judicial efforts in Latin America*, "Taiwan Journal of Democracy" 2019, vol. 15, no. 1, pp. 63–89, https://www.airitilibrary.com/Article/Detail/18157238-201907-201907310007-201907310007-63-89 [accessed: 2024.11.10].

company, and Odebrecht, a construction company. Between 2001 and 2016, Odebrecht admitted paying US$788 million in bribes to politicians and political parties in Angola, Mozambique, and nine Latin American countries (Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Mexico, Panama, Peru, and Venezuela).[28]

The economic impact of the exposure of these corruption schemes has been devastating. Petrobras and Odebrecht paid billions in settlements not to the Latin American countries directly affected by the corruption, but to settle class actions brought by investors in New York under U.S. jurisdiction. This paradox underscores a critical issue: the FCPA, a U.S. law not enforceable within Brazil, became the primary mechanism for imposing consequences on these multinational companies.

Economic analysis by Ferraz *et al.*[29] reveals the broader sectoral damage caused by the Car Wash investigations. Their study of Brazilian construction companies found a 54% reduction in employment and a 63% decrease in wage bills among firms that were investigated. More troubling were the substantial adverse spillover effects: companies not involved in the investigation experienced reduced access to credit, leading to a 12% reduction in wage bills and 10% decrease in employee numbers. These findings demonstrate that while corruption itself damages economies, the investigation's approach (one that used settlement agreements reached in the United States under extraterritorial application of foreign laws) created ripple effects throughout the regional economy that may have exceeded the original harm.

Weak judicial systems have been identified as a key cause for Latin America's struggle in controlling corruption. The lack of independence and transparency of the judiciary not only enables corruption but also allows undue influence by political and economic elites to actively undermine judicial institutions.[30] However, this assessment must be nuanced: as I demonstrate via the Brazilian case, robust judicial independence can serve as a critical bulwark against corruption, even when other institutions falter. The challenge lies not in the absence of judicial structures, but in ensuring their autonomy and effective functioning.

Nevertheless, institutional reforms, transparency measures, and citizen engagement have demonstrated potential to improve corruption control, as evidenced by recent improvements in Guatemala and the Dominican Republic.[31] Understanding the Latin American landscape from a Latin American perspective, focusing on risk rather than perception, offers an alternative analytical framework that may better capture regional realities. Brazil's integrity system provides a particularly instructive case study

---

[28] B. Miller, F. Uriegas, *Latin America's Biggest Corruption Cases: A Retrospective*, "Americas Quarterly" 11 July 2019, https://www.americasquarterly.org/article/latin-americas-biggest-corruption-cases-a-retrospective [accessed: 2024.11.15].

[29] C. Ferraz, L. Moura, L. Norden, R. Schechtman, *The unintended consequences of Brazil's landmark anti-corruption campaign*, VoxDev, 2025, https://voxdev.org/topic/institutions-political-economy/unintended-consequences-brazils-landmark-anti-corruption [accessed: 2024.11.15].

[30] S. Woolston, *What the Corruption Perceptions Index Actually Says About Corruption in Latin America*, InSight Crime, 23 February 2024, https://insightcrime.org/news/what-corruption-perceptions-index-actually-says-about-corruption-latin-america [accessed: 2024.11.15].

[31] *Ibid.*

for examining how institutional mechanisms can address corruption within the region's unique political and legal context. In the following section, I analyze this system in detail to understand both its strengths and limitations in combating corruption and impunity.

3. The Brazilian Integrity System

Integrity systems, as defined by the OECD (2021), comprise a set of public institutions, practices, actions, and policies designed to prevent, detect, punish, and remediate corruption and fraud. These systems are fundamental to healthy political, economic, and social structures, fostering good governance that correlates with higher per capita incomes, lower infant mortality rates, and greater literacy.[32] A National Integrity System encompasses a comprehensive set of institutions, practices, and policies aimed at preventing corruption and promoting integrity within a country.[33] In Brazil, the Integrity System encompasses various mechanisms that ensure accountability and promote transparency, with the Judiciary playing a particularly pivotal role in recent years.

The International Federation of Accountants (IFAC) provides a useful framework for understanding accountability in the public sector, as shown in Figure 1.

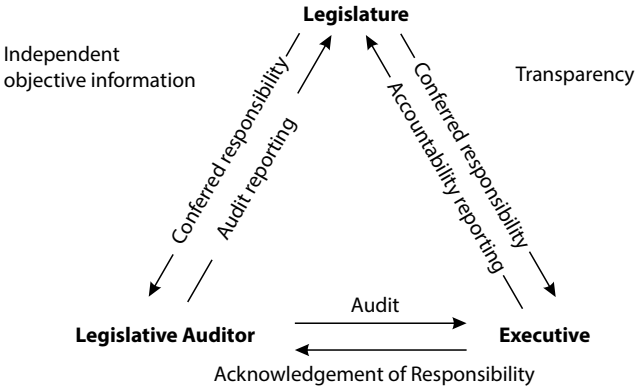


Figure 1. Example of overall accountability process in the public sector
Source: International Federation of Accountants (IFAC), *Governance in the Public Sector: A Governing Body Perspective*, Portal TCU, 2001, p. 6, https://portal.tcu.gov.br/en_us/biblioteca-digital/governance-in-the-public-sector-a-governing-body-perspective.htm [accessed: 2024.09.10].

[32] D. Kaufmann, A. Kraay, P. Zoido-Lobatón, *Governance matters*, World Bank, 1999, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/665731468739470954/Governance-matters [accessed: 2024.09.21].

[33] R.T. de S. Barreto, J.B. Vieira, *Public integrity programs in Brazil: Indicators and challenges*, "Cadernos EBAPE – Escola Brasileira de Administração Pública e de Empresas" 2021, vol. 19, pp. 442–463.

According to the model in Figure 1, the Legislature sanctions the financial budget and authorises the Executive to execute expenditures. Internal controls within both branches are then audited by legislative bodies.[34] However, this framework does not fully reflect Brazil's reality, where the judiciary has emerged as a critical actor in the accountability process because of its independence and oversight role. The above figure offers an essential picture, but it is not complete for the purposes of studying the Brazilian context, since the judiciary plays a very important role in this process, and has recently become perhaps the strongest pillar of the whole structure.

After democratization in 1985, Brazil has made significant strides to improve public governance. Brazil's governance system, established by the 1988 Federal Constitution, is built on a separation of powers among the legislature, executive, and judiciary.[35] These branches are independent yet designed to operate harmoniously.[36] Notably, the judiciary, as a non-elected body, plays a unique role in maintaining checks and balances by independently overseeing the actions of the elected branches (the executive and the legislature).

3.1. The Brazilian Federative System

Brazil's federative system is unique in its three-tiered structure – federal, state, and municipal levels – granting significant autonomy to municipalities and to states and the federation. This arrangement, rooted in the country's size and historical development, was formalized in the 1988 Constitution and grants local governments significant political and administrative independence, contributing to the complexity and robustness of Brazil's governance structure.[37]

This three-tiered system shapes the country's judicial organisation and jurisdictional distribution. The executive and legislative branches operate at all three levels, with direct elections ensuring democratic representation across federal, state (twenty-six states plus a Federal District), and municipal (5,568 municipalities) governments for a four-year term.

Federal and state elections are held simultaneously, electing both chief executives and legislative representatives. The federal legislature is bicameral, consisting of the Chamber of Deputies and the Senate, while municipalities also maintain their own legislative bodies, a unique feature of Brazilian federation organization. This decentralized

---

[34] International Federation of Accountants (IFAC), *Governance in the Public Sector: A Governing Body Perspective*, Portal TCU, 2001, https://portal.tcu.gov.br/en_us/biblioteca-digital/governance-in-the-public-sector-a-governing-body-perspective.htm [accessed: 2024.09.10].

[35] Article 2 (Brazil 2022).

[36] Brasil, Tribunal de Contas da União, *Referencial Básico de Governança: Aplicável a Órgãos e Entidades da Administração Pública*, 2nd ed., Brasília 2014, https://www.gov.br/economia/pt-br/acesso-a-informacao/acoes-e-programas/integra/gestao-do-conhecimento/publicacoes/referenciais-externos/referencial_basico_governanca_orgaos_entidades.pdf/view [accessed: 2024.09.21].

[37] E.R. Lewandowski, *Evolução do estado federal no Brasil* [in:] *Doutrina: edição comemorativa 20 anos*, Brasília 2017, pp. 319–331, https://www.stj.jus.br/publicacaoinstitucional/index.php/dout20anos/article/view/3429 [accessed: 2024.09.21].

approach enables governance tailored to diverse regional needs but adds complexity to accountability mechanisms.

Competences of the federative entities are distributed by the Constitution and usually, but not necessarily, respect territorial aspects: from local (municipalities) to regional (state) and national (federation) levels. Some competences are exercised collectively by all of them.

Understanding this federative complexity is essential to analyzing Brazil's judicial system, particularly in corruption cases where jurisdictional questions often arise, as is evidenced in the Car Wash Operation.

3.2. The role of the judiciary in accountability

While the accountability framework outlined by the IFAC (Figure 1) emphasises the legislature and executive, Brazil's judiciary has become a cornerstone of its integrity system. As a non-elected body, the judiciary provides an impartial check on the activities of the executive and legislative branches, ensuring compliance with constitutional principles. This role has become increasingly prominent as the judiciary adjudicates cases involving corruption, fraud, and abuse of power. The judiciary plays a decisive and unique role in Brazil's system of checks and balances. Its transparency practices further enhance its accountability: the publication of all judicial acts, accessible to the public, reinforces trust and enables scrutiny. The National Council of Justice's publication of detailed statistics on judicial performance exemplifies a commitment to openness unmatched by many other countries.

The judiciary in Brazil is administratively and financially autonomous. A National Council of Justice (CNJ) was established in 2004 to enhance compliance and oversight. Notably, the system guarantees a double degree of jurisdiction, ensuring that facts are adjudicated at least twice – a principle integral to the adversary system and full defence.[38]

Brazil's judicial system includes specialized (labour, electoral, and military) and common (federal and state) branches organised across multiple levels (first instance, appellate courts, and superior courts). A general overview of the system, with its impressive numbers, is set out in Table 1. The different colours separate the specialized (light grey) from the common (dark grey) branch.

As Table 1 illustrates, Brazil's judicial organization reflects the federative complexity discussed earlier. The system encompasses over 21,000 judges across five distinct branches, organised hierarchically with multiple levels of review. This multi-layered design, while potentially cumbersome, serves as a safeguard against judicial overreach: each level provides checks on the others, and the National Council of Justice (CNJ) ensures oversight across all branches. However, as the Car Wash Operation demonstrated, this same institutional arrangement can create jurisdictional ambiguities that may be exploited or mishandled.

[38] Article 5, LV (Brazil 2022); A.S. Pedra, *A Natureza Principiológica do Duplo Grau de Jurisdição*, "Revista de Direito Administrativo" 2008, vol. 247, pp. 13–30.

Table 1. Brazilian Judicial System

Constitutional Jurisdiction	STF Supreme Court						National Council of Justice (CNJ)
Superior Courts	TST Superior Labour Court	TSE Superior Electoral Court	STM Superior Military Court	STJ Superior Court			
2nd Instance	TRT (24)	TRE (27)	–	TRF (6)	TJ (27)	TJM (SP/MG/ RS)	
1st Instance	Labour Judges (3.599)	Electoral Judges (2.836)	Military Audits (38)	Federal Judges (1.917)	State Judges (12.472)	State Military Audits	
Judicial Branch	Labour Justice	Electoral Justice	Military Justice	Federal Justice	State Justice		
	Specialized Justice (Federal)			Common Justice			

Source: Adapted from Judiciary Functional Structure [s.d.].

Two branches deserve particular attention for their role in combating corruption. Federal Justice adjudicates crimes against federal interests, including money laundering, corruption involving federal entities (such as Petrobras), and crimes that cross state or national borders. The Car Wash Operation fell primarily under federal jurisdiction due to the involvement of federal crimes and of the state-owned oil company. This branch includes Federal Regional Courts (TRF) as appellate courts and the Superior Court of Justice (STJ) as the highest ordinary court for federal matters.

Brazil's specialized electoral judiciary branch is particularly noteworthy for its dual role in adjudicating disputes and providing consultative guidance. Its implementation of electronic voting systems and biometric registration has positioned Brazil as a global leader in election security, reinforcing public trust in democratic processes.

This robust institutional Integrity System is reinforced by a comprehensive set of laws aimed at combating crime. In 2013, Brazil enacted Law No. 12,846, known as the Anticorruption Act.[39] But before that, a set of other pieces of legislation already set out to track corruption. Brazil first defined corruption as a criminal offence in its 1830 Criminal Code. This definition has since been updated, most recently in 2003, under the current 1940 Criminal Code. In 1990, the Law of Crimes against the Economic Order[40] defined crimes related to the economic order, including tax evasion and crimes against public finances.

[39] Brazil. Law No. 12,846 of August 1, 2013. Lei Anticorrupção [Anticorruption Act]. Diário Oficial da União, August 2, 2013, https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.htm [accessed: 2024.09.21].

[40] Brazil. Law No. 8,137 of December 27, 1990. Lei dos Crimes contra a Ordem Econômica [Law of Crimes Against the Economic Order]. Diário Oficial da União, December 28, 1990, https://www.planalto.gov.br/ccivil_03/leis/l8137.htm [accessed: 2024.09.21].

After 1988, when the new democratic constitution came into force, a set of laws and regulations to enable democracy and reinforce combatting corruption were created. The first stronger instrument was the Administrative Improbity Law;[41] its aim is to punish public officials for illicit self-enrichment, causing damage to public finances, or violating the principles of public administration. Sanctions can include fines, loss of office, suspension of political rights, and prohibition from contracting with the public sector. Inspired by rules from the Basel Committee on Banking Supervision (1975), and from the Securities and Exchange Commission in the United States, the Brazilian Central Bank created Resolution No. 2,554/1998. This contains elements such as internal control and the promotion of an ethical organizational culture.[42]

The Anti-Money Laundering Law[43] establishes penalties for money laundering and outlined the obligations of financial institutions to report suspicious activities. It has been updated over the years to enhance its effectiveness, particularly during the Car Wash investigation. In 2000, the Fiscal Responsibility Law[44] enforced fiscal transparency and accountability for public spending. It establishes rules for fiscal management and determines that public officials are accountable for actions that result in budget deficits or fiscal mismanagement.

Regarding elections, a crucial piece of legislation aimed at improving the country's political environment was enacted in 2010: the Clean Record Act.[45] This law disqualifies candidates from running for public office if they have been convicted of crimes such as corruption, misuse of public funds, or administrative misconduct. Its primary goal is to prevent politicians with compromised records from holding office. However, there has been some controversy surrounding this specific aspect. It renders individuals ineligible even before a final judicial review has taken place, which raises concerns about potential conflicts with the presumption of innocence outlined in Article 5, LVII, of the Brazilian Constitution, which states, "no one shall be considered guilty before the criminal conviction becomes final and unappealable." I return to this issue in the analysis of my main theme, the Car Wash Operation.

---

41 Brazil. Law No. 8,429 of June 2, 1992. Lei de Improbidade Administrativa [Administrative Improbity Law]. Diário Oficial da União, June 3, 1992, https://www.planalto.gov.br/ccivil_03/leis/l8429.htm [accessed: 2024.09.21].

42 J.P. Ceren, V. Moura do Carmo, *Crítica ao compliance na lei brasileira de anticorrupção*, "Revista do Direito Público" 2019, vol. 14, no. 3, pp. 87–109.

43 Brazil. Law No. 9,613 of March 3, 1998. Lei de Lavagem de Dinheiro [Anti-Money Laundering Law]. Diário Oficial da União, March 4, 1998, https://www.planalto.gov.br/ccivil_03/leis/l9613.htm [accessed: 2024.09.21].

44 Brazil. Complementary Law No. 101 of May 4, 2000. Lei de Responsabilidade Fiscal [Fiscal Responsibility Law]. Diário Oficial da União, May 5, 2000, https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm [accessed: 2024.09.21].

45 Brazil. Complementary Law No. 135 of June 4, 2010. Lei da Ficha Limpa [Clean Record Act]. Diário Oficial da União, June 7, 2010, https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp135.htm [accessed: 2024.09.21].

Immediately after the Anticorruption Act, the legislature also passed the Organized Crime Law,[46] defining criminal organizations and establishing means for their prosecution. It also permits the use of plea bargains, which became crucial in investigating corruption during the Car Wash operation.

Established in 2017 by the Office of the Comptroller General of the Union, the Brazilian Integrity System, together with the Ethics Management System of the Federal Executive Branch (2007),[47] functions effectively,[48] even though public perception – often shaped by media coverage[49] – has a different picture. There is surely space for improvement, but it is essential to differentiate between perceived corruption and the actual instances of wrongdoing or prosecution efforts.

Marques and Oliveira-Castro[50] argue that the perception of corruption is higher in countries with excessive regulation compared to those with less rigid regulatory burdens. Greater regulation creates more opportunities for the misuse of power as an instrument to enable the covert practice of corruption behind the entire set of rules and regulations.

One of the main criticisms regarding impunity in corruption cases is a perceived delay in judicial proceedings, along with the statute of limitations. A comprehensive study conducted for the National Council of Justice by independent researchers[51] reveals that both issues may not be as severe as the media often portrays.[52] Contrary to popular belief, only 5% of corruption cases are dismissed because of the slowness of the justice system. On average, corruption cases take six and a half years to be resolved, most of that time being spent in the judicial fact-finding phase. The same study found that 95% of federal police investigations between 2003 and 2018 were resolved – 57% of which uncovered no crime, and 38% of which identified guilty parties and moved forward to trial. These numbers suggest that the system is capable of addressing corruption effectively when cases are pursued.[53]

---

46 Brazil. Law No. 12,850 of August 2, 2013. Lei das Organizações Criminosas [Organized Crime Law]. Diário Oficial da União, August 5, 2013, https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm [accessed: 2024.09.21].

47 OECD, *The Public Integrity System in the Brazilian Federal Executive Branch*, Paris 2021.

48 R.T. de S. Barreto, J.B. Vieira, *Public integrity programs in Brazil*…

49 M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção*…; A.J. Maia, *A imprensa como factor explicativo do discurso social da corrupção*, 2010, https://www.cpc.tcontas.pt/documentos/outros.html [accessed: 2024.09.29].

50 M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção*…

51 Conselho, Nacional de Justiça, *Justiça criminal*…

52 L. Destri, *Justice Is Delayed but (Apparently) Is Not Failing*, Pesquisa Fapesp, 2019, https://revistapesquisa.fapesp.br/en/justice-is-delayed-but-apparently-is-not-failing [accessed: 2024.09.29].

53 Conselho, Nacional de Justiça, *Justiça criminal*…; L. Destri, *Justice Is Delayed but (Apparently) Is Not Failing*…

4. The Car Wash Operation

The Car Wash Operation (*Operação Lava Jato*), which began in Brazil in March 2014 and later affected other Latin American countries including Ecuador, Peru, and Mexico, stands as one of Brazil's largest anti-corruption investigations. The operation profoundly impacted Latin America's political and economic landscape. The operation derives its name from a small car wash and gas station in Brasília, *Posto da Torre,* which was owned by a currency dealer called Alberto Youssef, and served as a front for money laundering. Interestingly, the location now houses a laundry service, adding a layer of irony to its history.

The operation uncovered a sprawling corruption network involving politicians, executives, and major corporations. Over seven years (2014–2021), it resulted in more than 165 convictions and recovered approximately $1 billion for Brazil's state treasury (Marques and Oliveira-Castro 2023).

The operation spanned seven years (2014–2021) across eighty phases, uncovering a systematic scheme whereby:

- construction companies formed a cartel to inflate contract prices;
- Petrobras executives received kickbacks (estimated at 3% of contract values);
- part of the money involved funded political campaigns and personal enrichment;
- the scheme involved billions of reals over more than a decade.

4.1. Jurisdiction and case development

As money laundering is a federal crime, the investigation fell under federal jurisdiction. Following Brazilian law, jurisdiction must be determined through a five-step process.[54] asks the following questions:

1. Does any of the crimes fall under Military Justice?
2. Are any of the crimes electoral?
3. Does any of the defendants have the right to be tried by a special court?
4. If none of these apply, is the crime under the jurisdiction of Federal Justice (Art. 109 of the Constitution)?
5. Is any of the crimes under the jurisdiction of a jury court?

After jurisdiction was assigned, the operation revealed that money laundering activities performed by Alberto Youssef took place in Paraná, thus falling under the jurisdiction of Curitiba's 13th district court, which specializes in financial crimes and money laundering. Initially, the investigation targeted small-time offenders, but it soon uncovered a sprawling corruption network involving politicians, executives, and major corporations.

Despite the emergence of new facts and actors that should have been treated by other courts, the case remained in Curitiba, resulting in an expanded jurisdiction for

[54] A. Lopes Jr., *Direito processual penal*, 16th ed., São Paulo 2019, https://cptl.ufms.br/files/2020/05/Direito-Processual-Penal-Aury-Lopes-Jr.-2019-1.pdf [accessed: 2024.09.29].

the court and highlighting flaws in judicial procedures, particularly regarding jurisdictional overreach and the handling of confidential information.

The investigation started as a seemingly isolated money laundering case, with money dealers (*doleiros*), including Alberto Youssef. The trail of evidence led to a luxury Range Rover that Youssef acquired for Paulo Roberto Costa, a former director of Petrobras. The money laundering then shifted its focus to the state-owned oil company. After being charged, Paulo Roberto Costa entered a plea bargain and revealed the corruption scheme at Petrobras: bribes (1–5% of contract value) for contracts and kickbacks to political parties. Subsequent evidence revealed that major construction firms (Odebrecht, OAS, etc.) formed a cartel (*Clube dos Empreiteiros*) to rig bids for Petrobras contracts, exposing the corporate side of the scheme and showing corruption was systemic, not isolated. After his arrest, Marcelo Odebrecht, president of the main construction firm involved, implicated ninety-eight politicians, including ministers, senators, and federal deputies in his plea bargain.[55]

In exchange for reduced sentences, Costa and Odebrecht cooperated with the judiciary via plea bargain agreements, providing insider testimony that named names and described the mechanics of the entire scheme, which would be nearly impossible to prove by following a paper trail alone. In some cases, as we will see, no other evidence than testimony was used to convict political adversaries.[56]

The operation indicted 429 individuals and convicted over 150 people, including dozens of top politicians and CEOs and Brazilian President Luiz Inácio Lula da Silva. Petrobras recovered more than 5.3 billion reals (US$920 million) as part of a series of reimbursements. The operation was stopped in February 2021, as the result of a gradual influence of the then president Bolsonaro's executive actions.

4.2. Public reaction and media influence

Public engagement against corruption in Brazil is a relatively recent phenomenon,[57] gaining significant momentum during the 2013 protests, against a twenty-cent increase in public transportation fares. These protests were fueled not just by the fare hike but also sparked by dissatisfaction with government corruption and inefficiencies.

As a response, the government introduced a series of legislative measures, as previously mentioned, which became important tools in combating corruption and impunity. This was not the first time that Brazil reacted to corruption; a similar outcry followed the "Budget Dwarves" scandal in 1993. The Car Wash Operation capitalized on this wave of public discontent, reshaping social perceptions of corruption as a serious offence warranting strict penalties.

---

55 P. Sotero, J. Wallenfeldt, *Petrobras Scandal: Summary, Explanation, & Operation Car Wash*, Britannica, 2022, https://www.britannica.com/event/Petrobras-scandal [accessed: 2024.11.15].

56 *Ibid.*

57 M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção e os desafios no seu enfrentamento*, "Revista de Direito Brasileira" 2023, vol. 34, no. 13, pp. 194–219.

Corruption, often classified as a white-collar crime, it is typically perceived by the public as less harmful compared to common crimes, leading to the belief that those convicted should receive lighter penalties. In fact, social perceptions of the severity of a crime play a significant role in shaping the public's response to that crime.[58] However, the Car Wash Operation marked a significant shift in public opinion, as widespread street protests eventually led to the impeachment of President Dilma Rousseff.[59]

The media played a pivotal role, often framing the investigation as a battle between morality and corruption. The unlawful leaking of judicial information and biased reporting heavily influenced the outcome of the impeachment process.[60] A study on media editorials revealed a strong bias in favor of Rousseff's impeachment.[61] Despite the Supreme Court's ruling that she had committed no crime, mainstream media continuously linked her party to the corruption scandal. Ultimately, while Rousseff was impeached through a political judgment by Congress, she did not face the typical eight-year political ban, reflecting a public awareness of her legal innocence. Furthermore, research shows that corruption in Brazil was nonpartisan and not limited to one political group.[62] The leaking of judicial acts to the media involved active participation by Deltan Dallagnol, the Public Prosecutor leading the investigation, and Sergio Moro, the judge presiding over the case.

4.3. Judicial misconduct and political fallout

Revelations about improper collaboration between Judge Sergio Moro[63] and prosecutor Deltan Dallagnol[64] cast a shadow over the operation. Leaked communications published by *Intercept Brasil*[65] in June 2019,[66] exposed their coordinated efforts to

---

58 *Ibid.*

59 Dilma Rousseff is s a Brazilian economist and politician who served as the 36th president of Brazil from 2011 until her impeachment and removal from office on 31 August 2016.

60 M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção…*

61 T.M. Rodrigues, *The Role of the Media…*

62 M.P. Bertran, L. Vilaça, I. Rodello, E.M.S. Ribeiro, L. Morilas, *Court's neutrality or bias: Political affiliation among the defendants of the Car Wash Operation*, SciELO Preprints, 2022, https://preprints.scielo.org/index.php/scielo/preprint/view/4689 [accessed: 2024.10.19]; M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção…*

63 Sergio Moro was a federal judge at the time, in charge of judging all the eighty phases of the Car Wash Operation. In 2018, he resigned from being a judge and was nominated Minister of Justice and Public Security. In 2022, he was elected Senator for the state of Paraná, where he had served as a judge.

64 Deltan Dallagnol was a federal prosecutor at the time, in charge of the Car Wash Operation in the Federal Public Ministry from 2003 to 2021. In 2021, he resigned from being a prosecutor to become a politician and was elected Federal Deputy for the state of Paraná. His election as federal deputy was revoked on 16 May 2023 by the Superior Electoral Court of Brazil in a unanimous decision for committing a fraud against the Clean Record act.

65 Intercept Brasil, *Vaza Jato*, 2019, https://www.intercept.com.br/especiais/mensagens-lava-jato [accessed: 2024.11.10].

66 This leak became known as "Vaza Jato," a wordplay on "Lava Jato," the name of the Car Wash Operation. "Lava Jato" refers to express car washes, while "Vaza" means "leak." In addition to the pun, the term also implies a sense of speed.

convict political figures, raising concerns about due process and impartiality. These revelations intensified scrutiny when Moro joined Jair Bolsonaro's[67] administration after the 2018 elections, suggesting potential conflicts of interest. Dallagnol, the Public Prosecutor leader of the Operation, followed a similar path in 2021, stepping down while facing fifteen ongoing administrative charges related to his conduct. In 2022, he was elected as a federal deputy, but in 2023, he was stripped of his mandate due to his premature and unlawful departure from his previous position.

The Supreme Court responded in 2021 by annulling several convictions, citing jurisdictional overreach and violations of due process. These decisions emphasised the importance of adhering to constitutional principles.

4.4. Transparency, publicity, and trust in the judiciary

As I argued earlier, judicial data is generally public in Brazil; however, constitutional exceptions apply,[68] and that is where the issue lies. Some judicial proceedings are supposed to remain confidential, particularly those involving high-level government officials. In this case, the procedures involving the president could not have been investigated by this judge because of jurisdictional limitations, and certainly, the leaked information should not have been made public. The release of specific confidential details to the media played a pivotal role in inflaming public opinion against the president, contributing to her impeachment. Furthermore, the leak also impacted the future political landscape, leading to the imprisonment of Lula da Silva, the previous president who was running for president once more; this effectively barred him from the electoral process due to the application of the Clean Record Act. This benefited the newly elected president, Jair Bolsonaro, who later appointed the same judge involved in the leaks to his administration.[69]

After the open political involvement of the two main figures in Car Wash Operation – the prosecutor Deltan Dallagnol and Judge Sergio Moro – became public and the their conversations were leaked by a news outlet, the Supreme Court, in a March 2021 ruling (confirmed in April 2021), decided to annul the related procedures. The Court determined that the lawsuits should restart from the beginning to uphold due process, concluding that Moro had overstepped his jurisdiction.[70]

One final observation: all judgments by the Brazilian Supreme Court are broadcast on a public TV channel, in line with the principles of transparency and the publicity of judicial acts. In this case, key judicial decisions have also been shown on major TV networks, watched by a large portion of the population.

---

[67] Jair Messias Bolsonaro is a Brazilian politician and former military officer who served as a member of the Chamber of Deputies from 1991 to 2019 and as the 38th president of Brazil from 2019 to 2023.

[68] The Brazilian Constitution, article 5, LX, states that "the law may only restrict the disclosure of proceedings if the restriction is required to protect privacy or the interest of society."

[69] B. Mier, B. Pitts, K. Swart, R.R. Ioris, T.M. Sean, *Anticorruption and Imperialist Blind Spots: The Role of the United States in Brazil's Long Coup*, "Latin American Perspectives" 2023, vol. 50, no. 5, pp. 29–46.

[70] Brasil, Tribunal de Contas da União, *Referencial Básico de Governança*…

This raises important questions. What are the boundaries of transparency and publicity in judicial proceedings? How can these principles be balanced to uphold due process while ensuring accountability?

5. The role of transparency in combating corruption

Publicity and transparency are foundational to democracy, particularly in the fight against corruption and impunity. As Winston Churchill famously remarked,[71] democracy is the worst form of government, except for all others. Unlike autocratic regimes, democratic systems offer essential control mechanisms like transparency and publicity to mitigate corrupt practices example.[72]

However, transparency is not an end in itself. It is a means to accountability, which is the cornerstone of democracy. As Schudson[73] notes, transparency can be constructive but also harmful under certain circumstances. While accessible information is crucial, its utility depends on who accesses it and how it is used. Empowered groups, often targeted by anticorruption efforts, can manipulate transparency to protect their interests. Tools like jurimetrics, increasingly employed by major law firms, exacerbate this imbalance, showing that greater transparency does not always lead to greater accountability.

The Car Wash Operation, the primary case discussed in this article, provides a cautionary tale of transparency's dual role. In this case, media coverage and leaked judicial acts played a pivotal role in shaping public opinion.[74] Publicity, in this context, became a tool for swaying social perception, aided by selective media disclosure. Here, publicity itself posed a risk: the judge overseeing the case subverted the system by releasing information to the mass media that was meant to remain confidential, ultimately affecting the course of democratic processes in the country.

The Car Wash Operation reveals a paradox in Brazil's integrity system: while the institutional framework proved robust enough to investigate and prosecute high-level corruption, demonstrating the system's effectiveness, serious procedural violations by key actors (Judge Moro and Prosecutor Dallagnol) threatened its legitimacy. Ultimately, it was the Supreme Court's intervention that preserved democratic principles by annulling contaminated proceedings. This demonstrates that Brazil's integrity system worked not despite these violations, but because its institutional checks and balances, particularly judicial review, were strong enough to correct them. The media played

---

[71] Even if he became famous for saying the words, the concept was not really his. His exact words were: "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time" (House of Commons, 11 November 1947).

[72] M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção…*

[73] M. Schudson, *The Shortcomings of Transparency…*

[74] M.B. Marques, J.M. Oliveira-Castro, *Um resgate histórico da corrupção…*

a dual role: essential for transparency and public awareness, yet sometimes amplifying biases and procedural irregularities.

The institution responsible for upholding electoral integrity in Brazil – as well as in other Latin American countries – was the same: the judiciary. An independent and strong Supreme Court was responsible for sustaining the electoral system in 2022 in Brazil, after the incumbent president at the time attempted a coup against it. Bolsonaro was prosecuted and condemned, according to the due process of law, and has been barred from running for office for a following eight years.[75] The U.S.A. did not take this step and their now convicted former president was reelected and is able to pardon his own wrongdoings.[76] In the same field, the Mexican Supreme Court stood up against a series of decrees from the president in charge, Andrés Manuel López Obrador, which maintained the independence of the electoral system.[77] Perhaps there is no correlation, but later (in September 2024) the Mexican Parliament passed a constitutional amendment changing their judicial system: instead of the traditional appointment-based system, grounded in training and qualifications, judges will be elected, with fewer qualifications required to run.[78] Consequences are still to be tested, but there is a consensus that the changes weaken the Mexican system of integrity.

Courts in Latin America (at least in Brazil, Colombia, Argentina, and Mexico) are increasingly involved in high-profile corruption prosecutions, which serve as critical interventions against backsliding in democratic governance. These judicial actions often reflect a broader commitment to uphold the rule of law and ensure accountability.[79] These actions became more viable following the third wave of democratization in Latin America, which enhanced judicial independence, allowing courts and judges to impose constraints on the executive, thus fostering democratic resilience to autocratic experiences in the past.[80]

While transparency is vital, it is insufficient on its own. A free press, robust judicial institutions, and an informed and engaged citizenry are equally essential.[81] The media, while capable of manipulation, also serves as a watchdog, highlighting corruption and holding power to account. Judicial systems must strike a delicate balance between openness and confidentiality to ensure both accountability and due process. The

---

75 T. Broner Taraciuk, R. Chavez, *Courts, a Last Line of Defense for Latin American Democracies*, "Americas Quarterly" 18 September 2023, https://americasquarterly.org/article/courts-a-last-line-of-defense-for-latin-american-democracies [accessed: 2024.11.23].

76 K. Crowley, *Trump Is Headed Back to the White House. Can He Pardon Himself as President?*, USA Today, 2024, https://www.usatoday.com/story/news/politics/elections/2024/11/06/can-donald-trump-pardon-himself/76091471007 [accessed: 2024.11.23].

77 T. Broner Taraciuk, R. Chavez, *Courts*…

78 J. Wagner, *Mexico's Contentious Judiciary Overhaul Becomes Law*, "The New York Times" 2024, https://www.nytimes.com/2024/09/15/world/americas/mexico-overhaul-judiciary-law.html [accessed: 2024.11.23].

79 L. Gamboa, B. García-Holgado, E. González-Ocantos, *Courts against backsliding: Lessons from Latin America*, "Law & Policy" 2024, vol. 46, no. 4, pp. 358–379.

80 *Ibid.*

81 C. Lindstedt, D. Naurin, *Transparency Is Not Enough*…

landscape of corruption in judicial courts across Latin America is marked by significant challenges, including deteriorating perceptions of integrity and ongoing corruption scandals. However, the resilience of independent judicial systems and the implementation of new anti-corruption laws provide a basis for cautious optimism. Continued vigilance and reform are essential to ensure that judicial institutions can effectively combat corruption and uphold democratic principles in the region.

6. Conclusions

The Car Wash Operation offers a compelling case study on the interplay between transparency, publicity, and accountability in combating corruption. Its analysis reveals a critical disconnect: while robust anticorruption frameworks may improve transparency and legal tools, their effectiveness often lags behind public perceptions of impunity. This underscores the need for institutional systems that bridge this gap, ensuring that anticorruption efforts are both impactful and perceived as legitimate.

The Car Wash Operation produced mixed results for Latin America's anti-corruption efforts. While it strengthened some aspects of the legal and institutional framework, improving: (1) corruption prevention mechanisms; (2) investigative techniques; and (3) the resolution of certain corruption cases. It also revealed significant weaknesses in due process protections and the potential for judicial overreach. The operation's legacy thus serves as both a model and a cautionary tale for regional anti-corruption efforts.

The Brazilian Integrity System exemplifies a model characterized by extensive transparency and publicity, which are crucial – though not sufficient – elements in promoting democracy and combating corruption and impunity. While the intricacies of Brazil's judicial system may present challenges to international comprehension, it has proven its capacity to effectively fulfill its role. Similarly, the majority of Latin American Integrity Systems have followed this trajectory, underscoring the significant impact of the third wave of democratization in stabilizing the region.

Globally, the rise of anti-system leaders has tested the limits of democratic integrity systems. The social media, with its algorithm-driven manipulation of public opinion, has emerged as a powerful disruptor, contributing to democratic setbacks such as the election of Bolsonaro in Brazil, Trump in the U.S.A., and the Brexit referendum. These examples highlight a broader decline in public trust, ethical civility, and informed civic engagement – challenges that integrity systems must navigate in their quest to sustain democracy.

Mass and social media have not only shaped public opinion but also highlighted vulnerabilities within democratic governance, where judicial independence and the rule of law are sometimes at risk. Nevertheless, the resilience demonstrated by judicial institutions in Brazil and other Latin American countries underscores their unexpected strength. These courts have increasingly taken on the role of democratic guardians,

ensuring accountability and countering autocratic tendencies despite intense political pressure. However, the dual nature of transparency as both a tool for accountability and a potential disruptor of democratic trust warrants careful consideration. While transparency is indispensable to democratic governance, its misuse – whether by the media or public officials – can destabilize institutions and erode public confidence.

The role of Latin American Integrity Systems in promoting accountability has proven to be crucial. However, constant threats require sustained vigilance and reinforced efforts. While these institutions have demonstrated a degree of stability, they must work to communicate their achievements and importance more effectively to citizens, a task that also relies on constructive media engagement. Transparency has undeniably played a vital role, despite its occasional drawbacks, but it must be complemented by robust judicial institutions to effectively combat impunity and uphold democratic principles.

Ultimately, the fight against corruption and impunity requires more than transparency; it demands strong, independent judicial institutions, constructive media engagement, and active citizen participation. A balanced approach, one that avoids the politicization of justice and fosters accountability through fair and transparent processes, is vital. By reinforcing institutional integrity and promoting democratic values, Latin American nations can navigate current challenges while laying the foundation for a more equitable and resilient future.

Literature

Barreto R.T. de S., Vieira J.B., *Public integrity programs in Brazil: Indicators and challenges*, "Cadernos EBAPE – Escola Brasileira de Administração Pública e de Empresas" 2021, vol. 19, pp. 442–463.

Bertran M.P., Vilaça L., Rodello I., Ribeiro E.M.S., Morilas L., *Court's neutrality or bias: Political affiliation among the defendants of the Car Wash Operation*, SciELO Preprints, 2022, https://preprints.scielo.org/index.php/scielo/preprint/view/4689 [accessed: 2024.10.19].

Brasil, Tribunal de Contas da União, *Referencial Básico de Governança: Aplicável a Órgãos e Entidades da Administração Pública*, 2nd ed., Brasília 2014, https://www.gov.br/economia/pt-br/acesso-a-informacao/acoes-e-programas/integra/gestao-do-conhecimento/publicacoes/referenciais-externos/referencial_basico_governanca_orgaos_entidades.pdf/view [accessed: 2024.09.21].

Broner Taraciuk T., Chavez R., *Courts, a Last Line of Defense for Latin American Democracies*, "Americas Quarterly" 18 September 2023, https://americasquarterly.org/article/courts-a-last-line-of-defense-for-latin-american-democracies [accessed: 2024.11.23].

Cameron M.A., *The Return of Oligarchy? Threats to Representative Democracy in Latin America*, "Third World Quarterly" 2021, vol. 42, no. 4, pp. 775–792, https://www.tandfonline.com/doi/epdf/10.1080/01436597.2020.1865794?needAccess=true [accessed: 2024.09.14].

Ceren J.P., Moura do Carmo V., *Crítica ao compliance na lei brasileira de anticorrupção*, "Revista do Direito Público" 2019, vol. 14, no. 3, pp. 87–109.

Chaves Jr. A., Machado B.A., de Pádua T.A., *The judgment of crimes against humanity in Brazil: Analysis through the critical criminological lens of Lola Aniyar*, "International Journal of Development Research" 2021, vol. 11, no. 11, pp. 47135–47145.

Conselho, Nacional de Justiça, *Justiça criminal, impunidade e prescrição*, Brasília 2021.

Corruption Perceptions Index 2024, Transparency.org, 2025, https://www.transparency.org/en/cpi/2024 [accessed: 2024.11.9].

Crowley K., *Trump Is Headed Back to the White House. Can He Pardon Himself as President?*, USA Today, 2024, https://www.usatoday.com/story/news/politics/elections/2024/11/06/can-donald-trump-pardon-himself/76091471007 [accessed: 2024.11.23].

Destri L., *Justice Is Delayed but (Apparently) Is Not Failing*, Pesquisa Fapesp, 2019, https://revistapesquisa.fapesp.br/en/justice-is-delayed-but-apparently-is-not-failing [accessed: 2024.09.29].

Fachin E., *Embargos de Declaração no Habeas Corpus 193.726 Paraná*, Supremo Tribunal Federal, 2021, https://portal.stf.jus.br/processos/detalhe.asp?incidente=6043118 [accessed: 2024.10.20].

Ferraz C., Moura L., Norden L., Schechtman R., *The unintended consequences of Brazil's landmark anti-corruption campaign*, VoxDev, 2025, https://voxdev.org/topic/institutions-political-economy/unintended-consequences-brazils-landmark-anti-corruption [accessed: 2024.11.15].

Gamboa L., García-Holgado B., González-Ocantos E., *Courts against backsliding: Lessons from Latin America*, "Law & Policy" 2024, vol. 46, no. 4, pp. 358–379.

Gonzalez-Ocantos E., Baraybar Hidalgo V., *Lava Jato beyond borders: The uneven performance of anticorruption judicial efforts in Latin America*, "Taiwan Journal of Democracy" 2019, vol. 15, no. 1, pp. 63–89, https://www.airitilibrary.com/Article/Detail/18157238-201907-201907310007-201907310007-63-89 [accessed: 2024.11.10].

International Federation of Accountants (IFAC), *Governance in the Public Sector: A Governing Body Perspective*, Portal TCU, 2001, https://portal.tcu.gov.br/en_us/biblioteca-digital/governance-in-the-public-sector-a-governing-body-perspective.htm [accessed: 2024.09.10].

Intercept Brasil, *Vaza Jato*, 2019, https://www.intercept.com.br/especiais/mensagens-lava-jato [accessed: 2024.11.10].

Kaufmann D., Kraay A., Zoido-Lobatón P., *Governance matters*, World Bank, 1999, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/665731468739470954/Governance-matters [accessed: 2024.09.21].

Lewandowski E.R., *Evolução do estado federal no Brasil* [in:] *Doutrina: edição comemorativa 20 anos*, Brasília 2017, pp. 319–331, https://www.stj.jus.br/publicacaoinstitucional/index.php/dout20anos/article/view/3429 [accessed: 2024.09.21].

Lindstedt C., Naurin D., *Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption*, "International Political Science Review/Revue internationale de science politique" 2010, vol. 31, no. 3, pp. 301–322, https://www.jstor.org/stable/25703868 [accessed: 2024.09.14].

Lopes Jr. A., *Direito processual penal*, 16th ed., São Paulo 2019, https://cptl.ufms.br/files/2020/05/Direito-Processual-Penal-Aury-Lopes-Jr.-2019-1.pdf [accessed: 2024.09.29].

Maia A.J., *A imprensa como factor explicativo do discurso social da corrupção*, 2010, https://www.cpc.tcontas.pt/documentos/outros.html [accessed: 2024.09.29].

Marques M.B., Oliveira-Castro J.M., *Um resgate histórico da corrupção e os desafios no seu enfrentamento*, "Revista de Direito Brasileira" 2023, vol. 34, no. 13, pp. 194–219.

McCann F., *France bans analytics of judges' decisions*, Lexology, 2019, https://www.lexology.com/library/detail.aspx?g=ff53dfbe-0fe6-4dee-8a1d-990bf8459020 [accessed: 2024.09.14].

Mendilov J., *Introduction* [in:] *The Fight against Systemic Corruption: Lessons from Brazil (2013–2022)*, eds. M.E. Trombini, E. Valarini, V.E. de Oliveira, M. Pohlmann, Wiesbaden 2024, pp. 1–7.

Mier B., Pitts B., Swart K., Ioris R.R., Sean T.M., *Anticorruption and Imperialist Blind Spots: The Role of the United States in Brazil's Long Coup*, "Latin American Perspectives" 2023, vol. 50, no. 5, pp. 29–46.

Miller B., Uriegas F., *Latin America's Biggest Corruption Cases: A Retrospective*, "Americas Quarterly" 11 July 2019, https://www.americasquarterly.org/article/latin-americas-biggest-corruption-cases-a-retrospective [accessed: 2024.11.15].

OECD, *The Public Integrity System in the Brazilian Federal Executive Branch*, Paris 2021.

Pedra A.S., *A Natureza Principiológica do Duplo Grau de Jurisdição*, "Revista de Direito Administrativo" 2008, vol. 247, pp. 13–30.

Phillips T., *Brazil's Supreme Court Upholds Ban on Elon Musk's X over 'Illegal Conduct'*, "The Guardian" 2 September 2024, https://www.theguardian.com/technology/article/2024/sep/02/brazils-supreme-court-upholds-x-ban-over-conduct [accessed: 2024.09.14].

Pinto S.R., *Direito à memória e à verdade: Comissões de verdade na América Latina*, "Revista Debates" 2010, vol. 4, no. 1, pp. 128–143.

Rincon R., Sultan A., *Top five takeaways on corruption perception in Latin America: Insights from professionals across the region*, International Bar Associatio 2024, https://www.ibanet.org/top-five-takeaways-on-corruption-perception-in-latam [accessed: 2024.09.14].

Rodrigues J.G., *Publicidade, transparência e abertura na administração pública*, "Revista de Direito Administrativo" 2014, vol. 266, pp. 89–123.

Rodrigues T.M., *The Role of the Media in the Impeachment Processes of Dilma Rousseff (2016) and Michel Temer (2017)*, "Contracampo" 2018, vol. 37, no. 2, pp. 36–57.

Rodríguez-García G., *Measuring the Risk of Corruption in Latin American Political Parties. De Jure Analysis of Institutions*, "Data & Policy" 2022, vol. 4, e42.

Schudson M., *The Shortcomings of Transparency for Democracy*, "American Behavioral Scientist" 2020, vol. 64, no. 11, pp. 1670–1678.

Sotero P., Wallenfeldt J., *Petrobras Scandal: Summary, Explanation, & Operation Car Wash*, Britannica, 2022, https://www.britannica.com/event/Petrobras-scandal [accessed: 2024.11.15].

Stavenhagen R., *Human Rights, Democracy and Development in Latin America*, "Economic and Industrial Democracy" 1991, vol. 12, no. 1, pp. 31–41.

STJ (online), *Judiciary Functional Structure*, STJ International – National High Court of Brazil, https://international.stj.jus.br/en/Brazilian-Judicial-Branch/Functional-Structure [accessed: 2024.09.21].

Wagner J., *Mexico's Contentious Judiciary Overhaul Becomes Law*, "The New York Times" 2024, https://www.nytimes.com/2024/09/15/world/americas/mexico-overhaul-judiciary-law.html [accessed: 2024.11.23].

Woolston S., *What the Corruption Perceptions Index Actually Says About Corruption in Latin America*, InSight Crime, 23 February 2024, https://insightcrime.org/news/what-corruption-perceptions-index-actually-says-about-corruption-latin-america [accessed: 2024.11.15].

Summary

Luciana Romano Morilas

Transparency, Accountability, and Judicial Independence in Brazil's Fight against Corruption: Lessons for Latin America from the Car Wash Operation

This article examines transparency, accountability, and judicial independence in combating corruption in Latin America, focusing on Brazil's Integrity System and the transnational Car Wash Operation. Recognizing the limitations of external anti-corruption frameworks and perception-based indices, my research here adopts a Latin American perspective to analyze the region's unique institutional challenges. Analysis reveals a critical paradox: while Brazil's institutional framework successfully investigated high-level corruption across multiple Latin American countries, serious procedural violations by key judicial actors threatened that investigation's legitimacy. Media coverage and leaked documents shaped public opinion, demonstrating transparency's dual role as both essential and potentially disruptive. The Supreme Court's intervention annulling tainted proceedings proved that the system's institutional checks and balances were strong enough to self-correct. I conclude that robust judicial independence, particularly through specialized electoral courts, combined with a free press and an engaged citizenry, is essential for democratic resilience. As anti-system leaders globally test democratic integrity systems, this article offers timely insights for Latin American countries navigating the complex balance between transparency and due process in anti-corruption efforts.

Keywords: integrity systems, public opinion, rule of law, anti-corruption frameworks, media influence.

Streszczenie

Luciana Romano Morilas

Transparentność, odpowiedzialność i niezawisłość sądownictwa w walce z korupcją w Brazylii – wnioski z Car Wash Operation w Ameryce Łacińskiej

W tym badaniu przeanalizowano transparentność, odpowiedzialność i niezależność sądownictwa w zwalczaniu korupcji w Ameryce Łacińskiej, ze u szczególnym uwzględnieniem roli Brazylijskiego Systemu Integracji oraz międzynarodowego działania Car Wash Operation. Biorąc pod uwagę ograniczenia działań zewnętrznych struktur antykorupcyjnych i stosowania przez nie wskaźników opartych na ich własnej percepcji, w niniejszym badaniu do analizy tego wyjątkowego wyzwania instytucjonalnego regionu przyjęto perspektywę Ameryki Łacińskiej. Analiza ta ujawnia poważny paradoks: podczas gdy brazylijskie instytucje skutecznie ścigały korupcję na wysokim szczeblu w wielu krajach Ameryki Łacińskiej, poważne naruszenia proceduralne dokonane przez kluczowych przedstawicieli wymiaru sprawiedliwości zagroziły legitymizacji tych antykorupcyjnych działań. Z jednej strony relacje medialne oraz wyciekające dokumenty kształtowały opinię publiczną, a z drugiej pokazywały podwójną rolę transparentności: niezbędną i potencjalnie destrukcyjną. Interwencja Sądu Najwyższego unieważniająca nieprawidłowości proceduralne udowodniła, że instytucjonalne mechanizmy kontroli i równowagi okazały się

wystarczająco silne, aby móc dokonać samonaprawy. Badanie potwierdziło, że dla stabilności demokracji niezbędna jest silna niezależność sądownictwa, zwłaszcza wyspecjalizowanych sądów wyborczych w połączeniu z wolną prasą i zaangażowaniem obywateli. W czasie, gdy przywódcy ruchów antysystemowych na całym świecie testują systemy spójności demokratycznej, niniejsze badanie oferuje aktualne informacje na temat krajów Ameryki Łacińskiej, które starają się utrzymać skomplikowaną równowagę między transparentnością a rzetelnym prowadzeniem procesu antykorupcyjnego.

Słowa kluczowe: systemy integralności, opinia publiczna, praworządność, ramy antykorupcyjne, wpływ mediów.

Shaun S. Yates
London Metropolitan University, United Kingdom
s.yates1@londonmet.ac.uk
ORCID: 0000-0003-2477-3019

Craig Lundy[1]
London Metropolitan University,
United Kingdom
c.lundy@londonmet.ac.uk
ORCID: 0000-0002-6087-1161

https://doi.org/10.26881/gsp.2025.4.06

A Revised Framework for Efficiency Reform Research: Reflections from the Lower Criminal Court Literature of England and Wales

1. Introduction

The aim of this article is to offer policy reform researchers a framework for effectively thinking about and implementing the concept of efficiency within the criminal justice system. The central problem that this article concerns itself with is that the literature, both historical and contemporary, has often used the word efficiency in an ambiguous or conflictual manner that brings into question thinkers' arguments. Pivaty and Johnston have similarly expressed concern regarding the problematic undertheorising of efficiency in the literature:

> On a general note, we observe that the concepts of "efficiency" or "effectiveness" as an underlying goal of criminal justice are incredibly complex and undertheorised. The discourse of "efficiency" may include different, and sometimes conflicting underlying ideas […] more research is needed into the meanings attached to "efficiency," "effectiveness" and related goals and values in criminal justice by different actors and in different contexts, and into whether and how these aspirations are translated into practice.[2]

While Pivaty and Johnston have focused on largely contemporary texts, the present article demonstrates that the problem they are commenting upon has been historical.[3] Often unknowingly, thinkers have advocated for multiple and often incompatible accounts of efficiency within their own works; for example, see the discussion of Packer and Le Vay in Section 3.[4] At other times, separate criminal justice thinkers

[1] As a Leverhulme Research Fellow, Dr Craig Lundy would like to acknowledge support received from the Leverhulme Trust.

[2] A. Pivaty, E. Johnston, *The move towards efficacy and managerialism in criminal justice: A global phenomenon* [in:] *Efficiency and Bureaucratisation of Criminal Justice Global Trends*, eds. A. Pivaty, E. Johnston, Oxon 2023, pp. 14–15.

[3] *Ibid*.

[4] H. Packer, *The Limits of the Criminal Sanction*, Stanford 1968; J. Le Vay, *Magistrates' Courts Report of a Scrutiny 1989. Volume 1*, UK 1989.

have established themselves as advocates for efficiency or inefficiency and, yet, these seemingly opposing thinkers support indistinguishable policy changes; for example, see the discussion of Marsh and Farrington in Section 3.[5] Certainly, as Pivaty and Johnston[6] indicate above, this level of complexity makes navigating the criminal justice efficiency reform literature a difficult task. This undertheorising of how to use the term efficiency obstructs the development of fruitful policy reforms. The purpose of this article is to aid socio-legal thinkers by offering them a framework that can help situate and evaluate different constructions of efficiency and, ultimately, to aid researchers in forming more coherent efficiency-reform ideas.

Rephrased, the heart of this article's argument is that efficiency researchers should use the framework presented here to improve the quality of criminal justice efficiency reform discussions. In support of this overarching argument, Section 2 establishes the context of the article by describing the rise of managerial efficiency from the 1980s in the English and Welsh criminal justice system; this is necessary as it provides the foundation for a deeper analysis of how policy thinkers have problematically conceptualised efficiency for reform ends. Section 3 builds from this context to establish that historically, key criminal justice thinkers such as Packer, Le Vay, Auld, and Leveson have used the term efficiency in ambiguous and often conflictual ways.[7] Section 4 then explains Macdonald's research framework, emphasising its useful aspects for navigating the efficiency-focused literature.[8] Section 5 then critiques and revises Macdonald's work, drawing upon some of the useful aspects of Chase's work.[9] In this way, Sections 3 through 5 serve to justify the current article's argument that a new framework would be useful for efficiency-focused policy reform thinkers: there has been a persistent, historical problem in the literature regarding how thinkers conceptualise and communicate efficiency reform ideas. Section 5 concludes by articulating a new, revised framework for future criminal justice efficiency-oriented research. Section 6 then offers some reflections from the authors, emphasising the imperfect-but-useful nature of this article's revised framework. Lastly, Section 7 summarises the key contribution of the article: that its framework can aid policy reform thinkers by helping them to navigate (situate and evaluate) the criminal justice literature's often irreconcilable accounts of efficiency.

Whilst this article is interested in efficiency in the criminal justice system in a broad sense, it focuses its discussion on the lower criminal court literature of England and

---

[5] L. Marsh, *Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process*, "Common Law World Review" 2016, vol. 45, no. 1, pp. 51–67; R. Farrington, *Summary Justice Are Magistrates Up to it?*, UK 2016.

[6] A. Pivaty, E. Johnston, *The move towards efficacy…*

[7] H. Packer, *The Limits of the Criminal Sanction*…; J. Le Vay, *Magistrates' Courts Report*…; R. Auld, *Review of the Criminal Courts of England and Wales*, London 2001; B. Leveson, *Review of Efficiency in Criminal Proceedings*, London 2015.

[8] S. Macdonald, *Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes*, "New Criminal Law Review" 2008, vol. 11, no. 2, pp. 257–311.

[9] *Ibid.*; S. Chase, *The Tyranny of Words*, New York 1938.

Wales. The researchers' specialist area of knowledge motivates this narrowing of the literature. This narrowing of focus also serves the article pragmatically; an analysis of all the efficiency literature regarding the criminal justice system (even if just limited to the UK) would be a project outside the scope of an article of this size. At the same time, the present text argues that researchers can learn lessons from the English and Welsh lower criminal court literature that are transferable to other criminal justice sectors. Certainly, domestic criminal justice processes typically rely on the overlapping contributions of many services including the police, the courts, the prison service, and the probation service amongst others. To this end, when this article discusses the criminal justice literature, it does so while largely focusing on the lower criminal court literature of England and Wales, but this has some transferable relevance to other criminal justice sectors, including potentially those outside the UK. Rephrased, the present article offers readers efficiency-related insights that may be applicable to their own specialised criminal justice context; the insights offered here are not necessarily limited to the lower criminal court process of England and Wales.

2. The rise of managerial efficiency

After reviewing the rise of neoliberalism and New Public Management in England and Wales since the 1980s, this section explains how thinkers have contested managerialism's prioritisation of efficiency over other traditional justice values (such as accessibility, openness, and fairness). This context is important because it emphasises the centrality of efficiency in the English and Welsh criminal justice literature for at least the prior forty years. Certainly, thinkers have long contested whether efficiency supports or diminishes the concept of justice; it has been the focal point in the lower criminal court literature.

According to Bell,[10] neoliberalism emerged in the 1980s when England and Wales (as well as other Western nations) embraced a more "laissez-faire," free-market-oriented approach to governing the public sector. In practical terms, the government oversaw the reallocation of work from the public sector to the private sector.[11] For example, see how in 1997 the private corporation G4S engaged in a Private Finance Initiative with the UK government to design, build and manage HM Prison Altcourse.[12] As another example, see the probation service's introduction of Community Rehabilitation Companies that oversaw the management of low-level offenders in the 2010s.[13] This ideological drive was motivated by the central belief that the "social good will be

[10] E. Bell, *Criminal Justice and Neoliberalism*, London 2011, p. 140.

[11] D. Harvey, *A Brief History of Neoliberalism*, Oxford 2005; L. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Durham 2009.

[12] A. Ludlow, *Privatising Public Prisons: Labour Law and the Public Procurement Process*, London 2015; Prison Reform Trust, *Private Punishment: Who Profits?*, PRT Briefing, London 2005.

[13] J. Deering, M. Feilzer, *Privatising Probation: Is Transforming Rehabilitation the End of the Probation Ideal?*, Bristol 2015.

maximized by maximizing the reach and frequency of market transactions"; this drive also encompassed bringing "all human action into the domain of the market".[14] Within this broad ideological shift, the style of management within remaining public services also shifted, taking on more business-like characteristics. The literature refers to this narrower shift within public services as New Public Management (hereafter NPM).[15]

This NPM shift in England and Wales emphasised that the concept of efficiency should feature more prominently in the running of public services, rendering them more business-like. From the 1980s onwards, the UK Prime Minister Margaret Thatcher emphasised the importance of efficiency in running public services, claiming that "we need more of it" and that "efficiency is not the enemy."[16] Thatcher's opposition leader, Neil Kinnock, similarly upheld support for the concept of efficiency, stating simply that "Justice and efficiency – the two go together."[17] The formation of Thatcher's "efficiency units" in the 1980s and Tony Blair's continued focus on efficiency policy reform from the late 1990s through the 2000s demonstrate the widespread political acceptance of efficiency in the reform of public services.[18] The framing of efficiency as normatively good continued under Prime Minister David Cameron's stewardship; he argued that efficiency was integral for a "smarter state."[19] Evidently, since the rise of NPM in the 1980s, a consistent political drive for greater efficiency has defined the UK government's administration of public services.

The value of efficiency was particularly prominent in terms of how NPM was applied to the reform of the lower criminal courts of England and Wales. Since the 1980s, a range of government-sponsored reports have argued that efficiency is a foundational value that substantiates the criminal courts' delivery of justice. As Le Vay has argued, "the courts need to be efficiently run if they are to dispense justice."[20] This is a sentiment similarly repeated by Auld: "the fundamental principles of a good system are that it should be just and efficient."[21] Similarly, the Runciman report, the Ministry of Justice's 2012 white paper, '*Swift and Sure Justice*,' and Leveson's 2015 '*Review of Efficiency in*

---

14 D. Harvey, *A Brief History of Neoliberalism*…, p. 3.

15 See: C. Hood, *A Public Management for All Seasons?*, "Public Administration" 1991, vol. 69, no. 1, pp. 3–19; *idem*, C. Scott, *Bureaucratic Regulations and New Public Management in the United Kingdom: Mirror-Image Developments?*, "Journal of Law and Society" 1996, vol. 23, no. 3, pp. 321–345; K. Walsh, *Public Service and Market Mechanisms*, London 1995.

16 M. Thacher, *Leader's speech, Brighton 1984*, British Political Speech, 1984, http://www.britishpoliticalspeech.org/speech-archive.htm?speech=130 [accessed: 2024.01.31].

17 N. Kinnock, *Leader's speech, Blackpool 1988*, British Political Speech, 1988, http://www.britishpoliticalspeech.org/speech-archive.htm?speech=194 [accessed: 2024.01.31].

18 C. Haddon, *Reforming the Civil Service – The Efficiency Unit: The Efficiency Unit in the early 1980s and the 1987 Next Steps Report*, Institute for Government, 2012, p. 6, https://www.instituteforgovernment.org.uk/publication/report/reforming-civil-service-efficiency-unit [accessed: 2024.01.31]; C. Dillow, *The End of Politics: New Labour and the Folly of Managerialism*, Petersfield 2007.

19 D. Cameron, *Prime Minister: My vision for a smarter state*, Gov.uk, 2015, https://www.gov.uk/government/speeches/prime-minister-my-vision-for-a-smarter-state [accessed: 2024.01.31].

20 J. Le Vay, *Magistrates' Courts Report*…, p. 39.

21 R. Auld, *Review of the Criminal Courts*…, p. 10.

Criminal Proceedings' all endorse a pro-efficiency stance.[22] All of these reports advocate for the centrality of efficiency in the courts' delivery of summary justice.

Yet, other thinkers have argued that the emphasis on managerial efficiency in the criminal justice system has degraded the quality of justice in the criminal courts. Moore is perhaps the most direct thinker who occupies this position; they have argued that the "quality of justice is being eroded by the drive towards managerial efficiency."[23] Meanwhile, Rhodes described NPM's emphasis on efficiency as the "hollowing out" of state services.[24] Lastly, Bohm and Ritzer have framed the modern criminal justice system as delivering "McJustice," likening it to the efficiency-driven model of McDonald's restaurants.[25] They have asserted that the primary benefit of a McDonaldised justice system is its efficiency and swiftness, with little to offer beyond that.[26] These thinkers highlight that when the criminal justice system prioritises efficiency over traditional values such as accessibility, openness, and impartiality, the overall quality of justice declines.[27] This critique points to a significant volume of opposition against the prioritisation of efficiency in shaping criminal justice policies.

In summary, since the 1980s, the issue of efficiency has been pivotal in the criminal justice literature. Typically, academics and non-government sponsored reports have provided critical accounts of efficiency reform, emphasising how a drive towards efficiency has the capacity to significantly erode the quality of justice. Central to this concern is that traditional values such as accessibility, verdict accuracy, and fairness are being deprioritised in favour of cost-savings, waste-mitigation, and speediness. Meanwhile, efficiency reform advocates have emphasised the managerial benefits, often arguing that wider normative and moral concerns do not need to be deprioritised. This debate underscores the importance of clearly defining what efficiency means. Indeed, a lack of communicative clarity may result in policy reformers

---

[22] G. Runciman, *The Royal Commission on Criminal Justice Report*, UK 1993; Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, London 2012; B. Leveson, *Review of Efficiency in Criminal Proceedings*, London 2015.

[23] R. Moore, *The Enforcement of Financial Penalties by Magistrates' Courts: An Evaluative Study*, PhD thesis, Birmingham 2001, p. 33.

[24] R. Rhodes, *The New Governance: Governing without Government*, "Political Studies" 1996, vol. 44, p. 652. Similarly argued: J. Deering, M. Feilzer, *Privatising Probation*…; C. Nicklas-Carter, *Efficiency of the English Criminal Courts in a Time of Austerity: Exploring Courtroom Lawyers' Assessment of Government Policy (2010–2017)*, PhD thesis, Keele 2019.

[25] R. Bohm, *"McJustice": On the McDonaldization of Criminal Justice*, "Justice Quarterly" 2006, vol. 23, no. 1, p. 127; G. Ritzer, *The McDonaldization of Society*, Thousand Oaks 1993, p. 36.

[26] R. Bohm, *"McJustice"*…; G. Ritzer., *The McDonaldization of Society*… See also G. Robinson, C. Priede, S. Farrall, J. Shapland, F. McNeill, *Understanding 'Quality' in Probation Practice: Frontline Perspectives in England & Wales*, "Criminology & Criminal Justice" 2013, vol. 14, no. 2, pp. 123–142.

[27] J. Spigelman, *The 'New Public Management' and the Courts*, "Australian Law Journal" 2001, vol. 75, pp. 1–46; J. Raine, *Modernising Courts or Courting Modernisation?*, "International Journal of Public Sector Management" 2001, vol. 13, no. 5, pp. 390–416; *idem*, M. Willson, *Beyond Managerialism in Criminal Justice*, "The Howard Journal of Criminal Justice" 1997, vol. 36, no. 1, pp. 80–95; *iidem*, *New Public Management and Criminal Justice*, "Public Money & Management" 1995, vol. 15, no. 1, pp. 35–40; S. Yates, *Over-efficiency in the Lower Criminal Courts: Understanding a Key Problem and How to Fix It*, UK/USA 2024.

not fully understanding the risks or benefits of a given efficiency idea. The following section demonstrates how key thinkers in the literature often provide contradictory or unhelpfully ambiguous accounts of efficiency which obstruct the development of useful policy reforms.

3. Efficiency's conflicting conceptualisations

The efficiency-related criminal justice policy reform literature is particularly difficult to navigate because it often offers ambiguous and conflicting accounts of what it means to be efficient. In support of this point, this section begins by explaining that although the government-sponsored reports of Le Vay, Auld, and Leveson have a pro-efficiency stance, their conceptualisations of efficiency are in conflict.[28] Following this, this section draws attention to how the typically critical academic literature similarly offers wide-ranging and differing accounts of efficiency. Lastly, this section demonstrates how thinkers such as Packer and Le Vay offer multiple irreconcilable conceptualisations of efficiency in their own work that they then use interchangeably.[29] Taken together, these points provide evidence to support the claim that it is often unclear what efficiency advocates are attempting to achieve and what efficiency critics are critical of. More directly, this section establishes some of the key problematic issues that justify this article's offering of a new framework for efficiency-focused policy reform research.

As established in the prior section, Le Vay, Auld, and Leveson have argued for greater efficiency in the English and Welsh criminal justice process.[30] Yet, these thinkers' conceptualisations are conflictual, bringing into question what it means to argue for greater efficiency in the lower criminal courts. Auld advocates for efficiency in the form of magistrates receiving greater training and enabling them to move beyond their local area: "there should be a ready mechanism for enabling them, when required, to sit in adjoining areas." Auld's efficiency proposal would have likely offended Le Vay, who argues that the magistrates' courts fundamentally rely on "the delivery of local, summary justice by local, lay people."[31] Indeed, for Auld, magistrates promote efficiency by working beyond their local area; and for Le Vay, magistrates must retain their local focus as a prerequisite for efficiency. In terms of policy reform, therefore, these two pro-efficiency thinkers are at loggerheads.

Critics of the above assessment may argue that this observed discrepancy between the efficiency visions of Auld and Le Vay is not as fatal as suggested here. One could argue that as long as policy reform researchers share an overall vision of efficiency

---

28 J. Le Vay, *Magistrates' Courts Report…*; R. Auld, *Review of the Criminal Courts…*; B. Leveson, *Review of Efficiency…*

29 H. Packer, *The Limits of the Criminal Sanction…*; J. Le Vay, *Magistrates' Courts Report…*

30 J. Le Vay, *Magistrates' Courts Report…*; R. Auld, *Review of the Criminal Courts…*, p. 101; B. Leveson, *Review of Efficiency…*

31 R. Auld, *Review of the Criminal Courts…*; J. Le Vay, *Magistrates' Courts Report…*, p. 39.

in terms of "doing more with less," the *means* by which to achieve this vision are arbitrary, or at least a separate issue. Our article refutes this criticism because such means-based differences are the primary concern of policy reform work. Whilst it may be true that Auld and Le Vay share a broad conceptual vision of efficiency, if this results in conflicting directions for how to change real-world practices, this brings into question the usefulness of such an abstraction.[32] It would, of course, be impossible to keep magistrates in their local areas whilst simultaneously reallocating magistrates to different regions. Consequently, in order to avoid frustrating policy reform overseers, researchers should be specific when it comes to defining the means (not just the abstract ends) of efficiency.

Further demonstrating this conflict, there is evidence to support the claim that Leveson's efficiency vision would offend both Auld and Le Vay.[33] Leveson proposes that magistrates' courts (and particularly magistrates themselves) should process cases that are ordinarily disposed of in the Crown Courts. According to Leveson, this would be for greater efficiency because it would lower the cost needed to dispose of cases, owing to the lower criminal courts' focus on speediness and use of volunteer judges (magistrates). In contrast to Leveson's vision, Auld's conceptualisation of efficiency prioritises a new form of court specialisation, arguing that the government should establish a new middle-tier "District Court" which would sit between the magistrates' courts and Crown Court.[34] Contrary to Leveson's (2015) position, Auld is certain that "there should be no significant change in the balance of numbers of District Judges and magistrates, or in the relative volumes or nature of summary work assigned to each of them."[35] Instead, Auld argues that the UK government should establish a new structure within the court system that allows more specialised and arguably appropriate time parameters and processes for judicial staff to dispose of cases. Again, there is a conflict here in the literature regarding what it means to be efficient in delivering criminal justice: Auld argues against the redistribution of work to the magistrates' courts, whereas Leveson is in favour of it. Meanwhile, Le Vay may well have protested Leveson's efficiency policy reform recommendation on the basis that it would further erode the lay status of magistrates by having them take on more cases, effectively making them case-hardened. In these few examples, it is notable how Le Vay, Auld, and Leveson's conceptualisations of what efficiency means are in conflict. This is despite all three thinkers being vocal efficiency advocates, each arguing that efficiency is normatively good and that more of it should be a goal of reformers. Again, this draws policy reform thinkers' attention to the importance of detailing what it means (or should mean) for the courts to deliver efficient criminal justice.

The wider academic literature also offers varying, often conflictual accounts of efficiency. Marsh has argued for reforms that challenge the "real inefficiencies" of the

---

32 R. Auld, *Review of the Criminal Courts*…; J. Le Vay, *Magistrates' Courts Report*…

33 B. Leveson, *Review of Efficiency*…; R. Auld, *Review of the Criminal Courts*…; J. Le Vay, *Magistrates' Courts Report*…

34 B. Leveson, *Review of Efficiency*…; R. Auld, *Review of the Criminal Courts*…, p. 280.

35 B. Leveson, *Review of Efficiency*…; R. Auld, *Review of the Criminal Courts*…, p. 114.

process, while criticising Leveson for undertheorising what it means to be inefficient.[36] In this way, Marsh is an efficiency advocate but disagrees with Leveson, who somewhat paradoxically also claims to be an efficiency advocate. Unlike Leveson, Marsh frames greater efficiency in the criminal justice process as being attached to more robust standards for ensuring accurate verdicts of guilt. Complicating matters further, Farrington argues in favour of inefficiency.[37] For Farrington, inefficiency is normatively good because it ensures that the courts can commit to "a proper judicial standard" which involves, in part, the costly but accurate allocation of guilty verdicts and the delivery of punishments.[38] To this end, despite Farrington advocating for inefficiency, and Marsh advocating for efficiency, substantively these two thinkers are arguing for the same ends.[39] Certainly, therefore, conceptualisations of efficiency are wide-ranging in the criminal justice literature: advocacy for efficiency does not necessitate agreement on how practices should change or on the ends that those practices should seek to achieve.

Thinkers also have conflicting, inconsistent conceptualisations of efficiency within their own work. For example, in some sections of Le Vay's text, he argues that efficiency relies on the scrutiny of "the relationship of resources and work" and ultimately, efficiency equates with financial savings in "cost per case" terms.[40] Yet, at other times, Le Vay has argued that in the interests of promoting greater efficiency, there should be substantially greater funding given to IT projects (the digitisation of court work), the hiring of more staff to prevent case delays, and the development of a costly national management agency. Under this latter conceptualisation, Le Vay frames efficiency as dedicated to delay mitigation, restating the adage "justice delayed is justice denied."[41] In Le Vay's work, therefore, efficiency simultaneously refers to cost-savings (which may generate delays) and delay mitigation (which will incur greater costs). Rephrased, Le Vay's 1989 work presents reformers with an inconsistent understanding of what it means to be efficient in the criminal justice process.

Critics may argue here that this is simply a misreading of Le Vay, as overcoming delays and reducing running costs (costs per case) are compatible goals. Problematically, however, Le Vay does not establish when each conceptualisation of efficiency should be the priority when they inevitably come into conflict. Indeed, what is the criterion that renders spending sufficiently efficient? Le Vay is somewhat tacitly aware that his conceptualisation of efficiency was inconsistent: sometimes he equates efficiency to cost savings, at other times he equates it with increased spending that results in a speedier or more modernised/digitised process; "improvements in efficiency are not invariably expressed in reduced spending."[42] Again, therefore, this produces a difficult

---

36 L. Marsh, *Leveson's Narrow Pursuit*…, p. 51; B. Leveson, *Review of Efficiency*…

37 R. Farrington, *Summary Justice*…

38 *Ibid.*, p. 83.

39 L. Marsh, *Leveson's Narrow Pursuit*…

40 J. Le Vay, *Magistrates' Courts Report*…, pp. 3 and 30.

41 *Ibid.*, p. 39.

42 *Ibid.*, p. 59.

task for the policy reformer because it is unclear what efficiency means in the criminal justice process: what is the exact goal and means by which to achieve efficiency? Le Vay's work forthrightly claims that it is specifically directed towards offering such policy reform ideas; therefore, it should be more exacting on this issue. Such ambiguity is problematic for mobilising real-world, concrete change.

Similarly, multiple distinct conceptualisations of efficiency emerge when examining Packer's work, and problematically, these conceptualisations often interchange with each other.[43] This is a point that is articulated in Macdonald's work.[44] As Macdonald demonstrates, Packer's framing of efficiency reflects three distinct forms: "investigative efficiency," "operational efficiency," and "deterrent efficacy."[45] In greater detail, Macdonald argues that Packer sometimes uses the term efficiency in the sense that the police are reliable finders of truth (investigative efficiency). Meanwhile, in other extracts, Packer uses the term efficiency to mean that the courts operate speedily when assigning verdicts of guilt and innocence (operational efficiency). Finally, Macdonald argues that Packer sometimes uses the term efficiency to mean that a reliable criminal process can have a crime deterrent effect in society (deterrent efficacy). These varying conceptualisations become a problem when Packer uses the term efficiency without explicit reference to what he means. It becomes unclear whether he is discussing police fact-finding, in-court speediness, or a macro-level crime deterrent effect, or perhaps something else entirely when he discusses criminal justice efficiency. Consequently, the task of the policy reformer becomes difficult when Packer does not provide adequate concrete context regarding how he uses the term.

In summary, it is evident that whilst the issue of efficiency has occupied a significant portion of the historical criminal justice reform literature, there is conflict within this literature about what efficiency means (or should mean). This is despite some thinkers' claiming to be united in either their advocacy of or critical stance towards efficiency in the criminal justice process. Additionally, criminal justice reform thinkers[46] have offered conflicting accounts of what efficiency means within their own work, adding an additional layer of confusion about what it is they are arguing for when speaking of efficiency reform. Collectively, this section has drawn attention to how there are complexities within the criminal justice efficiency reform literature which are a problem for policy reformers: conceptualisations of efficiency are often ambiguous and conflictual, across and within thinkers' works.

---

43 H. Packer, *The Limits of the Criminal Sanction*…

44 S. Macdonald, *Constructing a Framework*…

45 *Ibid.*, pp. 26–28; H. Packer, *The Limits of the Criminal Sanction*…

46 Such as J. Le Vay, *Magistrates' Courts Report*…; H. Packer, *The Limits of the Criminal Sanction*…

4. Applying Macdonald's framework

Developing from the work of Packer, this section argues that the work of Macdonald offers useful insights for situating and evaluating various (often ambiguous and conflictual) conceptualisations of efficiency that exist in the criminal justice process literature. This section supports this argument by first explaining Macdonald's claim that "to adopt a simple yes/no approach to the different ways in which values are held, as Packer did, is inadequate" and that instead, researchers should adopt a multidimensional framework.[47] Second, this section explains Macdonald's interpretation of Max Weber's work, and how criminal justice thinkers can understand accounts of efficiency as either non, weak, or strong ideal-types. These types aid readers in clarifying the various perspectives within the efficiency reform literature, ultimately drawing attention to how it is an oversimplification to frame this literature as representing two camps (those for efficiency and those critical of efficiency). Certainly, it is better to view the conceptualisations of efficiency that are present in the literature as resembling a constellation of differing interpretations. Throughout, this section draws upon the ideas of thinkers discussed in Sections 2 and 3, demonstrating the merits of Macdonald's framework for navigating the contemporary efficiency-oriented policy reform literature. This is necessary for the subsequent section of this article which seeks to advance Macdonald's research framework.

To begin, it is necessary for researchers to accept a multidimensional framework in order to avoid making incorrect assumptions about how different values relate to each other. This is a point argued by Macdonald when criticising Packer's) spectrum-based framework for understanding values in the criminal justice process. Indeed, Packer's framework problematically accepts that:

> There are people who see the criminal process as essentially devoted to values of efficiency in the suppression of crime. There are others who see those values as subordinate to the protection of the individual in his confrontation with the state. A severe struggle over these conflicting values has been going on in the courts of this country for the last decade or more.[48]

To this end, Packer frames efficiency as being dichotomously opposed to civil protections. He later articulates this dichotomy of social values as the Crime Control and Due Process models of criminal justice. Macdonald contests this framing, arguing that values do not exist on a spectrum of "polar opposites" and that it is a falsehood to believe that as "adherence to one set of values increases so adherence to the other set necessarily diminishes."[49] Rather, Macdonald argues that social values (such as efficiency) are interpretative, and that values can be supportive of each other either because they are subjectively defined in an overlapping manner, or because the consequences of some contexts demand it. Efficiency and civil protection

---

47 S. Macdonald, *Constructing a Framework*…, p. 2.
48 H. Packer, *The Limits of the Criminal Sanction*…, p. 4.
49 S. Macdonald, *Constructing a Framework*…, p. 68.

practices/processes do not necessarily have to be in competition or categorical. The merits of Macdonald's multidimensional framework can be further observed when examining the relationship between Packer's civil protection and efficiency values more closely. Consider, for example, how a policy reformer may eliminate some dubious fact-screening processes that occur in the criminal courts in order to reduce the state's capacity to commit abuses of power. Such a policy change would result in an unnecessary process (a dubious fact-screening process) being removed from the criminal court system, allowing the swifter suppression of crime in society. In this example, efficiency gains are compatible with civil protection gains, the two values are not mutually exclusive as Packer's work suggests. To reiterate using the phraseology of Macdonald, "a simple yes/no approach to the different ways in which values are held, as Packer did, is inadequate."[50] As this demonstrates, Macdonald's multidimensional framing of values is superior to Packer's.

Second, Macdonald offers a useful interpretation of Max Weber, specifically regarding how accounts of efficiency can be either non, weak, or strong ideal-types. As Macdonald explains, there is a distinction between a simple description of practice in a plain analytic sense (a non-ideal-type), a construct that is a prescription for what normatively ought or should be (a weak ideal-type) and finally, a purely logical theoretical construct which is useful for thought experimentation and exposition (a strong ideal-type). Before advancing further, it is necessary to explain these typologies in greater detail:

For Macdonald, a non-ideal-type is "a description of a particular strategy or approach (historical or proposed)."[51] For example, Leveson (2015) describes the use of live link video conferencing technology as a means by which to promote greater efficiency because of how it can reduce the need for prisoners to travel to the courthouse.[52] To this end, Leveson's video conferencing account matches the non-ideal-type because it serves as a description of what efficiency looks like in practical terms. This is perhaps the simplest of Macdonald's types; it refers to specific practices that could be interpreted as being for efficiency.

Meanwhile, Macdonald frames a weak ideal-type as a construct that can be used as "a prescription of what ought to exist."[53] This construction type is applicable to the latter half of Le Vay's work, where he frames efficiency in terms of "justice delayed is justice denied."[54] This is a distinct type of conceptualisation because it relies on a normative claim: delays obstruct a good outcome (justice). As Le Vay writes, "we firmly reject the proposition that there is something objectionable about bringing considerations of efficiency and effectiveness to bear on the running of courts."[55] This conceptualisation moves beyond a simple description of what does or can exist, it argues instead for

50 *Ibid.*, p. 19.
51 *Ibid.*, p. 77.
52 B. Leveson, *Review of Efficiency…*
53 S. Macdonald, *Constructing a Framework…*, p. 77.
54 J. Le Vay, *Magistrates' Courts Report…*, p. 39.
55 *Ibid.*

what should or ought to exist; it becomes a normative goal. This isolated, normative understanding of efficiency can be compared with that of Jones.[56] In this work, efficiency is framed as the technical relationship between a high rate of convictions compared to a low financial/administrative cost for a given courthouse. At the same time, Jones clarifies that "it must be recognized that this search for efficiency may itself undercut substantive justice ends."[57] For Jones, normative claims are decoupled from plain, analytic efficiency constructions. There is a distinction then between descriptions of practice (the non-ideal-type) and claims about what is normatively desirable (the weak ideal-type).

Importantly, Macdonald emphasises that weak ideal-types require rationalisation, as it is on this basis that such conceptualisations are justified and can be contested. Indeed, it is on this rationalisation basis that policy reform researchers can criticise and disregard some conceptualisations of efficiency.[58] With this framework, Le Vay's work can be criticised on the basis that they do not offer an in-depth explanation as to why justice delayed is justice denied, they simply assert it.[59] This is in contrast to Herbert[60] who also argues for greater efficiency in the criminal court context, stating the same adage, "justice delayed is justice denied." Unlike Le Vay, Herbert offers an in-depth rationalisation for this claim, tethering speediness to the "interests of victims, witnesses and the public" and arguing that delays deny historical legislative directions enshrined in the Magna Carta.[61] By applying Macdonald's framework, policy reform thinkers can disregard Le Vay's conceptualisation of efficiency whilst accepting Herbert's: Le Vay's account is comparatively under-rationalised and, ultimately, is less able to stand up to critical scrutiny.[62]

This weak ideal-type construction also helps clarify how thinkers such as Le Vay, Auld, Leveson, and Marsh can all be advocates for efficiency but be in conflict about what this actually means in practice.[63] Whilst all these thinkers offer arguments for greater efficiency in the criminal justice process, their justifications for this vary, often significantly. Le Vay, for example, argues that preserving the laity and localness of magistrates is a normative goal of efficiency. Meanwhile, Marsh argues that preserving verdict accuracy is a normative goal of efficiency. Leveson on the other hand, emphasises that speediness and cost-savings ought to be the goal of efficiency reforms. From these varying normative accounts of efficiency (otherwise known as weak ideal-types), each thinker proceeds to develop equally varying real-world reform recommendations (otherwise known as non-ideal-types). In this way, Auld, Leveson,

---

56 C. Jones, *Auditing Criminal Justice*, "British Journal of Criminology" 1993, vol. 33, no. 2, pp. 187–202.
57 *Ibid.*, p. 190.
58 S. Macdonald, *Constructing a Framework…*
59 J. Le Vay, *Magistrates' Courts Report…*
60 Ministry of Justice, *Swift and Sure Justice…*, p. 3.
61 J. Le Vay, *Magistrates' Courts Report…*; Ministry of Justice, *Swift and Sure Justice…*, p. 3.
62 S. Macdonald, *Constructing a Framework…*; J. Le Vay, *Magistrates' Courts Report…*; Ministry of Justice, *Swift and Sure Justice…*
63 J. Le Vay, *Magistrates' Courts Report…*; R. Auld, *Review of the Criminal Courts…*; B. Leveson, *Review of Efficiency…*; L. Marsh, *Leveson's Narrow Pursuit…*

and Marsh are united only in a superficial sense as advocates for efficiency. Upon closer inspection, it becomes clear that their ideas of efficiency are distinct because of their equally distinct normative claims (their weak ideal-type constructions) and because of their differing practical real-world change recommendations (non-ideal-type constructions). Rephrased more simply, Macdonald's framework helps readers identify how the literature often uses the term efficiency in unique ways, rendering what it means to be an efficiency advocate somewhat meaningless. Instead, Macdonald's framework suggests readers should focus on how writers use the term efficiency to signpost a normative end, and/or how writers use the term to describe a practice or process.[64] This more sophisticated framework helps to clear the semantic confusion that surrounds the criminal justice efficiency literature.[65]

Similarly, this framework provides greater clarity regarding the discrepancy between Marsh and Farrington.[66] To reiterate Section 3, Marsh is for efficiency, whereas Farrington is for inefficiency. Yet, these two thinkers both adopt similar normative accounts of what is desirable; namely, processes that ensure verdict accuracy. In this way, Marsh and Farrington are opposed only in a superficial sense: they agree on what is normatively desirable despite their framing of what is efficient/inefficient. Macdonald's framework is useful therefore because it allows readers to recognise that it is an oversimplification to frame the literature as resembling the two irreconcilable, dichotomous camps of efficiency reform advocates and efficiency reform critics (which Packer's framework encourages).[67] Certainly, there is great variety regarding thinkers' normative constructions of efficiency as well as their visions for how such goals can be practised in real-world terms.

The final type that Macdonald offers is the strong ideal-type. This is a "purely logical" theoretical construct which offers a "one-sided accentuation of one or more points of view."[68] As Weber explains, an ideal-type of this kind is a "mental construct [that] cannot be found empirically anywhere in reality."[69] This type of construction is exemplified in the aforementioned "investigative efficiency" (see Section 3) because this construction relies on the police/prosecution being inerrant and infallible truth-seekers.[70] This is, of course, an impossible reality. Whilst such strong ideal-type theoretical constructions are useful because they aid in thought experimentation and exposition, Macdonald contends that they cannot be used as policy reform recommendations because of their extreme impractical character.

In conclusion, the work of Macdonald is evidentially valuable because of how it helps researchers logically situate and evaluate different conceptualisations of efficiency within the criminal justice policy reform literature. Macdonald provides

64 S. Macdonald, *Constructing a Framework*…
65 Compared to H. Packer, *The Limits of the Criminal Sanction*…
66 L. Marsh, *Leveson's Narrow Pursuit*…; R. Farrington, *Summary Justice*…
67 H. Packer, *The Limits of the Criminal Sanction*…
68 S. Macdonald, *Constructing a Framework*…, p. 16.
69 *Ibid.*, p. 46.
70 *Ibid.*, p. 26.

a framework that differentiates between three constructions of efficiency (the non, weak, and strong ideal-type), emphasising their different uses and their distinguishing criteria. These constructions show that viewing the literature as simply divided into proponents and critics of efficiency reform is an oversimplification. Instead, it is better to frame the literature as multidimensional: it offers various efficiency constructions that are either normative claims, descriptions of practice, or thought experiments. Collectively, Macdonald's framework forms a useful basis for navigating the criminal justice efficiency reform literature; however, as discussed in the next section, there is room for improvement here.

5. A revised framework for policy reform researchers

This section revises Macdonald's conceptual framework to enable criminal justice thinkers to better navigate the efficiency reform literature.[71] First, this section explains and then applies Chase's claim that abstractions can obstruct useful communication about real-world affairs, and subsequently, this section argues that Macdonald's framework should make use of a new construction type, the 'high-order abstraction'.[72] Second, this section argues that Macdonald's framework would benefit from simplification, drawing attention to some of his unnecessary labelling choices. Third, this section argues that Macdonald's framework should be expanded to more explicitly integrate quantitative accounts of efficiency, enhancing his framework's explanatory power. In addressing these points, this section serves to finalise its justification argument for why a revised framework would be beneficial for efficiency-focused criminal justice researchers. Following this, this section offers a summarised table of its revised framework, demonstrating its ability to provide additional insight and clarity regarding seemingly irreconcilable accounts of efficiency that exist in the criminal justice literature. Collectively, and to reiterate, this section justifies and presents the article's key contribution to readers: an improved framework for efficiency-focused policy reform research.

To begin, Chase's work offers insights that can enhance Macdonald's original framework, specifically regarding how high-order abstractions can obstruct the development of clear policy reform recommendations. As Chase explains, an abstraction refers to the labelling of "clusters and collections of things," with higher abstractions being "essences and qualities."[73] Meanwhile, a referent is "an object or situation in the real world to which [a] word or label refers."[74] The distinction, therefore, is that abstractions are ambiguous and conceptual while referents are concrete and empirical. Chase argues that when writers use high-order abstractions (rather

71 *Ibid.*
72 S. Chase, *The Tyranny of Words*…
73 *Ibid.*, p. 6.
74 *Ibid.*, p. 5.

than referents) to explain other high-order abstractions, the actionable meaning of statements is problematically obscured. To this end, when the criminal justice literature offers a conception of efficiency without some connection to real-world situations or objects (a referent), the meaningfulness of this literature is significantly reduced for policy reform purposes; indeed, it is unclear how to implement a policy reform that makes use of such a vague conceptualisation of efficiency.

Chase's concerns regarding the action-undermining aspect of abstractions can be applied to Kinnock's use of efficiency (previously discussed in Section 2).[75] In explaining what efficiency is, Kinnock recounts:

> you can get some form of efficiency by ignoring social justice. You can say that you are slimming down, sharpening up, shaking out, and call it efficiency.[76]

In this extract, it is unclear what "social justice," "slimming down," "sharpening up," and "shaking out" mean. These are abstractions that have unclear real-world referents. This ambiguity would not be problematic if these terms received expansion in the remainder of Kinnock's statements. Kinnock, however, fails to do this. As a consequence, if readers are to acquire an understanding of Kinnock's efficiency, they must examine the wider historical and political context of Kinnock's statement, going beyond the text, and then make inferences of a sort that amounts to guesswork. To focus only on Kinnock's use of "social justice" in the above extract, it is unknown whether he is referring to the establishment of increased human rights protections, positive action, anti-racism legislation, or something else entirely. This example draws attention to how Chase's work can be used to enhance Macdonald's framework, by offering insight into how highly abstracted constructions of efficiency can be criticised for lacking clarity.[77] High-order abstractions of this type obstruct effective communication about concrete, real-world affairs; and therefore, Macdonald's original framework should be expanded in order to help users identify such undesirable constructions of efficiency.

To use another more contemporary example, consider the problematic use of efficiency in the Justice and Home Affairs Committee's (JHAC) 2023 report. This work is particularly relevant to the focus of this article because of how it is specifically a policy reform recommendation document. Indeed, it should be exceptionally clear in its prescriptions of policy change. One of JHAC's recommendations is as follows:

> The imposition of rehabilitative requirements should be guided by the individual circumstances of the case so as to ensure maximum efficiency of sentences.[78]

In this extract, it is unclear what is meant by "maximum efficiency of sentences." It could mean the ability of a sentence to reduce reoffending, or it could mean to improve

---

[75] N. Kinnock, *Leader's speech*…

[76] *Ibid.*

[77] S. Chase, *The Tyranny of Words*…; S. Macdonald, *Constructing a Framework*…

[78] JHAC, *Cutting crime: better community sentences*, Justice and Home Affairs Committee, UK 2023, p. 10.

offenders' compliance rates with rehabilitative requirements, or it could mean to achieve cost-savings in delivering rehabilitative sentences, or something else entirely. It is unclear how efficiency is to be understood here even when read in the wider context of the document. The term is left unhelpfully abstract; it requires defining: what is the "maximum efficiency" of a sentence?

This problem is demonstrated further when examining the Ministry of Justice's 2024 report that responds directly to JHAC's above policy reform recommendation, stating that:

> We agree. The Probation Service seeks to ensure efficiency of sentences by both maximising use of court time and considering individual circumstances to recommend the most appropriate sentencing option(s) in PSRs [Pre-Sentence Reports].[79]

Here, the Ministry of Justice has imposed its own interpretation regarding what it means to be efficient, rendering the statement "we agree" somewhat meaningless. As it was unclear what the efficiency goal was of JHAC, the Ministry of Justice cannot state that they agree with their recommendation in a meaningful sense. What has happened here is that the Ministry of Justice has offered their own account of what it means to be efficient, bringing into question the purpose of the JHAC making a policy reform recommendation.

Compounding the issue, the Ministry of Justice's 2024 report relies on abstractions to fully explain its interpretation of efficiency. For the Ministry of Justice, "maximum efficiency" means "maximising use of court time"; but what does this mean?[80] Perhaps it means that probation officers should be stationed in the courthouse for the longest allowed time period, ensuring that they are available whenever they are needed. Or perhaps to "maximise use of court time" means that more probation officers should be stationed in the courthouse, so that there is never an opportunity when a probation officer is unavailable. Or perhaps this phrase means that probation officers who are stationed in court should write as detailed reports as possible, in the time allotted to them as to better inform sentencers. Or again, it could be something else entirely. To restate, while the Ministry of Justice does attempt to link this reform recommendation to real-world, concrete practice (probation officers' use of Pre-Sentence Reports), it remains unclear what exactly efficiency means in this context. Despite attempting to rectify the ambiguity issues that are present in the JHAC report by offering their own more detailed account of what it means to achieve "maximum efficiency," they have ultimately used one abstraction to explain another resulting in ineffective communication. Understandably, this form of vague, interpretative communication is unhelpful for effective policy reform because it is unclear how exactly practice should be improved.

---

[79] Ministry of Justice, *Cutting Crime: Better Community Sentences Response from the Ministry of Justice to the Justice and Home Affairs Committee*, UK 2024.

[80] *Ibid.*, p. 29.

Consequently, the present article argues, first, that Macdonald's framework should be expanded to incorporate a new construction type, the "high-order abstraction." This follows in the prior discussion of Chase regarding how constructions of efficiency can have their meaning obscured by an over-reliance on abstract terms, as is the case with Kinnock, JHAC, and the Ministry of Justice.[81] This type serves to warn researchers of undesirable constructions that are worthy of criticism, owing to their unhelpful ambiguity.

Second, Macdonald's typological framework can be simplified. As explained in the prior section, the non-ideal-type centres on "a description of a particular strategy or approach (historical or proposed)."[82] This construction type is rephrased here as a "referent-based construction" because it has more to do with the collection of descriptive labels of empirical, real-world things and situations[83] than it does with the general concept of ideal-types. Certainly, it would be logical to label a type by what it is (based on referents), rather than what it is not (a non-ideal).

Further, Macdonald's weak ideal-type could be improved. The distinguishing feature of this construction type is its normative grounding: it functions to make claims about what ought or ought not to be. This normative grounding is at odds with ideal-types as prescribed by Weber, as Macdonald recognises himself: "[the ideal-type has] no connection at all with value-judgments, and it has nothing to do with any type of perfection other than a purely logical one."[84] Therefore, a more indicative label for Macdonald's weak ideal-type construction would be the "normative construction" type, signifying its grounding in claims of what ought to be. Macdonald's remaining construction type, the "strong ideal-type," can therefore be relabelled simply as the "ideal-type," thereby more accurately reflecting Weber's original phraseology without the addition of "strong"; it is simply an ideal-type.[85]

Third, Macdonald's framework can be improved further by explicitly integrating quantitative (rather than just qualitative) constructions of efficiency. This process of applying numeric representation (measurement) to indicators (specific empirical observations) is known as operationalisation.[86] This process allows abstract terms (such as efficiency) to gain quantitative meaning by becoming grounded in empirical, measurable parameters. For example, see Le Vay's "cost per case" metric or Leveson's discussion of "cracked" trials (the number of trials that do not go ahead as planned).[87] In view of this, it is logical to group such quantitative accounts of efficiency in the aforementioned referent-based construction type as they hold a close relationship

---

81 S. Chase, *The Tyranny of Words*…; N. Kinnock, *Leader's speech*…; JHAC, *Cutting crime*…; Ministry of Justice, *Cutting crime*…

82 S. Macdonald, *Constructing a Framework*…, p. 77.

83 As described in S. Chase, *The Tyranny of Words*…

84 S. Macdonald, *Constructing a Framework*…, p. 16.

85 *Ibid.*, p. 67.

86 Also see operationalism as discussed by P.W. Bridgman, *The logic of modern physics*, New York 1927; also see A. Bryman, *Social Research Methods*, 6th ed., Oxford 2021.

87 J. Le Vay, *Magistrates' Courts Report*…, p. 31; B. Leveson, *Review of Efficiency*…, p. 20.

Table 1. Integrated revised typological framework drawing on Chase, Packer and Macdonald

	What is it?	How might thinkers use it?	Example
Referent-Based Constructions	A thinker creates a referent-based construction by describing actual or possible real-world practice. This involves detailing actionable situations including the people/objects within those situations in technical, concrete terms. Such constructions are empirical and can be qualitative (a description of practice) or quantitative (following the aforementioned operationalisation process).	Thinkers can use referent-based constructions to describe a prominent practice or a collection of practices that do or could exist in the real-world. The usefulness of such a construction can be to offer an overview of what current practices define the criminal justice system in a purely analytic sense. For policy reform purposes, thinkers can pair a referent-based construction with a normative construction, to propose what should be or what should not be. By itself, however, referent-based constructions cannot make such normative claims.	See Jones's account of efficiency. Here, efficiency is framed as the production of convictions at the lowest administrative and financial cost in a given courthouse. Whether this is normatively desirable is a separate issue. As Jones emphasises, "it must be recognized that this search for efficiency may itself undercut substantive justice ends." Jones's account acts only as a description of what can be, not what ought to be.

Normative Constructions	A thinker creates a normative construction by offering a rationalisation that justifies what is or is not desirable. Wherever possible, a thinker's rationalisation should build directly upon concrete referents. The result is that abstractions are kept to a minimum and clarity of communication is preserved.	Policy reform researchers can use normative constructions as a general direction for policy reform, outlining what conceptually ought or ought not to be. Researchers can also compare and criticise normative constructions based on their rationalisations: whether they are substantively supported or not.	See Ward's account of efficiency. Here, Ward argues that "efficiency within the criminal courts ought to be being based on the way people experience their passage through them." Ward (2014) supports this argument in part by explaining how court users (a concrete referent) are more likely to report a positive experience and subsequently take a positive view of the justice system if they feel listened to by court staff. This can have positive effects such as increased court user compliance with court orders. In this way, Ward offers a rationalisation of why this vision of efficiency is normatively desirable.
Ideal-Type Constructions	A thinker creates an ideal-type by taking a referent-based construction and accentuating select features and practices to their logical extremes. This is to the degree that it becomes non-implementable in practical terms.	Thinkers can use the ideal-type construction to aid in thought experimentation and exposition. From these thought experiment-based discussions, thinkers can develop ideas that may aid in the forming of normative rationalisations about how the criminal justice process should be. Thinkers cannot sensibly frame ideal-type constructions as a normative or directly-actionable policy reform goal because of their extreme theoretical, non-practical nature.	See Macdonald's 'investigative efficiency', which presumes "the police/prosecutorial screening process is a perfectly reliable indicator of legal guilt." This construction is not implementable in practice but can be used for thought experimentation and exposition.

Table 1 (cont.)

High-Order Abstractions	A thinker creates a high-order abstraction when they attempt to construct one of the other types listed here but they overuse abstract terms. This is to the degree that the thinker's account of efficiency is effectively meaningless. Such constructions require significant interpretation that amounts to guesswork before they can be implemented in practice.	The only use of this construction type is for criticism. This construction type is undesirable for policy reform research purposes because it relies too heavily on abstractions (rather than real-world specificities). It impedes meaningful discussions about real-world practicalities. A critic can use the label of "high-order abstraction" to signpost that a particular construction is not useful for policy reform work.	See Kinnock's conceptualisation of efficiency. Here, efficiency is explained as relating to "social justice," "slimming down," "sharpening up," and "shaking out." These terms are not explained in detail; they are left unexplained and overly abstract. The result is that Kinnock's account of efficiency does not convey practical, real-world meaning on its own terms. Certainly, readers would have to make significant inferences to extract such meaning. Also see JHAC when discussing "maximum efficiency." In this case, while there is some relationship to the use of Pre-Sentence Reports (a referent), that relationship is not made clear. The result is that the phrase "maximum efficiency" requires interpretation to give it actionable meaning, which equates to a form of guesswork. Constructions of this type are not useful for prescriptive efficiency reform.

Source: Authors' own analysis based on: S. Chase, *The Tyranny of Words*, New York 1938; H. Packer, *The Limits of the Criminal Sanction*, Stanford 1968; S. Macdonald, *Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes*, "New Criminal Law Review" 2008, vol. 11, no. 2, p. 278; C. Jones, *Auditing Criminal Justice*, "British Journal of Criminology" 1993, vol. 33, no. 2, p. 195; J. Ward, *Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' – Is 'Procedural Due Process' Being Undermined?*, "British Journal of Criminology" 2014, vol. 55, no. 2, p. 14; N. Kinnock, *Leader's speech, Blackpool 1988*, British Political Speech, 1988, http://www.britishpoliticalspeech.org/speech-archive.htm?speech=194 [accessed: 2024.01.31]; JHAC, *Cutting crime: better community sentences*, Justice and Home Affairs Committee, UK 2023, p. 10.

with concrete, real-world affairs. By adjusting Macdonald's original framework to explicitly incorporate such quantitative accounts of efficiency under the referent-based construction type, the utility of his work improves because it can encapsulate a wider range of efficiency constructions.[88]

Taken together, these reconsidered types of efficiency construction (high-order abstractions, referent-based constructions, normative constructions, and ideal-types) are better positioned to help readers because they more succinctly indicate their purpose and function compared to those offered in Macdonald's work. Rephrased, this typology draws upon a broader philosophical ground whilst also benefiting from being clearer: the labels of each type more effectively describe their function. To conclude this section, here is a summarised table of this article's framework which, to reiterate, has the purpose of aiding criminal justice researchers when navigating efficiency reform literature.

The above revised framework provides insight into seemingly irreconcilable accounts of efficiency that exist in the criminal justice literature. As Sections 2 and 3 have described, on initial inspection, the criminal justice efficiency reform literature resembles two groups of thinkers, efficiency advocates and critics. However, in applying Macdonald's ideas (see Section 4), it becomes evident that this grouping of thinkers into two camps (efficiency advocates and critics) is misleading. It is more accurate to frame the literature as offering a constellation of understandings regarding what it means to be efficient in the criminal justice process. Importantly, and as established in this section, the usefulness of these efficiency constructions varies depending on their utility as either: (1) a descriptive account of practice (referent-based construction), (2) a claim about what ought to be (normative construction), or (3) an account that is useful for thought experimentation (ideal-type construction). Alternatively, there is the final undesirable construction (the high-order abstraction), which describes those accounts of efficiency that fail to meet the requirements of the prior three because of an excessive reliance on abstractions. It is along this direction that reform researchers can more robustly navigate (situate and evaluate) the criminal justice efficiency literature.

6. Anticipated criticism & further applications

Before concluding, it is useful to address some criticisms that may be levelled at this article's revised framework, alongside some further discussion regarding how the framework can be applied in other contexts beyond that of criminal justice efficiency reform. First, this section explains that it sides with Macdonald's novel interpretation of (strong) ideal-types because it serves as a useful heuristic device in policy reform research.[89] Second, this section makes clear that the framework offered in this article

[88] S. Macdonald, *Constructing a Framework…*
[89] *Ibid.*

is interpretivist in nature; it does not seek to repeat the mistakes of logical positivism. Lastly, this section argues that there is potential for the framework offered here to be applied in different fields of reform research, beyond that of criminal justice efficiency. In addressing these points, this section further fortifies the theoretical basis of the revised framework while indicating how it can be applied in other fields.

First, it is necessary to make clear that Macdonald's work, which the present article partially incorporates, contains an important and unusual interpretation of Weber's theory of ideal-types. Contrary to Macdonald's account, Weber makes clear that ideal-types are deeply entwined with empirical observations of practice: the ideal-type itself emerges initially as an abstraction from observing practice and subsequently, it shapes how researchers understand the practice that they observe.[90] It is the present authors' view that Weber almost certainly would not accept the claim that a theoretical abstraction cannot be used for practical recommendations. This appears to be a nuance that goes overlooked in Macdonald's work where he claims that a strong ideal-type "could not sensibly be advanced for practical implementation."[91] Macdonald's reading is true in a prima facie sense, as Weber's work does state that "In its conceptual purity, this mental construct [the ideal-type] cannot be found empirically anywhere in reality."[92] Yet, within this same section of Weber's work, he acknowledges that such ideal-types are used as a means by which people bring into the real-world "representations" of specified "utopias," demonstrating how ideal-types can be used as a means to direct real-world change.[93] Rephrased, Weber's original theory of an ideal-type is expressly concerned with practical affairs, not just thought experimentation as Macdonald argues. To this end, Macdonald does seem to misunderstand Weber regarding what an ideal-type is. Macdonald effectively renders his own conceptualisation of what an ideal-type means; it is distinct from Weber's.

Given that this article recognises this misreading, it may surprise readers that the present article continues to frame ideal-types as not useful for policy reform on the grounds that they do not focus on practical affairs – just as Macdonald argues when describing the "strong ideal-type."[94] Macdonald's unique interpretation of Weber is useful in setting a standard for clarity when describing efficiency-based practices. It would appear that for Macdonald, generating a "representation" of a utopia (an extreme conceptualisation of reality) allows for too broad a range of interpretation. Such extremity renders these constructions inadequate for policy reform prescription. The present article engages with Macdonald's thinking at this level: Macdonald's interpretation of a (strong) ideal-type is useful because it neatly categorises some of the literature's various interpretations of efficiency whilst also establishing a standard for identifying which constructions of efficiency are effective for policy reform.

---

90 M. Weber, *The Methodology of the Social Sciences*, Illinois 1949.
91 S. Macdonald, *Constructing a Framework*…, p. 67.
92 M. Weber, *The Methodology of the Social Sciences*…, p. 90.
93 *Ibid.*, p. 90–91.
94 S. Macdonald, *Constructing a Framework*…, p. 67.

Second, while the revised framework encourages researchers to categorise various accounts of efficiency under four construction types, it is crucial to emphasise that this framework is interpretivist in nature; it is not essentialist or positivistic. Users of the revised framework must recognise that while the literature presents various interpretations of efficiency (such as those described in Sections 3 and 4), their categorisation based on the four typologies outlined in Section 5 represents yet another interpretative act. This approach contrasts with essentialist and positivistic methods which often depend on the assumption that there are objective components underpinning accounts of social values, including efficiency (as discussed by Comte in his original 1865 publication). This latter approach to utilising the revised framework is logically untenable; employing the revised framework necessitates embracing a broad interpretative stance. Rephrased, the four construction types detailed in the framework equate to a heuristic device that seeks to aid researchers when thinking about the criminal justice efficiency literature. It is not an objective tool for systematising accounts of efficiency.

Lastly, the revised framework as presented in Section 5 could have broader utility within the social sciences, not just in the field of criminal justice efficiency reform. The observations made in the present article about various conflicting and ambiguous conceptualisations of efficiency, which obstruct the criminal justice literature, are similarly reported by Powell *et al.* when examining the meaning of "social justice":

> "Social justice" can be seen as a poorly defined "motherhood and apple pie" term. Virtually everyone is in favor of "social justice" but their interpretations of the term vary widely (there are many different varieties of apple!).[95]

As with Powell *et al.*, the present article has also identified that social value constructions (for example, efficiency) can take on many complex meanings owing to their interpretative nature and application to different contexts.[96] To this end, it is not inconceivable that the difficulty described in Section 3 could emerge in other fields, such as the study of social justice in social policy reform. Consequently, the present article welcomes the adaptation of its framework to other disciplines and their study of social value constructions more broadly, to aid in navigating such complex literature.

7. Conclusions

This article began by discussing the influential English and Welsh lower criminal court works of Le Vay, Auld, and Leveson.[97] In doing so, it has drawn attention to how the

---

[95] M. Powell, N. Johns, A. Green, *Social Justice in Social Policy': Social Policy Annual Conference*, Lincoln 2011, p. 1.

[96] *Ibid.*

[97] J. Le Vay, *Magistrates' Courts Report*…; R. Auld, *Review of the Criminal Courts*…; B. Leveson, *Review of Efficiency*…

term efficiency has been used problematically over a long period in this literature, and how it will continually be used in this way unless thinkers accept a new approach. Owing to how thinkers have used the word efficiency to mean divergent things, it is an oversimplification to divide the literature into dichotomous camps of efficiency advocates and critics (as explained in Section 3). The revised framework provided here can help avoid such an oversimplified reading, allowing researchers to embrace a more nuanced yet manageable overview of such complex literature. This article presented its framework for better conceptualising ideas of efficiency after critically discussing the theoretical works of Chase, Packer, and Macdonald.[98] In utilising Chase's work, our research has argued that "high-order abstractions" obscure meaningful policy reform discussions and, therefore, researchers should avoid constructions of this type.[99] The present article offers three other construction types that build on the work of Macdonald which aid in fruitful policy reform research: referent-based constructions, normative constructions, and ideal-type constructions.[100] Together, these four types serve to support policy reform researchers when navigating the efficiency-oriented criminal justice literature. Lastly, this article has argued that this typological framework could be applied to other disciplines (not just socio-legal studies) and other social value-based concepts (not just efficiency). Ultimately, this article's revised framework aims to foster more rigorous, nuanced debates on subject matter that is prone to miscommunication and to support the development of effective policy reform.

Literature

Auld R., *Review of the Criminal Courts of England and Wales*, London 2001.

Bell E., *Criminal Justice and Neoliberalism*, London 2011.

Bohm R., *"McJustice": On the McDonaldization of Criminal Justice*, "Justice Quarterly" 2006, vol. 23, no. 1, pp. 127–146.

Bridgman P.W., *The logic of modern physics*, New York 1927.

Bryman A., *Social Research Methods*, 6th ed., Oxford 2021.

Cameron D., *Prime Minister: My vision for a smarter state*, Gov.uk, 2015, https://www.gov.uk/government/speeches/prime-minister-my-vision-for-a-smarter-state [accessed: 2024.01.31].

Chase S., *The Tyranny of Words*, New York 1938.

Comte A., *A General View of Positivism*, Cambridge 2009.

Deering J., Feilzer M., *Privatising Probation: Is Transforming Rehabilitation the End of the Probation Ideal?*, Bristol 2015.

Dillow C., *The End of Politics: New Labour and the Folly of Managerialism*, Petersfield 2007.

Farrington R., *Summary Justice Are Magistrates Up to it?*, UK 2016.

Haddon C., *Reforming the Civil Service – The Efficiency Unit: The Efficiency Unit in the early 1980s and the 1987 Next Steps Report*, Institute for Government, 2012, https://www.institutefor-

[98] S. Chase, *The Tyranny of Words*…; H. Packer, *The Limits of the Criminal Sanction*…; S. Macdonald, *Constructing a Framework*…

[99] S. Chase, *The Tyranny of Words*…, p. 6.

[100] S. Macdonald, *Constructing a Framework*…

government.org.uk/publication/report/reforming-civil-service-efficiency-unit [accessed: 2024.01.31].

Harvey D., *A Brief History of Neoliberalism*, Oxford 2005.

Hood C., *A Public Management for All Seasons?*, "Public Administration" 1991, vol. 69, no. 1, pp. 3–19.

Hood C., Scott C., *Bureaucratic Regulations and New Public Management in the United Kingdom: Mirror-Image Developments?*, "Journal of Law and Society" 1996, vol. 23, no. 3, pp. 321–345.

JHAC, *Cutting crime: better community sentences*, Justice and Home Affairs Committee, UK 2023.

Jones C., *Auditing Criminal Justice*, "British Journal of Criminology" 1993, vol. 33, no. 2, pp. 187–202.

Kinnock N., *Leader's speech, Blackpool 1988*, British Political Speech, 1988, http://www.britishpoliticalspeech.org/speech-archive.htm?speech=194 [accessed: 2024.01.31].

Le Vay J., *Magistrates' Courts Report of a Scrutiny 1989. Volume 1*, UK 1989.

Leveson B., *Review of Efficiency in Criminal Proceedings*, London 2015.

Ludlow A., *Privatising Public Prisons: Labour Law and the Public Procurement Process*, London 2015.

Macdonald S., *Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes*, "New Criminal Law Review" 2008, vol. 11, no. 2, pp. 257–311.

Marsh L., *Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process*, "Common Law World Review" 2016, vol. 45, no. 1, pp. 51–67.

Ministry of Justice, *Cutting Crime: Better Community Sentences Response from the Ministry of Justice to the Justice and Home Affairs Committee*, UK 2024.

Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, London 2012.

Moore R., *The Enforcement of Financial Penalties by Magistrates' Courts: An Evaluative Study*, PhD thesis, Birmingham 2001.

Nicklas-Carter C., *Efficiency of the English Criminal Courts in a Time of Austerity: Exploring Courtroom Lawyers' Assessment of Government Policy (2010–2017)*, PhD thesis, Keele 2019.

Packer H., *The Limits of the Criminal Sanction*, Stanford 1968.

Powell M., Johns N., Green A., *Social Justice in Social Policy'. Social Policy Annual Conference*, Lincoln 2011.

Pivaty A., Johnston E., *The move towards efficacy and managerialism in criminal justice: A global phenomenon* [in:] *Efficiency and Bureaucratisation of Criminal Justice Global Trends*, eds. A. Pivaty, E. Johnston, Oxon 2023, pp. 1–15.

Prison Reform Trust, *Private Punishment: Who Profits?*, PRT Briefing, London 2005.

Raine J., *Modernising Courts or Courting Modernisation?*, "International Journal of Public Sector Management" 2001, vol. 13, no. 5, pp. 390–416.

Raine J., Willson M., *Beyond Managerialism in Criminal Justice*, "The Howard Journal of Criminal Justice" 1997, vol. 36, no. 1, pp. 80–95.

Raine J., Willson M., *New Public Management and Criminal Justice*, "Public Money & Management" 1995, vol. 15, no. 1, pp. 35–40.

Rhodes R., *The New Governance: Governing without Government*, "Political Studies" 1996, vol. 44, pp. 652–667.

Ritzer G., *The McDonaldization of Society*, Thousand Oaks 1993.

Robinson G., Priede C., Farrall S., Shapland J., McNeill F., *Understanding 'Quality' in Probation Practice: Frontline Perspectives in England & Wales*, "Criminology & Criminal Justice" 2013, vol. 14, no. 2, pp. 123–142.

Runciman G., *The Royal Commission on Criminal Justice Report*, UK 1993.

Spigelman J., *The 'New Public Management' and the Courts*, "Australian Law Journal" 2001, vol. 75, pp. 1–46.
Thatcher M., *Leader's speech, Brighton 1984*, British Political Speech, 1984, http://www.britishpoliticalspeech.org/speech-archive.htm?speech=130 [accessed: 2024.01.31].
Wacquant L., *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Durham 2009.
Walsh K., *Public Service and Market Mechanisms*, London 1995.
Ward J., *Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' – Is 'Procedural Due Process' Being Undermined?*, "British Journal of Criminology" 2014, vol. 55, no. 2, pp. 341–358.
Weber M., *The Methodology of the Social Sciences*, Illinois 1949.
Yates S., *Over-efficiency in the Lower Criminal Courts: Understanding a Key Problem and How to Fix It*, UK/USA 2024.

Summary

Shaun S. Yates, Craig Lundy

A Revised Framework for Efficiency Reform Research: Reflections from the Lower Criminal Court Literature of England and Wales

This article presents a theoretical framework to aid researchers in navigating the efficiency-oriented criminal justice reform literature. It centres on the influential English and Welsh lower criminal court efficiency reform-oriented reports of Le Vay, Auld, and Leveson. In doing so, this article demonstrates that, historically, the literature has provided accounts of efficiency that have often been ambiguous and conflictual. As a result, it is often difficult to understand what efficiency advocates are advocating for and what efficiency critics are critical of. In view of these influential reports and other more contemporary supplementary works, this article critically discusses the theoretical contributions of Chase, Packer, and Macdonald. The result is that the present article provides readers with a revised typological research framework for navigating the often-confusing efficiency-oriented criminal justice literature. The framework organises efficiency constructions into four types: (i) referent-based, (ii) normative, (iii) ideal-type, and (iv) high-order abstractions. Whereas the first three types are useful for policy reform research, researchers should avoid conceptualisations of efficiency that match the fourth construction type, high-order abstractions. This work concludes by arguing that researchers beyond socio-legal studies and criminology could adapt the revised framework for analysing a range of social value-based reform ideas.

Keywords: criminal justice efficiency, lower criminal courts, England and Wales, policy reform, conceptual reform, Packer.

Streszczenie

Shaun S. Yates, Craig Lundy

Zrewidowane ramy badawcze nad reformą efektywności – refleksje na podstawie literatury dotyczącej sądów karnych niższej instancji w Anglii i Walii

W artykule zaproponowano ramy teoretyczne, które mają ułatwić badaczom orientację w literaturze poświęconej reformom wymiaru sprawiedliwości w sprawach karnych ukierunkowanym na efektywność. Analiza koncentruje się na istotnych raportach Le Vaya, Aulda i Levesona dotyczących reform funkcjonowania niższych sądów karnych w Anglii i Walii. Autorzy wskazują, że historycznie pojęcie efektywności było w literaturze ujmowane w sposób niejednoznaczny i często sprzeczny, co utrudniało rozróżnienie stanowisk jej zwolenników i krytyków. Odwołując się do wspomnianych raportów, a także nowszych prac uzupełniających, opracowanie poddaje krytycznej analizie teoretyczny wkład Chase'a, Packera i Macdonalda. Na tej podstawie autorzy przedstawiają zrewidowane ramy typologiczne, mające na celu uporządkowanie rozproszonej i często mylącej literatury dotyczącej efektywności w wymiarze sprawiedliwości w sprawach karnych. W ramach tej typologii wyróżniono cztery sposoby konceptualizacji efektywności: (1) oparte na referencie, (2) normatywne, (3) oparte na typie idealnym oraz (4) abstrakcje wyższego rzędu. Choć pierwsze trzy typy okazują się użyteczne w badaniach nad reformami polityki karnej, autorzy wskazują na ograniczenia związane z nadmiernie abstrakcyjnymi ujęciami efektywności. Artykuł kończy się wnioskiem, że zaproponowane ramy analityczne mogą zostać twórczo wykorzystane również przez badaczy spoza obszaru studiów społeczno-prawnych i kryminologii, do analizy reform opartych na wartościach społecznych.

Słowa kluczowe: efektywność wymiaru sprawiedliwości w sprawach karnych, sądy karne niższej instancji, Anglia i Walia, reforma polityki, reforma koncepcyjna, Packer.

Kerrie Schaefer
University of Exeter, United Kingdom
K.V.Schaefer@exeter.ac.uk
ORCID: 0000-0002-9305-7633

https://doi.org/10.26881/gsp.2025.4.07

Theatre and Referendums: The Case of the Indigenous Voice to Parliament

> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. *This is the torment of our powerlessness*. We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.[1]

On 14 October 2023, a referendum held to change the Australian constitution to include an Aboriginal and Torres Strait Islander Voice to Parliament was rejected. The national vote was, approximately, 60/40% against constitutional reform. Each state vote followed that percentage breakdown with, at either ends of the spectrum, the state of Victoria rejecting reform by a smaller margin of 54/46% and the state of Queensland rejecting it by a larger margin of 70/30%. Only the Australian Capital Territory, containing the nation's capital, Canberra, the seat of Federal government, reversed the trend voting 60/40% in favour of constitutional change.[2] I am an Australian citizen of European heritage resident in the UK since early 2007. I am currently Professor in Community Performance in the Department of Communications, Drama and Film at the University of Exeter. My analysis here will focus on theatre and referendums,

[1] *Uluru Statement from the Heart* in M. Davis, G. Williams, *Everything You Need to Know about the Voice*, Sydney 2023, p. 193.

[2] For a numerically exact breakdown of the results of the 2023 referendum see: https://results.aec.gov.au/29581/Website/ReferendumNationalResults-29581.htm [accessed: 2025.08.7].

with a focus on the Indigenous Voice to Parliament referendum. First, I outline what the Voice is. I then discuss my position as a non-participating citizen, based on my understanding of historical and recent acts of voting in referendums in Australia and the UK. Third, I examine literature on theatre and referendums before engaging in a brief analysis of the Voice referendum. I argue that the Voice went beyond tragedy to become a "Theatre of Cruelty" (with apologies to Antonin Artaud[3]) in so far as it failed to address the structural basis of Indigenous disadvantage in Australia that leaves too many First Nations people – both older and younger – incarcerated and/or in detention.

1. What is the Indigenous Voice to Parliament?

Aboriginal and Torres Strait Islander peoples have been custodians of the huge land mass more recently known as Australia for around 60,000 years. Unlike in other parts of the former British Empire (New Zealand and Canada, for instance), there were no agreements or treaties created between First Nations people and British colonialists when they claimed land for the British, as Captain James Cook did aboard the *Endeavour* in 1770, and established a penal colony at Botany Bay (New South Wales) in 1788. In a case brought to the High Court of Australia, Eddie Mabo asserted traditional ownership rights of the Meriam people to islands in the Torres Strait. The 1992 Mabo decision overturned the legal fiction of *terra nullius*, asserting that no-one owned the land claimed by the British, and acknowledged traditional rights of Torres Strait Islander peoples to their land. In 1993, the Australian government introduced Native Title legislation to reflect Indigenous rights to land including on the Australian mainland. The continuity of First Nations culture in the country is powerfully stated in the declaration that "sovereignty was never ceded."

A federation of colonial states became a Commonwealth nation in 1901. At the point of Federation, the Australian Constitution came into force. Megan Davis and George Williams note that First Nations peoples were "excluded from the political settlement that brought about the new nation."[4] Indeed, they state that:

> […] there is no record of Aboriginal and Torres Strait Islander peoples playing any role in the drafting of the Constitution or the process that led to the creation of the Australian nation. Nor did they take part in the delegation that travelled to Britain to have that document enacted. Nor is there any record of Indigenous people being consulted about this, or their consent being sought to bring about a new nation on their ancestral lands. Instead, the Constitution was drafted to exclude Aboriginal people, who many of the colonists viewed as a "dying race."[5]

---

[3] A. Artaud, *The theatre and its double: essays*, Montreuil 2001.
[4] M. Davis, G. Williams, *Everything You Need…*, p. 33.
[5] *Ibid.*

While Federation granted citizenship rights to most of the population of the new nation, this foundational moment was experienced differently by those who had survived the frontier violence of the colonial settler period.[6] After Federation, Indigenous Australians were forced from their traditional, ancestral lands onto state government and missionary run reserves. There, as Davis and Williams note: "Every aspect of their lives was regulated, from marriage, employment and freedom of movement, to regulation of their work and how pay from that work was to be spent."[7] Often surrounded by wire to maintain separation between Indigenous inhabitants and the rest of society, these missions or reserves resembled open prisons. Despite being known as the Protection Era, because it was "distinguished by special, seemingly benevolent legislation aimed at protecting Aboriginal people from the 'worst effects of contact with Europeans,' including diseases and violence,"[8] the era was characterised by "overtly discriminatory laws in which Aboriginal people were denied equality in almost every aspect of their lives."[9] Additionally, in this period, assimilationist policy was enacted and Indigenous children were forcibly removed from their families to be integrated into so-called mainstream society. Along with the Immigration Restriction Act (1901), introduced shortly after Federation and which excluded non-British/European peoples from settling in Australia, assimilationist policy aided the creation of a racialised – "white" – nation. The state-sanctioned and widespread practice of forced removal of children became known as the Stolen Generations, documented in the *Bringing them Home* report[10] by the Australian Human Rights and Equal Opportunity Commission after a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. Labor Prime Minister, Kevin Rudd, issued a National Apology to the Stolen Generations in 2008.

The political project to reverse historical exclusion and to achieve First Nations' constitutional recognition has been a long-lasting one. I omit here a significant amount of complex history, for brevity's sake. However, the project gathered ground again in around 2015.[11] After representations to government by forty-odd Indigenous leaders, the Liberal/National Coalition Prime Minister, Malcolm Turnbull, with the bipartisan support of Labor opposition leader, Bill Shorten, established a Referendum Council to undertake public consultation on constitutional reform, including a concurrent

---

[6] See H. Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Sydney 2006. See also Professor Lyndall Ryan's mapping of frontier wars *Colonial Frontier Massacres in Australia, 1788–1930*, https://c21ch.newcastle.edu.au/colonialmassacres/map.php [accessed: 2025.08.7].

[7] M. Davis, G. Williams, *Everything You Need…*, p. 34.

[8] *Ibid.*

[9] *Ibid.*

[10] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Australia) & Wilson, Ronald, Sir, 1922–2005 & Australia. Human Rights and Equal Opportunity Commission, *Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney 1997, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/ [accessed: 2025.06.7].

[11] For a more comprehensive historical timeline see *ibid.*

process of Indigenous designed and led consultation. A series of First Nations Regional Dialogues took place under the auspices of the Referendum Council. These dialogues, according to Davis and Williams, aimed "to discuss options for constitutional reform, and to ensure that Aboriginal decision-making is at the heart of the reform process."[12] The process culminated in a three-day national Indigenous Constitutional Convention held at Uluru in the Northern Territory in May 2017. The Convention "gave rise to a national Indigenous consensus position on how Indigenous people want to be constitutionally recognised."[13] This majority position was powerfully expressed in the Uluru Statement from the Heart (2017). The rather poetic statement (see an excerpt quoted above) issued the call for a constitutionally entrenched First Nations Voice to Parliament, and a Makarrata commission to oversee a process of treaty-making and truth-telling. In other words, it called for Voice, Treaty, and Truth. Although the Turnbull government rejected the call for Voice, Treaty, and Truth, work continued to develop the Voice to Parliament via a Joint Select Committee of Parliament, chaired by Senators Patrick Dodson and Julian Leeser, and through the work of the then Minister for Indigenous Australians, Ken Wyatt. In 2021, an interim report on the Indigenous Voice Proposal was released initiating a feedback process as part of the second stage of a co-design process.[14] In 2022, Anthony Albanese became Labor Prime Minister after a general election. In his winning speech, he committed to implementing the Uluru Statement from the Heart.

2. Voting Acts: on not voting in the Voice referendum

When the new Labor Prime Minister committed his government to implementing the Uluru Statement from the Heart in his election acceptance speech in May 2022, I rechecked the rules of electoral franchise in Australia. My check confirmed that as an Australian citizen resident in the UK since 2007 (for seventeen years), I am ineligible to vote in Australian elections. I exceed the short-term period (six years) within which a citizen living/working overseas can remain enrolled to vote. It was upsetting to re-confirm what I already knew; that I was not able to vote in the referendum on the Voice. I would not be taking part in Australian history, via this second referendum to remedy the foundational act of exclusion of First Nations peoples from the Constitution. I longed to participate in a referendum like the one in which 91% of the Australian electorate voted in favour of changing the Australian constitution to include First Nations peoples as had been the case in 1967, after a long campaign led by First Nations leaders and aligned to the civil rights movement in Australia. But was that the

[12] *Ibid.*, p. 14.

[13] S. Morris, *Insights for design of direct public participation: Australia's Uluru process as a case study*, p. 2, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3230377/MF19-Australia-paper.pdf [accessed: 2025.08.7].

[14] M. Davis, G. Williams, *Everything You Need…*, p. 14.

case: what was the 1967 referendum? And, would the Australian electorate back up that vote for constitutional recognition for First Nations people in 2023, some fifty-six years later? My hope, even without my participation, was that the referendum for the Voice to Parliament, the first step in implementing the triumvirate of Voice, Treaty, and Truth, would succeed.

In relation to the first question on the 1967 Referendum, Davis and Williams state, "exactly what the [1967] referendum achieved has long been the subject of debate and misunderstanding. Indeed, the vote has attained somewhat of a mythical status that far exceeds the legal changes it brought about […]."[15] They go on to explain that it is a common misconception that the 1967 referendum "dealt with fundamental questions of justice and Aboriginal rights, such as their status as citizens and ability to vote. These misconceptions have sometimes been accompanied by the myth that the referendum overrode a Flora and Fauna Act by which Aboriginal people were treated as part of Australia's native wildlife. No such Act has ever existed."[16] Countering common misconception and myth, Davis and Williams explain that the 1967 referendum "deleted two sets of words from the Constitution. First, it removed an exclusion from the races power in section 51 (xxvi) that had prevented the federal Parliament from enacting laws for Aboriginal people. Second, it repealed section 127, which had prevented Aboriginal people from being included in 'reckoning the numbers of the people of the Commonwealth.'"[17] It was a positive thing that the referendum was upheld since "both provisions referred to Aboriginal people in negative ways, either by way of removing them as a subject of federal power, or by excluding them from the count of the people of the Commonwealth used for determining representation in the federal Parliament."[18] So, in fact, the 1967 referendum changed the Constitution to include Indigenous Australians in the census and gave control of Indigenous affairs to the Commonwealth government rather than the states. In terms of the latter, centralisation promised more consistent and better funding of Indigenous affairs as well as relief from discriminatory state legislation. However, due to the deletions, there remained a lack of substantial reference to and recognition of First Nations in the Constitution (that is, it remains exclusionary). Yet a myth grew, falsely, that the 1967 Referendum conferred rights and recognition, which it most certainly did not, possibly precluding the need for further change. With the historical precedent of 1967 somewhat more circumscribed, the next question to address is: Would the yes vote succeed?

I have voted in two notable referendums. In 1999, the Australian government held a referendum to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President. As a second point, there was a proposition to insert a preamble to the constitution which included (weak) acknowledgement of Indigenous Australians amongst other things. In 2016, the UK government called a referendum to vote on UK membership

15 *Ibid.*, p. 35.
16 *Ibid.*, p. 47.
17 *Ibid.*, p. 35.
18 *Ibid.*, p. 36.

of the European Union. I am eligible to vote in UK parliamentary (and local English) elections as a "qualifying Commonwealth citizen" over eighteen, with a local address, and not currently serving a prison sentence nor being a peer in the House of Lords. The Australian electorate rejected the proposal for Australia to become a republic and rejected the insertion of a preamble. The then Prime Minister, John Howard, had acknowledged the growing republican movement by calling a referendum and, at the same time, created unnecessary division around whether the President of a putative republic would be elected by popular vote or by parliament. In the end, the core issue of republic versus constitutional monarchy became bogged down in debate about who should elect a future president and how. The question finally put to the people specified that the President would be "appointed by a two-thirds majority of the members of the Commonwealth Parliament" thus, perhaps, repelling republican voters who disagreed with this mode of electing a president. The disaffected increased monarchists' numbers. The preamble, similarly, was written by the PM with an Australian poet and then First Nations Senator (from the Australian Democrats party). An early iteration mentioned "mateship" as a core Australian value, thus alienating many female and progressive voters. The pre-amble only offered weak recognition of First Nations peoples and certainly did not acknowledge custodianship of country for six millennia.

The 2016 referendum on UK membership of the European Union came two years after the vote on Scottish independence, in which uncertainly about Scotland's position within the EU after independence was one lever used to pressure Scottish voters to remain within the United Kingdom. Conservative Prime Minister, David Cameron, called a referendum on EU membership in 2016 to appease Eurosceptic elements in his own party. He was unsettled by the increasing popularity of the United Kingdom Independence Party (UKIP) led by Nigel Farage. There were multiple groups representing the positions of remain and leave. However, the EU referendum has since been described by the Electoral Reform Society as "dire" with "glaring democratic deficiencies."[19] In contrast to the Scottish independence referendum, "which for all its faults undoubtedly featured a vibrant, well-informed, grassroots conversation that left a lasting legacy of on-going public participation in politics and public life," the Electoral Reform Society noted that the EU referendum left far too many people feeling "ill-informed about the issues […] The polling also shows that voters viewed both sides as increasingly negative as the campaign wore on. Meanwhile, the top-down, personality-based nature of the debate failed to address major policies and subjects, leaving the public in the dark."[20] The referendum vote was, approximately: 52% leave, 48% remain. The Electoral Reform Society subsequently published a report, *It's Good to Talk: Doing Referendums Differently*,[21] which I refer to below.

---

[19] Electoral Reform Society, *Doing referendums differently* [Press release], 2016, https://www.electoral-reform.org.uk/doing-referendums-differently/ [accessed: 2025.08.9].

[20] *Ibid.*

[21] Electoral Reform Society, *It's Good to Talk: Doing Referendums Differently* [Report], 2016, https://www.electoral-reform.org.uk/latest-news-and-research/publications/its-good-to-talk/ [accessed: 2025.08.1].

Based on these acts of direct democracy and with the 1967 referendum in better context, my confidence in and hopes for a yes vote reduced considerably. I was in Australia in July/August to visit family over the Northern hemisphere school summer holidays. We were aware there was going to be a referendum on an Indigenous Voice to Parliament. Bookshop shelves contained sections on the Voice. I picked up and read a couple of books to be better informed: Charles Prouse's *on the Voice to Parliament* offered a very moving personal perspective from a Nyikina man (from north-west Western Australia).[22] Davis and Williams's *Everything You Need to Know about the Voice to Parliament* provided invaluable and extremely knowledgeable information on Australian constitutional law, reform, and the case for recognition.[23] Both co-authors are constitutional law experts, and Davis, a First Nations woman, was intimately involved in Uluru Statement and Referendum processes. The same authors also produced the outstanding *Everything You Need to Know about the Uluru Statement from the Heart* (2021). Both texts proved critical in understanding the full context to the Voice. I am relying heavily on Davis and Williams (2023) here.

In August 2023, Albanese attended the Garma festival, a festival celebrating traditional cultures and knowledges of the Yolngu peoples of East Arnhem Land. There he gave an address outlining a "starting point," recommending the addition of three (draft) sentences to the Constitution:

> There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.
> 1. The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.
> 2. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.[24]

The referendum date of 14 October 2023 was announced on 30 August 2023, as we headed back to the UK.

3. Reviewing theory and practice: theatre, theatricality, performativity, and referendums

While there were numerous books on the Voice (the publishing industry was in full production mode), I wondered about theatre especially in relation to the referendum, and also more generally given recent UK events. Google turned up one return for theatre on the Voice referendum: *Facing Up* by Lynden Nicholls, performed at Theatre

[22] Ch. Prouse, *On the Voice to Parliament*, Australia 2023.
[23] M. Davis, G. Williams, *Everything You Need…*
[24] *Address to Garma Festival*, https://www.pm.gov.au/media/address-garma-festival [accessed: 2025.06.7].

Works, an independent theatre in Melbourne, Victoria, in May 2023. On further investigation, I found that the play was first developed and performed in 2018/2019 in Ballarat (regional Victoria). Nicholls is a non-Indigenous playwright and was inspired by the Uluru Statement from the Heart (2017) to create the piece. The play is documentary-based and places alternating focus on Federal Policy on Indigenous issues and the parallel First Nations protest since 1901. That is, the play juxtaposes statements on historical record from Australian Prime Ministers, played by a white/European male actor, against political and personal First Nations histories enacted by two female First Nations actors. The play was performed in theatre and community spaces in Ballarat, including the Botanical Gardens, which features an avenue displaying the bronze busts of former Australian Prime Ministers. It also played as part of national Indigenous festivals such as NAIDOC (National Aborigines and Islanders Day Observance Committee) and Reconciliation weeks. A substantial teachers' pack was prepared to support school visits to the production.[25] Theatre Works explicitly linked the production to the Voice:

> This powerful production explores Australian Federal policy and attitudes towards First Nations people from federation to the present, delving into both the official history and the rarely acknowledged Indigenous protest. The Indigenous Voice to Parliament, a proposed constitutional amendment, seeks to establish an Aboriginal and Torres Strait Islander Voice. If approved, this Voice would advise the Australian Parliament and government on matters relating to the social, spiritual, and economic wellbeing of Aboriginal and Torres Strait Islander people.
>
> The Voice to Parliament proposal highlights the need for better representation and consultation with First Nations people, making FACING UP an eerily timely and pertinent production.[26]

Far more common than live performance created or, in fact, booked to play in relation to the Referendum, were statements on the Voice released by theatre companies on organisational websites or linked-in pages: Actnow Theatre (South Australia), Belvoir St Theatre (Sydney, NSW), Sydney Theatre Company, Melbourne Theatre Company, and Black Swan State Theatre Company of Western Australia.[27] First Nations founded and led organisations, Ilbijerri Theatre Company (established in 1990 in Melbourne,

---

[25] Reviews are available here: Stage Whispers, https://www.stagewhispers.com.au/reviews/facing [accessed: 2025.06.7] and Lilithia Review, https://www.lilithia.net/facing-up-lynden-nicholls/ [accessed: 2025.06.7].

[26] I. Nicolls, *Facing up*, https://www.theatreworks.org.au/2023/facing-up [accessed: 2025.06.7].

[27] Actnow Theatre, https://www.actnowtheatre.org.au/news/we-say-yes-to-the-voice [accessed: 2025.06.7]; Belvoir St Theatre, https://belvoir.com.au/posts/2023/06/19/belvoir-st-theatre-the-voice-statement/ [accessed: 2025.06.7]; Sydney Theatre Company, https://www.sydneytheatre.com.au/about/yes-statement [accessed: 2025.06.7]; Melbourne Theatre Company, https://www.mtc.com.au/discover-more/about-us/statement-on-the-voice/#:~:text=We%20say%20yes.,made%20for%20and%20about%20them [accessed: 2025.06.7]; Black Swan State Theatre Company, https://www.linkedin.com/posts/black-swan-state-theatre-company_on-14-october-2023-a-referendum-will-be-activity-7102562344664276992-q_JN/?trk=public_profile_like_view [accessed: 2025.06.7].

Victoria) and Bangarra Dance Theatre (established in 1989 in Sydney, NSW), released powerful "yes statements" which I reproduce here:

> We, The First Peoples of this land, have lived sustainably here for over 65,000 years. Despite the disruption of 235 years of colonisation we are still here and our connection to this land is unbroken. Our culture is rich and woven through everyday life on this continent and the things that all Australians enjoy – story, art, music, sport, science, knowledge.
> For over 30 years, ILBIJERRI Theatre Company has supported, facilitated and amplified First Peoples' voice through the medium of theatre.
> We believe that a constitutionally enshrined Voice to parliament to advise Government on matters affecting our people is a modest step in the right direction.
> In principle: the Voice acknowledges that Aboriginal and Torres Strait Islander Peoples are best placed to design the programs and policies that impact them. It's a chance to listen, to give agency, and ultimately address the ever-widening gap of health, education, employment, incarceration, – the inequalities that diminishes us all.
> We encourage everyone to vote for a better future that celebrates First Peoples and their cultures. A future in which we are all enriched – and to acknowledge what an incredible privilege and honour it is to live on this stunningly beautiful country and actually how truly "lucky" we are. If the Voice is empowered to function well, it will unite us and move us forward as a country, together.
> Do we know exactly how it's going to work? Well, actually there's a proposal at voice.gov.au that you can read. But actually – we've never done this before – we're trying something new! This is exciting! And besides – whatever we've been doing up until now isn't working.
> So let's give it a go. We've got nothing to lose, and everything to gain.
> Here, now, is a rare moment for this country to STEP UP – let's not crumple under fear mongering and toxic misinformation. Let's take this small easy step together. Let's make a stand for a better future together with the First Peoples of this land.
> One small step for you, a giant leap for our country. So vote yes.[28]

> For over three decades, Bangarra Dance Theatre has been privileged to be entrusted with sharing the powerful voices of the world's oldest living Cultures – the Aboriginal and Torres Strait Islander Cultures of this nation.
> The stories we tell have awakened a national consciousness to the deep scars of our colonial history, and the legacy of unseen trauma left in its wake. We attend to this knowing that by carrying Story, we also carry a responsibility to give insight into our experiences, promote understanding, and effect change. But is this enough?
> Like our artform, truth telling has the profound ability to set a course of action that emboldens and steers us towards a future that otherwise lay unimagined – until now.
> Bangarra Dance Theatre fully supports voting "Yes" in the national referendum for the Constitutional Recognition of Australia's First Peoples. By supporting the vote for "Yes," we not only pay respect to the truth of the past, we state our vision for our future as a nation that values equity and fairness and acknowledges the rights of Indigenous Peoples.

[28] Ilbijerri Theatre Company, *Our Stance on the Voice to Parliament*, https://www.ilbijerri.com.au/voice-to-parliament/ [accessed: 2025.06.7].

> We encourage everyone to inform themselves, listen with an open mind, and trust that they are participating in a process that gave us the Uluru Statement from the Heart – a process that has been collaborative, careful and intensely thorough.
> We also recognise and respect the importance of empowering our Aboriginal and Torres Strait Islander artists and storytellers to define and communicate their individual views on this issue.
> We hope for a peaceful and constructive process towards change, and that the resilience and courage that has underscored the survival of our First Nations Peoples inspires all Australians to step forward and walk together in the spirit of truth, reconciliation, and equality for all.[29]

There is little scholarship on theatre in relation to the Voice or the performativity of these company/organisational "yes statements" (I could not find any "no statements"). The timeline for theatres to develop new work in response to a mooted referendum no doubt bears on this lack, and any critical reflections are probably forthcoming/in press (like this one). Theatre and performance studies academics have engaged with similar happenings such as the 2000 Walk for Reconciliation,[30] the 2008 apology,[31] and the then government's rejection of the Uluru Statement from the Heart.[32] Gay McAuley offers insight into the Apology from the perspective of "being there" at a gathering of people, including Indigenous groups, on the lawns of Parliament.[33] She examines unofficial social performances that supplemented the official apology that took place inside Parliament. Her analysis reveals the rich and sometimes unsettling complexities involved in acts of apology as part of processes of reconciling Indigenous and non-Indigenous Australians. Theron Schmidt has examined "the theatricality at work in examples of publicly performed discourse including Kevin Rudd's official apology in 2008."[34] Helena Grehan has studied "the performative qualities of both the 'Uluru Statement from the Heart' (2017) […] and the Government's response to this invitation via their Media Release and subsequent interviews."[35] She analyses "modes of address, the language used, and the aesthetic and ethical questions raised by each text" giving her "insight on the politics of speaking and listening in the current Australian political climate."[36] Interestingly, Casey's examination of the symbolic act of walking across

---

[29] Bangarra, *Bangarra Statement on the National Referendum for the Constitutional Recognition of Australia's First Peoples*, 2023, https://www.bangarra.com.au/media/mfrbnswu/2023-bangarra-statement-the-voice-referendum.pdf [accessed: 2025.06.7].

[30] M. Casey, *Referendums and reconciliation marches: What bridges are we crossing?*, "Journal of Australian studies" 2006, vol. 30, no. 89, pp. 137–148.

[31] G. McAuley, *Unsettled Country: Coming to Terms with the Past*, "About Performance" 2009, vol. 9, pp. 45–65; T. Schmidt, *'We Say Sorry': Apology, the Law and Theatricality*, "Law Text Culture" 2010, vol. 14, pp. 55–78, https://ro.uow.edu.au/ltc/vol14/iss1/5 [accessed: 2025.06.7].

[32] H. Grehan, *First Nations Politics in a Climate of Refusal: Speaking and listening but failing to hear*, "Performance Research" 2018, vol. 23, no. 3, pp. 7–12.

[33] G. McAuley, *Unsettled Country…*

[34] T. Schmidt, *'We Say Sorry'…*, p. 55.

[35] H. Grehan, *First Nations Politics…*, p. 7.

[36] *Ibid.*

Sydney Harbour Bridge, which a quarter of a million people did in protest against the Howard government's stance on Reconciliation, reveals that popular (press) sentiment celebrating the walk as a performative act was more white virtue signalling than an expression of a desire for real or tangible political – that is, constitutional – change. Her in-depth analysis is prescient of events in 2023. These examples indicate that it is possible to study not only theatre performances, such as *Facing Up*, but (official and unofficial) social performances and the theatricality at work in performative acts (for instance, saying sorry, making yes statements, walking/protesting, and so on).

Wider examination of the field of theatre and referendums revealed literature on the Scottish referendum on independence and Brexit. In relation to Brexit, there is scant evidence of theatre about the referendum on UK membership of the EU in advance of the vote. After the dire campaign and close result, which led to the resignation of a Prime Minister, The Royal National Theatre of Great Britain (NT) responded directly with *My Country: A Work in Progress* directed by the theatre's artistic director Rufus Norris. The piece opened in London in February 2017 before a national tour.[37] In contrast, there is plentiful evidence that Scottish theatre makers engaged with the subject of independence in advance of the 2014 referendum. Sila Güvenç states that "members of the Scottish theatre community played a vital role in the Scottish independence referendum of 2014. They organized and took part in meetings, campaigns, and debates following its announcement. Though it is apparent that the majority of those involved were in favour of independence, plays on the subject addressed both sides of the argument…"[38] Participating theatre makers and researchers Laura Bissell and David Overend concur stating that theatre performances about Scottish independence, many of which took place in the final six weeks before the referendum itself, "were a constituent part of a wider social movement, which included performances of opinion across the country and beyond."[39] They assert that theatre "offered a space and time for both politicised spectacle and dialogue around political issues."[40] There was a high level of theatre activity in advance of the 2014 Scottish referendum that simply was not evident in advance of referendums elsewhere.

---

[37] M. Zaroulia, *After the British EU referendum: When the theatre tries to do "something"* [in:] *The Routledge Companion to Theatre and Politics*, eds. P. Eckersall, H. Grehan, 1st ed., Abingdon & New York 2019, pp. 17–20.

[38] S.Ş. Güvenç, *'Yae, Nae, or Dinnae Ken': Dramatic Responses to the Scottish Referendum and Theatre Uncut*, "New Theatre Quarterly" 2017, vol. 33, no. 4, p. 383.

[39] L. Bissell, D. Overend, *Early Days: Reflections on the Performance of a Referendum*, "Contemporary Theatre Review" 2015, vol. 25, no. 2, p. 250.

[40] *Ibid.*

4. Adversarial acts

Elections are story-telling contests in which the *demos* comes to be represented by identifying with competing and contested narratives about itself.[41]

Once the Liberal/National Coalition Opposition veered from bipartisan support with the Albanese government for First Nations constitutional recognition, the Voice referendum became a narrative contest between opposing and competing sides: yes and no. An instance of truth-telling theatre and plentiful "yes statements" by theatre companies were contested in and across multiple media spaces (traditional and social media, on T-Shirts, posters, stickers, etc.). A familiar negative narrative became much more appealing and powerful than the affirmative one. Leading the Yes vote was the Prime Minister himself. Cast against Albanese was a younger, First Nations woman from a remote town in central Australia, Jacinta Nampijinpa Price. Despite also being a politician and Shadow Aboriginal Affairs Minister, she was significantly junior to the Prime Minister and played a well-pitched role as the younger, Indigenous, female underdog taking it to the older, white, powerful man. With Price fronting the campaign, the no vote undermined the yes position by characterising it as government-led change from the top down: a powerful and elite ruse led by the usual (Indigenous and non-Indigenous) cast of educated, political activist, cultural elites concentrated in capital cities. This narrative gained ground even though the Voice was not an idea that emerged from Canberra or from bureaucrats. It was an Indigenous idea, that emerged from Indigenous dialogues held across Australian regions, and which congealed into a majority consensus expressed by the 2017 Uluru Statement.

Campaign scripts opposed "yes statements" to more popular slogans: "If you don't know, vote no"; "vote no to the voice of division." The first/former script enacts a retreat to popular or folksy wisdom which takes a very binary view of the world divided into people who know and people who do not know. If you are one of the latter, it is assumed that it is better to vote no than be hoodwinked by the powerful and knowing. This "wisdom" also enables disinformation to flourish by refusing to challenge confusion and obfuscation. Rather than pick through truths and untruths or gain knowledge, voters are encouraged to simply vote no. Equally damaging was the call to "vote no to the voice of division." The no campaign held that the creation of a representative and consultative Indigenous body was an act that divided Indigenous and non-Indigenous Australians. It claimed that the case against the Voice promoted unity with all Australians held together in radical equality within the one nation. Of course, this version of nationalism – a unity of different equals ultimately subsumed into a singular oneness – holds together only if history is ignored, which it was. The racially discriminatory laws and practices of the past, which have been documented in the Royal Commission into Aboriginal Deaths in Custody[42] and the Australian Human

[41] S. Coleman, *Elections as Storytelling Contests*, "Contemporary Theatre Review" 2015, vol. 25, no. 2, p. 169.

[42] Australia, Royal Commission into Aboriginal Deaths in Custody & Johnston, Elliott (1998), *Royal*

Rights and Equal Opportunity Commission's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families,[43] were glossed over. The connections between racialised laws and practices of the past and structural disadvantage in the present were denied. The no case promoted, instead, an unproblematic patriotic present.

The tragedy of the Voice referendum was also a Theatre of Cruelty in which the role of theatre was extremely marginal. Even though the Scottish referendum for independence was rejected 55/45%, there was a sense of theatre having engaged in a movement for change, opening spaces for dialogue, presenting both sides of the debate and, thereby, enabling (con)testing of positions and deliberation. New affirmative identities and affective relationships were forged in and through the prolific and deliberate activities of Scottish theatre and performance makers.[44] The cruelty of the Voice referendum is that there was a consensus amongst First Nations peoples in terms of Voice, Treaty, and Truth. That majority consensus was traduced by the referendum. The result excluded possibilities for Indigenous-led solutions to disadvantage manifest, not least, in high rates of incarceration and youth detention.

Political theorist Stephen Coleman, cited above, asks theorists of theatre and performance what our shared objectives should be in theorising and practicing "democratic performativity" and whether they are "helping to inject popular narrative into the over-determined script of electoral democracies; encouraging the noisiness of democratic voice; helping people say what it feels like to be them; democratising democracy; or, putting some feeling into an atrophying performance."[45] Theatre could do all of the above, and more. The Scottish independence referendum indicates how theatre-makers might participate in processes of direct democracy. However, theatre tends to reflect or respond to political culture: it does not drive it. In the aftermath of the EU referendum, the Electoral Reform Society produced a report to improve the conduct of referendums as a tool of democracy. The report suggests that the government needs to carefully lay the groundwork for "a political system that can tolerate the divisive aspects of a binary referendum debate."[46] as well as ensuring better (factual) information and more vibrant deliberative, rather than combative, debate.[47] Given the high stakes, the Albanese government leading the yes vote in the Voice referendum should have anticipated an adversarial or negative campaign. I would much rather be writing about theatre that flourished over the course of a long campaign that featured well informed citizens debating constitutional issues, than

---

Commission on Aboriginal Deaths in Custody [electronic resource], Council for Aboriginal Reconciliation Sydney.

43 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Australia) & Wilson, Ronald, Sir, 1922–2005 & Australia. Human Rights and Equal Opportunity Commission, *Bringing them home*…

44 L. Bissell, D. Overend, *Early Days*…

45 S. Coleman, *Elections as Storytelling Contests*…, p. 176.

46 Grehan H., *First Nations Politics*…, p. 9.

47 *Ibid.*, pp. 9–11.

characterising the short referendum campaign, dominated by personalities rather than issues, and falling back on patriotic tropes of nationalism, as a Theatre of Cruelty.

Literature

Albanese A., *Address to Garma Festival – Speech*, 30 July 2022, https://www.pm.gov.au/media/address-garma-festival [accessed: 2025.06.7].

Artaud A., *The theatre and its double: essays*, Montreuil 2001.

Australia, Royal Commission into Aboriginal Deaths in Custody & Johnston, Elliott (1998), *Royal Commission on Aboriginal Deaths in Custody [electronic resource]*, Council for Aboriginal Reconciliation Sydney.

Bangarra, *Bangarra Statement on the National Referendum for the Constitutional Recognition of Australia's First Peoples*, 2023, https://www.bangarra.com.au/media/mfrbnswu/2023-bangarra-statement-the-voice-referendum.pdf [accessed: 2025.06.17].

Bissell L., Overend D., *Early Days: Reflections on the Performance of a Referendum*, "Contemporary Theatre Review" 2015, vol. 25, no. 2, pp. 242–250.

Casey M., *Referendums and reconciliation marches: What bridges are we crossing?*, "Journal of Australian studies" 2006, vol. 30, no. 89, pp. 137–148.

Coleman S., *Elections as Storytelling Contests*, "Contemporary Theatre Review" 2015, vol. 25, no. 2, pp. 166–176.

Davis M., Williams G., *Everything You Need to Know about the Uluru Statement from the Heart*, Sydney 2021.

Davis M., Williams G., *Everything You Need to Know about the Voice*, Sydney 2023.

Electoral Reform Society, *Doing referendums differently* [Press release], 2016, https://www.electoral-reform.org.uk/doing-referendums-differently/ [accessed: 2025.08.9].

Electoral Reform Society, *It's Good to Talk: Doing Referendums Differently* [Report], 2016, https://www.electoral-reform.org.uk/latest-news-and-research/publications/its-good-to-talk/ [accessed: 2025.08.1].

Grehan H., *First Nations Politics in a Climate of Refusal: Speaking and listening but failing to hear*, "Performance Research" 2018, vol. 23, no. 3, pp. 7–12.

Güvenç S.Ş., *'Yae, Nae, or Dinnae Ken': Dramatic Responses to the Scottish Referendum and Theatre Uncut*, "New Theatre Quarterly" 2017, vol. 33, no. 4, pp. 371–385.

Ilbijerri Theatre Company, *Our Stance on the Voice to Parliament*, https://www.ilbijerri.com.au/voice-to-parliament [accessed: 2025.06.7].

McAuley G., *Unsettled Country: Coming to Terms with the Past*, "About Performance" 2009, vol. 9, pp. 45–65.

Morris S., *Insights for design of direct public participation: Australia's Uluru process as a case study*, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/3230377/MF19-Australia-paper.pdf [accessed: 2025.08.7].

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Australia) & Wilson, Ronald, Sir, 1922–2005 & Australia. Human Rights and Equal Opportunity Commission, *Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney 1997, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/ [accessed: 2025.06.7].

Nicholls I., *Facing up*, https://www.theatreworks.org.au/2023/facing-up [accessed: 2025.06.7].

Prouse Ch., *On the Voice to Parliament*, Australia 2023.
Reynolds H., *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Sydney 2006.
Schmidt T., *'We Say Sorry': Apology, the Law and Theatricality*, "Law Text Culture" 2010, vol. 14, pp. 55–78, https://ro.uow.edu.au/ltc/vol14/iss1/5 [accessed: 2025.06.7].
Zaroulia M., *After the British EU referendum: When the theatre tries to do "something"* [in:] *The Routledge Companion to Theatre and Politics*, eds. P. Eckersall, H. Grehan, 1st ed., Abingdon & New York 2019, pp. 17–20.

Summary

Kerrie Schaefer

Theatre and Referendums: The Case of The Indigenous Voice to Parliament

This article reflects on the opportunity for constitutional change that was lost when the referendum on the Indigenous Voice to Parliament that took place in Australia on 14 October 2023, was rejected. This reflection is partly personal, written by an Australian citizen of European descent. It also seeks to examine the role of theatre/performance in relation to acts of direct democracy. In May 2022, the Australian Prime Minister elect signalled that his incoming government would implement the 2017 *Uluru Statement from the Heart* (Voice, Treaty, Truth), which would require constitutional change. Ultimately, a six-week period was given to prepare the electorate for the Voice Referendum. While theatre organisations' responses were limited, mainly, to affirmative ("yes") statements, populist performatives of division and disinformation were abundantly evident. The short lead in time to the Voice referendum and a lack of leadership in the space of (un) democratic performativity mean that positive and meaningful political change for Indigenous Australians will take longer to achieve.

Keywords: Indigenous Voice to Parliament, constitutional change, referendums, direct democracy, theatre, performance/performativity.

Streszczenie

Kerrie Schaefer

Teatr i referenda – o Głosie Rdzennej Ludności w Parlamencie

Niniejszy artykuł podejmuje refleksję na temat utraconej szansy na zmianę konstytucji, gdy referendum w sprawie uznania Głosu Rdzennej Ludności w Parlamencie, które odbyło się w Australii 14 października 2023 r., zostało odrzucone. Refleksja ta ma częściowo charakter osobisty, ponieważ została napisana z perspektywy obywatelki Australii pochodzenia europejskiego. Jednocześnie autorka podejmuje próbę analizy roli teatru i performance'u w kontekście aktów demokracji bezpośredniej. Ma również na celu zbadanie roli teatru/performance'u w odniesieniu do aktów demokracji bezpośredniej. W maju 2022 r. premier elekt zasygnalizował, że jego nowy

rząd wdroży deklarację Uluru z 2017 r. (Głos, Traktat, Prawda), co wymagałoby zmiany konstytucji. Ostatecznie wyznaczono sześciotygodniowy okres na przygotowanie elektoratu do referendum wyborczego. Podczas gdy odpowiedzi organizacji teatralnych ograniczały się głównie do stwierdzeń twierdzących („tak"), populistyczne performatywy podziału i dezinformacji były bardzo widoczne. Krótki czas oczekiwania na referendum w sprawie głosowania oraz brak przywództwa w przestrzeni (nie)demokratycznej performatywności oznaczają, że osiągnięcie pozytywnych i znaczących zmian politycznych dla rdzennych Australijczyków zajmie więcej czasu.

Słowa kluczowe: Głos Rdzennej Ludności w Parlamencie, zmiany konstytucyjne, referenda, demokracja bezpośrednia, teatr, performance/performatywność.

Michał Kowalski
University of Warsaw, Poland
kowalmi@is.uw.edu.pl
ORCID: 0000-0001-7445-2040

https://doi.org/10.26881/gsp.2025.4.08

Myth and Punishment

"The gods created the world…"[1] and then it only got worse. This is a very brief summary of the content of mythological stories about the creation of the world that arose in various cultural systems independently of each other. After the world came into being and the first humans appeared, stories about the fall of the human race are a common motif in mythological narratives. Successive generations are always worse than those that preceded them. God, or the gods, send successive punishments on mankind for failing to live up to their expectations and not growing up to what they have been given and destined to do. The mythological motif of sin and punishment is a fascinating area of theological and ethical inquiry, provoking numerous questions about the nature of god/gods, about the nature of the source and causes of the existence of evil, questions about the nature of human beings, about the meaning of freedom, and about the existence (or lack) of human free will. But it is also an opportunity to ask what punishment is in mythology, what its meaning is, what its source is, and what legitimizes it. Moreover, the presence of punishment themes in ancient mythologies raises questions about the significance of ancient mythologies for the contemporary understanding of law and justice, and the principles of the functioning of modern societies.

Interest in mythologies as systems of ideas about the world of various peoples dates back to ancient times. Since ancient times, foreign myths have been treated

[1] Two caveats are necessary at the outset of this article. First, in this article I treat myths as narrative stories, without attempting to analyse their theological layer. Second, for the purposes of my article, significant simplifications were necessary, mainly because of the fact that in the case of individual cultures it is difficult to speak of the existence of a single and coherent set of stories that could be defined as, for example, Egyptian, Greek, Norse, or African mythology. Mythologies are collections of various stories, multi-threaded, and often contradictory, as the authors of anthologies devoted to the mythologies of particular peoples, cultures, or civilizations unanimously point out. In the case of societies defined as ancient, that is, those that existed over hundreds or thousands of years, it must be remembered that at various times individual cities, regions, and even individual social groups had their own myths (mythological systems), and the mutual relations between them, sometimes peaceful, and sometimes hostile, do not make it possible to formulate unequivocal statements about the myths of a given people. With both reservations in mind, in this article, when I use terms such as "Greek mythology" or "Egyptian mythology," I refer to the content of individual myths, collected and elaborated in anthologies devoted to given peoples.

as a kind of curiosity illustrating naivety or stupidity, or at best, merely a difference in the way barbarians think.[2] Foreign myths were contrasted with one's own myths, which were treated as true stories, told to real people by their only true gods. With the rise of their modern study, myths began to be seen as more than just strange tales told by alien peoples. Anthropological reflection on the knowledge systems of various societies, dating back to the turn of the nineteenth and twentieth centuries, has made it possible to distinguish universal features of mythological narratives that are independent of the culture of the communities that are their owners.

First, mythological stories are commonly distinguished from other types of narratives (that is, fairy tales, legends, riddles, historical tales, etc.).[3] We must remember this when we use the concept of myth today: we treat this type of story as a kind of fiction, as something untrue and not entirely serious, failing to notice that in societies defined as traditional (pre-literate), myths had the status of sacred stories, and therefore true stories, which distinguished them from fairy tales or legends invented for the entertainment of listeners.[4] What the myths said was treated with reverence and seriousness as indisputable truth, different from that of any type of stories invented by people. Myths carried a transcendent message that went beyond everyday experience. This is the source of their second significant feature: myths were treated as a sacred pattern of knowledge about the world, and thus as a pattern of action for people living in this world.[5] The function of myths was to explain all natural, moral, and social phenomena that went beyond individual experience. Knowledge of a given body of myths, specific to a particular collective, formed what has been termed a "collective soul."[6]

In concepts referring to psychology as broadly understood, myths have been interpreted as an expression of unconscious thinking, reflecting archetypes and symbols present in the human psyche;[7] as universal structures of thinking, including thinking in terms of opposition (that is, good and evil, sacred and profane, night and day, masculine and feminine);[8] and as a reflection of thinking about society, including the existence of a social structure (reflecting its tripartite division: those who rule, those who fight, and those who work).[9] Thus, the facts presented in mythological stories had the status of knowledge about the world, socially shared and respected, presented and reproduced through numerous ceremonies and rituals. Hence the common concern for the faithful transmission of their content and meanings, but also

---

2 J. Frazer, *Złota gałąź*, transl. H. Krzeczkowski, Warszawa 1962.

3 B. Malinowski, *Mit, magia, religia. Dzieła*, vol. 7, Warszawa 1990.

4 *Ibid*.

5 M. Eliade, *Traktat o historii religii*, transl. J. Wierusz-Kowalski, 2nd ed., Łódź 1993.

6 E. Durkheim, *Elementarne formy życia religijnego*, transl. A. Zadrożyńska, Warszawa 1990.

7 C. Jung, *Archetypy i symbole*, transl. J. Prokopiuk, Warszawa 1993.

8 C. Lévi-Strauss, *Struktura mitów* [in:] *idem*, *Antropologia strukturalna*, transl. K. Pomian, Warszawa 2000, pp. 185–216.

9 G. Dumézil, *Bogowie Germanów. Szkice o kształtowaniu się religii skandynawskiej*, transl. A. Gronowska, Warszawa 2006; see also: M. Składankowa, *Georges Dumézil i trójdzielny paradygmat mitycznej wyobraźni*, "Literatura na Świecie" 1987, no. 11(196), pp. 321–331.

the concern to observe the rules transmitted through myths, which were given the status of sacred stories. In this sense, myths became the source and justification for the entire law of a given community and, importantly, a socially accepted justification for moral assessments of actions undertaken by individuals, including a specific system of punishments and rewards related to compliance with the sanctified law by individuals belonging to a given community.

Myths legitimized the existing social order by referring to tradition, which made it possible to treat the norms and principles they expressed as going beyond the human understanding of justice. Therefore, what was passed down "from eternity" became "divine" law. What is important is that the assessment of specific actions of people living in a given society as "good" or "evil" was treated, at least in principle, as independent of the people in power and/or acting as judges (in myths often identified with the ruler). The common knowledge of divine laws, principles, and norms, conveyed in the form of a mythological story, made it possible, at least theoretically, to treat the court as an impartial institution, safeguarding the observance of laws that were earlier than any laws established by humans. The Torah (that is, "Law") is an example; it is a collection of sacred mythological stories, written down in Five Books after centuries of oral transmission;[10] it established the legal basis for the social organization of the nation of Israel in subsequent centuries up to the present day.

To put it differently and in anticipating further analysis, myths described the principles of social organization and formed the foundation of thinking about the world (a worldview) in which the concepts of order and harmony were central categories. Myths clearly defined what should be considered fair and provided a justification for possible punishments applied to those who acted contrary to the norms resulting from the truth of the myth, as well as a basis for possible rewards for those who acted in accordance with the accepted pattern. It is worth noting that in mythological stories there are individual heroes, often referred to as righteous persons, who defend order and justice, and their attitude is described as a model worth imitating. On the other hand, their actions are contrasted with the rest of humanity, that is, the mass actions of those who universally break recognised patterns and norms of behaviour.

In order to explain the relationship between myths and law, it is worth looking at three groups of mythological narratives that arose in various parts of the world (largely independently of each other, we can assume) and that express universal truths about social life and about the way law is understood. It is worth paying attention to the myths about the creation of the world, myths about the fall of man, and myths about the end of the world. Myths about the beginning of the world should be treated as stories about the emergence of a model for the legal system and the justification of the concept of justice; myths about the fall of man should be treated as narratives about those who violate the established order (violate the law and act against justice); and myths about the end of the world should be treated as stories about the inevitability of punishment for all wrongdoers and a possible reward for the chosen

[10] J. Barton, *Historia Biblii. Księga i jej religie*, transl. A. Kunicka, Warszawa 2022.

and righteous. Importantly, even a very cursory and necessarily simplified review of such mythological tales indicates significant similarities in their narrative structures and the similarity of the content they express.[11] The content, as I demonstrate, is of fundamental importance for understanding contemporary attitudes towards law, punishment, and justice.

1. The creation of the world

Most mythological stories about the creation of the world follow a similar scenario, which is noted by all researchers dealing with the comparative analysis of mythology. From non-existence (chaos) appears something which initiates the creation of something, some distinguished place in space from which the sky and the earth arise, air and water appear separating different dimensions of existence, and then creatures appear to inhabit the created world. What is significant among these first beings is that some being (or demiurge, god, force, or man) appears, whose attribute is the establishment of law that will be binding on all subsequent beings and emerging creatures. In most myths, the appearance of humans is the result of the actions of a god or gods, which, in turn, leads the gods to expect humans to act in accordance with the purpose and principles revealed to them by the gods. But things quickly begin to get complicated when, just as quickly, someone appears who challenges the established order.

In Near Eastern mythologies, the way in which the world came into being has consequences for all subsequent events, until its predicted end. Sumerian, Babylonian, and Old Testament myths (Akkadian, Aramaic, and Canaanite) combine, interpenetrate, and correspond with each other, creating a puzzle, difficult to interpret, that we try to decipher from the few surviving religious texts created in that area. In Sumerian mythology, the primordial ocean is the beginning and creator of everything, from which emerges the cosmic mountain An-Ki, which is both heaven and earth at the same time. From the union of heaven and earth the god Enlil (protector of the city of Nipur) is born, who in one of his first acts disturbs the established divine order by seducing the grain goddess Ninlil. Together with his wife, he is sentenced by his father to wander the underworld. Thanks to a trick, together with the children born in the underground, she comes to the surface, giving light to the world at that moment: first the moon goddess and then the sun god. Significantly, Enlil disrupts the established order, but his achievements surpass those of his father An and he becomes the chief god of the Sumerians. He is considered the creator of humanity and the one who gives it the ability to work the land. Babylonian mythology is similar in its structure: Marduk, the son of the god of wisdom Ea and the goddess Enki (in other versions Damkina), surpasses the power of his father, the god of wisdom. He puts the world in

[11] Cf. E. Cassirer, *Mit i religia* [in:] *idem*, *Esej o człowieku. Wstęp do filozofii kultury*, transl. A. Staniewska, Warszawa 1998, p. 139.

order, creates man from a killed deity, gives people magic, knowledge, and all kinds of skills; in other words, he is the model of a perfect ruler. The kings of Babylon ruled in his name over the peoples under their control, building temples and performing annual rituals that perpetuated his rule over the world.[12] It is significant that in many belief systems that developed in the Middle East, the king, who was the representative of God on earth, was at the same time the high priest, but also the high judge, ensuring that divine laws were observed and adjudicating any potential disputes in accordance with this law.[13]

In Egyptian mythology (in the version created in Hermopolis), one of the first figures to appear after the world emerges from nothingness is the goddess Ma'at. She is the goddess of law, justice and harmony, daughter of the god Re, and wife of the god Thoth (the god of wisdom). She does not occupy a prominent place in the pantheon(s) of Egyptian deities, although her role in the belief system was significant. Among her many attributes is an ostrich feather, symbolic of the power to judge and also a sign of judges. During the Old Kingdom, judges were called priests of Ma'at. Moreover, the concept of "*ma'at*" itself denotes not only a specific person/being, but above all the main principle governing the world. In this meaning, *ma'at* means the harmony necessary for the existence of the world, a specific power that prevents the world created by the god Re from returning to the times of primordial chaos. The feather motif appearing in Egyptian art is a symbolic reminder that the rules established in the beginning must always be followed. The pharaoh was responsible for maintaining law and order; together with the priests representing him, he offered a daily sacrifice to goddess Ma'at, and in the event of any natural disasters or disturbances, Ma'at was called upon to restore order and harmony to the world.[14]

In ancient Greece, one of the first figures to come into being after the creation of the world, according to the common scenario of mythological stories, was Themis (protector of law, justice, and harmony).[15] She was created from the union of Gaia and Uranus and belonged to the generation of the Titans (giants), the first beings born from this union. Then the Cyclopes, the hundred-handed gods and men arise. Like the Egyptian Ma'at, Themis does not become the heroine of her own myths, but appears as a secondary figure in many other stories. It is worth noting that Themis is one of the few Titans to survive the turbulent and extremely brutal period in which the world is formed. This testifies to the importance attributed to the guardian of primordial law, harmony, and order in subsequent mythical eras of human development. One could

[12] It is worth noting that it was against this authority that the biblical Abraham (Abram) rebels, leading his people out of Babylonian captivity; cf. R. Graves, R. Patai, *Mity hebrajskie. Księga Rodzaju*, transl. R. Gromacka, Warszawa 2002, pp. 144–147.

[13] G. Dumézil, *Bogowie Germanów…*

[14] For extensive commentary on the idea (concept) of Ma'at, see: J. Assmann, *Maat. Sprawiedliwość i nieśmiertelność w starożytnym Egipcie*, transl. A. Niwiński, Warszawa 2019. See also: G. Rachet, *Słownik cywilizacji egipskiej*, transl. J. Śliwa, Katowice 1994, p. 191.

[15] For more on the myths related to Themis, see the following part of this article, which is based on R. Graves, *Mity greckie*, transl. H. Krzeczkowski, Kraków 2022 and Z. Kubiak, *Mitologia Greków i Rzymian*, Kraków 2022.

say that her role in myths is to remind various heroes of the existence of laws that must not be broken, because acts that violate them always and unconditionally have disastrous consequences.

In the mythological narrative presented in the Old Testament writings and continued in the New Testament, the world comes into being by the will of God, according to His purpose and His words, prior to any material manifestation of His will. The creation of the world is an independent work of God the creator, and the history of humans begins *de facto* with an act of disobedience to divine principles. Everything that happens next can be presented, in great simplification, as a constantly occurring conflict between God, who reminds us of the existence of the Law, and people, who break these laws. The plot of the following biblical stories is similar: God establishes or confirms the law, but the people do not obey it; a righteous one appears who saves the people from a final catastrophe; the people promise to improve and obey the divine law, but soon after they stop obeying it… and history repeats itself several times in different variants.

It is worth noting that the source material concerning the oldest cosmogonic myths (about the creation of the world) is extremely scanty and at the same time difficult to interpret. The point is that these myths deal with extremely abstract issues that can be expressed using symbols, concepts, and languages whose meanings we are not always able to reconstruct and understand. Similar difficulties had to be faced by those who transformed orally transmitted myths into a document (written, depicted in a picture or sculpture) that has survived to modern times. Authors analysing cosmogonic myths point out that in stories about the creation of the world, abstract primordial forces and gods are replaced by a conventional second generation of gods. The creator gods are replaced by gods who rule over the world and act in this world.[16] The original principles that develop along with the emerging world in all mythologies become personified: gods appear whose main attribute is the protection of the observance of law. In the mythologies of the Near East, ancient Egypt, and ancient Greece, these oldest gods, creators of the world, are forgotten or marginalized and replaced by god-rulers whose main task is to ensure compliance with the originally established law. This transformation occurs not only in the most famous myths of Eurasian antiquity. In Inca mythology, the central figure is god Inti (Father of the Sun), considered the creator of the royal dynasty and of the entire Inca people. As the creator (father) of the Inca civilization, he was considered the creator of law, order, and social order, the maintenance of which was to be ensured by the sacrifices offered to him.

Those in power (including the power to judge) are treated as those who derive their prerogatives from divine endowment. But despite all the majesty attributed to their person, despite the numerous rituals and ceremonies associated with the person of the king, the actions they undertake are not always related to the realization of divine laws and principles. Myths feature good and bad rulers, and the mythological

[16] E. Eliade, *Historia wierzeń i idei religijnych*, vol. 1: *Od epoki kamiennej do misteriów eleuzyńskich*, transl. S. Tokarski, Warszawa 1988.

scenarios describing the conflicts between them are remarkably similar, regardless of the part of the world in which the myths were created. Where bad kings rule, most often usurpers who, through cunning or magic tricks, have taken over power that is not theirs, the world described seems to scream about the injustice taking place. In such a world, people have no defender, humanity is threatened by monsters, and various disasters, plagues and catastrophes occur; nature does not develop and humanity is threatened by the spectre of famine and wars. The restoration of law and order is associated with the appearance of a hero, initially unaware of his destiny, who, thanks to his righteousness and deeds in accordance with the eternal order, attains power at the end of the mythological story. Importantly, the legitimacy of his path to power is confirmed by the support provided to him by ordinary people and forces of nature such as trees, animals, and birds. This is to symbolize a kind of approval from higher forces given to the hero for acting in accordance with divine law. The bad king is defeated, whereas the good one lives happily ever after.[17]

This mythical pattern of good triumphing over evil is repeated in countless stories that are part of the contemporary canon of popular culture, from the stories of Gilgamesh and Moses, the story of King Piast,[18] the stories of the Knights of the Round Table,[19] the stories told by Tolkien[20] and C.S. Lewis,[21] and the story of Luke Skywalker told in the *Star Wars* saga. What these stories have in common is the triumph of good, legitimized by conduct consistent with principles that are earlier (and higher) than those laws that have been introduced and imposed by those currently in power in a contingent manner and are therefore contrary to unchanging ideas of justice. It can be said that these ancient and contemporary stories about the struggle between good and evil reflect a mythological archetype, according to which the victory of the good is justified by referring to a law that is earlier, and therefore more important, than the law established at a given moment by the current authorities. Laws made by humans can change, as can judges appointed by authorities to judge what is lawful and what is contrary to the law. However, the stories mentioned here, which belong to popular culture, but are based on ancient heroic myths, indicate that those who appeal to universal principles of justice are always the winners, especially when the law established by judges (the authorities) is in conflict with the laws established by gods.

---

17 J. Frazer, *Czarownik, kapłan, król*, transl. I. Wajnberg, Kraków 2024.

18 J. Banaszkiewicz, *Podanie o Piaście i Popielu. Studium porównawcze nad wczesnośredniowiecznymi tradycjami dynastycznymi*, Warszawa 2010.

19 *Opowieści Okrągłego Stołu*, ed. J. Boulenger, transl. K. Dolatowska, T. Komendant, Warszawa 1987.

20 A. Szyjewski, *Od Valinoru do Mordoru. Świat mitu a religia w dziele Tolkiena*, Kraków 2004.

21 C.S. Lewis, *Bóg na ławie oskarżonych*, transl. M. Mroszczak, Warszawa 1993.

2. The fall of man

Creation myths are stories that justify the existence of a pattern in which the world is ordered according to primary and primordial principles of harmony and order. In this sense, these myths are a justification for the existence of moral truths, a pattern that orders the functioning of the world and, at the same time, defines human beings' place in the world and the principles that humanity should follow in its actions (regardless of its place in the social structure).

Another universal thread in mythological stories is the conflict between those who are the guardians of existing laws and the people (or gods) who act against existing rules. In the Mesopotamian myth of Gilgamesh, there is a motif of the fall of humanity associated with the figure of Enkidu, a half-animal hunter, opponent, and later friend of Gilgamesh, who, after discovering his humanity, rebels against the will of the gods and is, therefore, sentenced to death by them. The elaborate story of the friendship between Gilgamesh and Enkidu ends with a second moral: after his friend's death, having understood the meaning of punishment for his evil deeds, Gilgamesh abandons the life of an adventurer and sets off in search of immortality. He finds two types of it: the first is earthly immortality that allows one to remain alive like a snake that is reborn every time it sheds its skin; the second consists in performing good deeds and being remembered in the immortal memory of grateful people.[22]

In numerous mythologies from various parts of the world there is a motif of successive eras of humanity, each of which is worse than the previous one. In Greek, Hindu, Norse, and New World mythology, four periods of human development are distinguished, with each subsequent era considered worse than the previous one. The first age, most often referred to in mythology as golden, is a time of perfect harmony, prosperity, peace, and moral perfection on the part of the people living then. For the Greeks, the last era, the Age of Iron, is a period of decline in morality and growth of evil among humans. In Hindu mythology, the last and current period, referred to as Kali Yuga (that is, the era of the rule of the bloodthirsty goddess Kali) is considered a time of darkness, evil, chaos, and conflict preceding the end of the world.[23] In Norse mythology, similarly, the last and fourth period of humanity's existence is referred to as the Time of Loki, when all the powers of evil take over the world, leading to the destruction of gods and humans. In Aztec mythology, the succession of eras is marked by successive Suns (the Sun of Earth, Wind, Fire, etc.), ruled by other gods and inhabited by other beings whose survival depends on the satisfaction of blood sacrifices made by humans. But none of these sacrifices is able to prevent subsequent catastrophes.[24]

---

[22] T. Margul, *Mity sumeryjskie znad ujścia Eufratu i Tygrysu* [in:] *idem*, *Mity z pięciu części świata*, Warszawa 1996.

[23] M. Eliade, *Indyjski symbolizm czasu i wieczności*, transl. K. Kocjan, J. Sieradzan, "Pismo Literacko-Artystyczne" 1986, no. 6–7, pp. 154–167.

[24] M. Frankowska, *Mitologia Azteków*, Warszawa 1987.

Although the biblical story does not divide the world's existence into successive eras in the way found in other mythologies,[25] the vision of the fall of humanity is a central motif of the narrative. The expulsion from Paradise, the Deluge, numerous plagues sent by God, and subsequent catastrophes are presented as the consequences of human disobedience to the commands of the Creator. The story ends with the announcement of the Last Judgment, which will affect all of humanity and each individual. Every action will be evaluated and every person will receive an appropriate punishment or reward.

As Mircea Eliade notes, the universality of the deluge myth can be explained by the phenomenon of diffusion, but the interpretative key to its dissemination is the symbolic universalism of its content. He notes that most deluge myths, including the Epic of Gilgamesh and the biblical story, are part of a cosmic rhythm in which the old world inhabited by fallen humanity is submerged in water, and sometime later, out of the watery chaos, a new world emerges. Eliade also states that in a great number of variants the deluge myth indicates that the return to the times of chaos is the result of sins (or ritual errors perpetrated by humanity), and sometimes the expression of the will of a divine being to put an end to humanity. The biblical stories can therefore be presented as successive eras of divine law and subsequent human rebellions.

This necessarily cursory review of selected mythologies of the fall of humanity makes it possible for us to indicate the reasons why mythological humanity is punished by its gods. These punishments are always caused by violations of divine laws, of divine harmony, and of balance. Since the gods are the guardians of such order, punishment for those who violate existing rules and act against laws considered sacred can be seen as a form of justice and an attempt to restore cosmic balance. The function of punishment is therefore to erase the guilt for violating eternal laws, and the administration of justice is aimed at returning to cosmic harmony and/or divine order.

Punishment for evil deeds should also be seen as a kind of moral lesson, intended to persuade people to change their evil behaviour by returning to the path of respect for divine laws. In this case, we can point to a second didactic function of punishment, which can be treated as a warning to all those potentially inclined to rebel against respect for the existing law. Thus, another function of punishment present in the mythologies mentioned, and resulting from the mythological lessons given to wrongdoers, may be its preventive function. Referring to the concepts used in social sciences, one can also say that myths play an important role as tools of social control, indicating specific attitudes and specific ways of behaving towards those who implement them.

[25] A significant moment here is the appearance of the Messiah – expected in the mythological narrative of the Old Testament and accomplished and awaited again in the tradition of the New Testament (cf. G. Pattaro, *Pojmowanie czasu w chrześcijaństwie* [in:] *Czas w kulturze*, ed. A. Zajączkowski, Warszawa 1988, pp. 291–329).

Gods expect laws to be obeyed and, in a sense, test the loyalty of people, checking their devotion, faith, and fealty. Those who in some way act contrary to divine commandments are punished in an exemplary manner, for example, by denying them eternal life, denying them rebirth in the cycle of reincarnation, and denying them grace, divine protection, or prosperity. There is a reward provided for those who act in a manner consistent with divine commandments (in many cases referred to as the righteous). It must be emphasised, however, that in all mythological stories the rewards are given to the few (the chosen or the righteous), while humanity as a whole experiences an inevitable cosmic catastrophe.

What seems extremely important here is the element of human free will, which enables him or her to make choices about his or her own behaviour. At this point, we can only point out that myths tell us what behaviour is appropriate and what behaviour is not. Mythological stories about the fall of humanity indicate very clearly the actions that punishment inevitably follows. In this sense, the quite abstract concept of justice, understood as a violation of divine order and harmony, is precisely specified. Every action has its consequences, and everyone will be judged in his or her own time. And this judgment will take place exactly in the manner the mythological stories say.

3. The end of the world

In all mythologies, the end of the world is presented as a time of reckoning and judgment, in which the deeds of each person will be judged in accordance with the law established at the beginning of the world. It can be said that the rules that apply to every person are obvious and clearly defined, and the references to particular mythological stories are intended to remind us constantly of the consequences of our actions, which will always – in the end – be subject to assessment.

Regardless of the content of the myths in individual communities, it can already be stated at this point that the idea of the institution of the court, and thus the idea of the victory of law and justice, is integrated into the system of mythological thinking about the world, constituting a link connecting the beginning and the end of the world. In biblical mythology, the end of the world is presented as a time of the last judgment announced at the beginning. In other mythologies, too, the end of the world is seen as something obvious and inevitable, something that cannot be stopped. An example of such an event is the Norse Ragnarok, whose arrival is inevitable and independent of the actions of individual people. The end of the world, preceded by the arrival of inevitable evil, will simply come. All humanity and all the gods will participate in it. In other mythologies, although the end of the world is portrayed as inevitable, it can be delayed by the good deeds of all people. It can also be stopped through prayers and sacrifices made by people (including human sacrifices, as mandated by a mythology such as that of the Aztecs).

The inevitability of the end of the world announced in myths leads to an intriguing issue, for the gods destroy the world along with the people they themselves created. Who is to blame for the fact that humans are imperfect because they do not fulfil the will of their creators? It seems that no matter how we answer this question, it is worth paying attention to this aspect of myths, which does not so much concern the punishments that befall evildoers, but points to the rewards that are to be received by those who act in accordance with God's commandments in their lives. Humanity as a whole does not live up to the expectations placed upon it, but there are always heroes in myths who have completely submitted to the laws set by their gods. It can be said of them that they remain faithful to divine laws. As I showed earlier, they are referred to as the righteous, the chosen, or saints. A striking feature of mythical stories is that they are always few in number compared to the whole mass of those who in mythology are defined as sinners, infidels, the perfidious, etc., or simply as being within the general category of humanity. But the reward that is to be granted to these few is also unique and not available to everyone, because following the path marked out by the gods is extremely difficult.

In many mythologies there is an idea of justice identified with the principle of harmony and order (natural harmony, divine order, etc.). In ancient Egypt, it is the principle of *ma'at*, in China it is *tao*,[26] in various variants of Hindu and Buddhist mythology it is karma (dharma),[27] and in Aztec mythology it is *teotl*, understood as the eternal power, the force that keeps the world in harmony. What unites these concepts is the idea behind them that the emerging world is in a state of perfect balance (as opposed to the previous non-being, identical with a state of primordial chaos). The further fate of the world, connected with the appearance of some beings in this world (gods, demons, titans, humans, elves, etc.) disturbs this ideal order. When analysing the content of myths from various communities, we encounter stories that are similar in structure: someone (a god, or most often a human) consciously or unconsciously rebels against the existing norms and principles, causing the world to lose its initial state of balance and harmony. In mythologies, such actions are defined as evil and as such always require a reaction from the forces of good, restoring, in principle, the initial state of happiness. But if we analyse the content of myths further, we encounter the constant decline of humanity and, thus, a gradual drifting away from the original ideal on the part of the world of the reality described.

The Egyptian goddess Ma'at plays an important role during the Judgment of Osiris (also called the Judgment of the Dead). The soul of each deceased, after performing the necessary funeral rites, heads to the afterlife led by the god of the dead, Anubis. There it stands before Osiris and Thoth and confesses its earthly deeds. Osiris, using scales, places the deeds of the deceased on one pan and Ma'at's feather on the other. If the deceased's confession is truthful and the heart unburdened by sins weighs the same as the feather, Osiris leads the deceased to the gates of paradise. If not, if some

[26] M.J. Künstler, *Mitologia chińska*, Warszawa 1985.
[27] M. Jakimowicz-Shah, A. Jakimowicz, *Mitologia indyjska*, Warszawa 1982.

sins of the deceased burden his or her heart, which weighs more than Ma'at's feather, the soul of the sinner is taken by a demonic Devourer in order to annihilate it. The representation of the judgment of the soul of the deceased, with all the symbols illustrating this judicial process, is a common motif in archaeological monuments and ancient Egyptian writing, which testifies to the importance attributed to the Judgment of Osiris as a kind of tool for assessing the conformity of human actions with the principles perceived as the divine harmony of the world.

The figure that connects ancient mythology with modern times is Themis, whose image is a well-known and widely used symbol of courts, justice, and law. Although there are no known specific myths directly related to Themis, her figure appears in many Greek mythological stories. Zygmunt Kubiak points out that her name comes from the Greek *tithemi* (meaning "I set"), which meant order and tidiness, and above all, law established by universal custom.[28] Such law was, therefore, an unchanging customary law, in the literal sense of the word, as distinguished from that established by human legislators. The existence of unwritten, but commonly known, norms and principles in classical Greek was expressed by the phrase *themis esti* ("this is right"), a reference to the name of this goddess.

In addition to her presence in the initial moments of the creation of the world (which she experienced as one of the few beings called into being at that time, which in itself is significant), Themis appears in the Greek deluge myth, when, against the will of Zeus, she resurrects the human race (which, Robert Graves assumes, is a borrowing from earlier Babylonian mythology).[29] She also advises Zeus not to marry the Nereid Thetis, because according to a prophecy her child would surpass its father in power.[30] She appears in one of the variants of the myths concerning the creation of the oracle at Delphi, for after the birth of Phoebus (the god of divination), she feeds him with nectar and ambrosia.[31] She warns Atlas, who is guarding the Hesperides orchard, against Heracles' stealing the golden apples. Her role in these myths is to give advice on proper conduct, but also to predict the future by pointing out to the negative consequences of actions that go against customary law. It can be assumed that Themis' prophetic role consists, on the one hand, in reminding the heroes of myths about the existence of unchanging principles that have been binding on all beings since the beginning of the world and, on the other hand, in pointing out the consequences (that is, the inevitability of punishment) that will befall those who have betrayed the eternal laws which bind gods and people.

---

[28] R. Graves, *Mity greckie*… and Z. Kubiak, *Mitologia Greków i Rzymian*…

[29] There are many variants of the Greek deluge myth; in one of them, at the end of the Bronze Age, an angry Zeus sends a cataclysm upon humanity as punishment for the sin of cannibalism. Thanks to the suggestion of Prometheus (the protector of humanity), two righteous persons build an ark which lands on Parnassus, near the oracle of Themis, who gives them an idea on how to regenerate the human race.

[30] Thetis marries Peleus, and from their union Achilles is born, who, according to Homer, was the bravest of warriors. As a hero, he surpasses all men in power, but thanks to Themis' power of prophecy, he does not threaten the power of Zeus.

[31] The oracular temple at Delphi was supposedly dedicated to her, before Apollo took it over.

Today, Themis is associated primarily with three symbols that are intended to characterise the functioning of established legal systems. The scales held in one hand symbolize the justice of the judgments passed, while the sword held in the other hand symbolizes the inevitability of punishment, but also the certainty of the verdicts passed by the courts. Her blindfold is intended to symbolize the impartiality of the judgments issued by the judge as well as the entire legislative and judicial system. Regardless of opinions about the modern judiciary, the message symbolized by the images of Themis is universally recognizable. One may ask to what extent ancient mythologies are related to the contemporary image of courts, legislation, and the judiciary. I would venture to say that we are dealing here with a situation that reflects expectations regarding the functioning of the entire justice system, rather than with knowledge of the mythological attributes of Themis. The widespread recognition of her image should be treated as a sign of social expectations of the judicial system, in which an important role is played by something called a sense of justice. This feeling seems to be a common social expectation, and, therefore, a universal expectation regardless of the place, time, and form in which it is articulated.

It is important to note the common application of the principle of cause and effect in mythological narratives. Every evil act affects the condition of the world and therefore the condition of all humanity. Evil acts always have consequences and the perpetrators of these acts are subject to punishment, regardless of whether they are detected and brought to justice in a human court. But, as is clear from myths about the fall of humanity, counteracting evil by punishing the detected perpetrators of evil deeds is not effective on the scale of humanity as a whole. Despite the response to specific evil done by individuals, evil leaves its mark on the world, one might say, on a cosmic scale. The punishment that befalls the perpetrator of an evil act is individual in nature, while all of humanity continues to suffer the consequences of the evil committed individually. Various cataclysms befall humanity: famine, loss of immortality, lack of the visible presence of the gods, diseases, earthquakes, floods, and every other imaginable misfortune.

Here one can point out a second problem by asking the question: What is punishment in mythology? Or to formulate this problem differently: Is the punishment socially just that befalls an individual who commits evil, since all of humanity suffers the consequences of his or her individual wrongdoing? It can be assumed that this punishment suffered by the mythological villain is primarily of a didactic nature. It sets an example of behaviour that is considered socially reprehensible for everyone and, at the same time, indicates the consequences that should be faced by anyone who breaks recognized social norms. However, there remains the problem of justifying why all of humanity should suffer the consequences of individual ill behaviour? The answer to this question should be sought in the social functions of mythology.

Here, it is worth drawing attention to Eliade's concept of the myth of eternal return, according to which all ritual actions, including the re-enactment of myths, in the form of a story or performance, in a way transport the participants of a given event to the exemplary situation of the beginning of the world, to a place and time beyond

everyday, secular reality.[32] In this sense, participation in the re-enactment of myths belongs to the order of the sacred, which is different from what constitutes the reality of everyday experience. Thus, Eliade claims, every person lives in a world that is in a particular way polluted by everyday life, although his or her thoughts and desires strive to return to paradisial happiness. Also, according to Eliade, this should be seen as a kind of sacralization of the idea of justice independent of the legal systems created by human beings.

What more can be said about the functions of punishment presented in myths? In Greek mythology, punishment is understood as an inevitable reaction to evil deeds. In this sense it is presented as something just, something that aims to restore the divine order. The situation is similar in Egyptian and Norse mythology, where the punishment for evildoers is the annihilation of the soul and deprivation of the possibility of eternal life. The Egyptian goddess Ma'at punishes those who have violated harmony and the principles of justice; her actions are intended to prevent the return of chaos that threatens the world as a result of the evil deeds committed by humans. The Norse gods Odin and Thor punish those who have broken moral principles and thus disturbed the world order. Norse mythology developed the concept of fate and destiny, according to which every individual evil deed is subject to inevitable punishment, but the sum of all evil deeds committed by humans and gods leads to the complete destruction of the world. In Hindu mythologies and in various variants of Buddhist mythologies, the punishment for evil deeds is the rebirth of the evildoer in forms of existence lower than humans in subsequent incarnations of the soul.

It is worth noting that in various mythologies the motif of punishment for ill behaviour applies equally to all beings and forms of existence, both gods and humans. Moreover, the punishment is independent of the wrongdoer's place in the social structure. Ernst Cassirer's valuable observation is that the content of myths is always dynamic: "it is a world of actions, a clash of forces and clashing powers,"[33] and so the world of myths is a world of values in constant conflict, which are not abstract in nature, but can always be identified as forces of good or forces of evil. The specific values defined as good in all myths are: order, tidiness, harmony, and justice; what can be identified as evil constitutes their negation. What is perceived as good and evil has a direct relationship with the functioning of both society as a whole and of individuals. The content of myths indicates a utopian principle concerning the whole of society: if everyone acted righteously, the gods would not send various cataclysms to humanity. However, the theme of human rebellion against the cosmic order (which equals the social order) that appears in myths is evidence of a conflict between individual values and the values expected by society. Myths can therefore be treated as a kind of algorithm for dealing with those who deviate from the recognized norms of conduct. Moreover, myths clearly indicate the justification for the system of punishments applied to such wrongdoers and the rewards provided for the righteous.

---

[32] M. Eliade, *Traktat o historii religii*…

[33] E. Cassirer, *Mit i religia* [in:] *idem*, *Esej o człowieku*…, p. 144.

Apart from the obvious, direct, and severe consequences resulting from social chaos and anarchy (the lack of principles for organizing social life), the fundamental source of evil expressed in myths is an uncertainty resulting from the lack of definable principles of cause and effect.[34] This uncertainty entails a time of unbearable loneliness and helplessness for a human being, from which the only way to escape is to seek stability that can be provided by the principles of cooperation with other people through subordination to existing norms. Hence, first the concept of divine law expressed, perpetuated, and controlled by myths, and later the concept of the social contract, meaning the institutionalization and formalization of law. However, in both cases there is a magical power of social consensus at work, indicating that the source of law is something that somehow precedes human decisions.

Even today, in common consciousness, there is an idea of justice independent of the institutions of the judicial system, an idea which, it seems, refers to a law that is earlier than the law made by people. This law can be described as mythical, natural, or divine law. A perfect illustration of the functioning of this law is a quotation from a cult comedy, when the main character of the film is bid goodbye by his mother with the words: "Court is court, but justice must be on our side!," after which he receives a grenade from her, which he puts in his pants pocket on his way to court. In folklore, one can find other traces of such thinking about law and justice in the form of curses and admonitions. For example, the phrases "You're a nuisance!," "It serves you right!," "That's what you'll get!," etc., are usually said when one is powerless to punish someone for acts that are contrary to applicable norms. In such situations we unconsciously appeal to the existence of some abstract justice that goes beyond the norms established by the existing system of legislation. This is, in my opinion, an intuitive reference to the same law (natural or divine) whose existence we are convinced of by myths, the content of which we have long since forgotten. Finally, one more minor note: curses and invectives appear in myths as a kind of weapon of powerless ordinary people against powerful rulers who, as judges, remain beyond the reach of the law they themselves have made and which they are supposed to obey. Casting a curse calling upon the gods to mete out justice that could not be expected by appealing to the justice of the courts is treated in mythologies as an extremely powerful weapon, one to which rulers did not remain indifferent.

Literature

Assmann J., *Maat. Sprawiedliwość i nieśmiertelność w starożytnym Egipcie*, transl. A. Niwiński, Warszawa 2019.

Banaszkiewicz J., *Podanie o Piaście i Popielu. Studium porównawcze nad wczesnośredniowiecznymi tradycjami dynastycznymi*, Warszawa 2010.

Barton J., *Historia Biblii. Księga i jej religie*, transl. A. Kunicka, Warszawa 2022.

[34] Eliade writes in this context: "man defends himself against what has no significance, against nothingness […], he flees from the sphere of the profane." M. Eliade, *Traktat o historii religii*…, p. 36.

Boulenger J. (ed.), *Opowieści Okrągłego Stołu*, transl. K. Dolatowska, T. Komendant, Warszawa 1987.
Cassirer E., *Mit i religia* [in:] *idem*, *Esej o człowieku. Wstęp do filozofii kultury*, transl. A. Staniewska, Warszawa 1998.
Dumézil G., *Bogowie Germanów. Szkice o kształtowaniu się religii skandynawskiej*, transl. A. Gronowska, Warszawa 2006.
Durkheim E., *Elementarne formy życia religijnego*, transl. A. Zadrożyńska, Warszawa 1990.
Eliade M., *Historia wierzeń i idei religijnych*, vol. 1: *Od epoki kamiennej do misteriów eleuzyńskich*, transl. S. Tokarski, Warszawa 1988.
Eliade M., *Indyjski symbolizm czasu i wieczności*, transl. K. Kocjan, J. Sieradzan, "Pismo Literacko-Artystyczne" 1986, no. 6–7, pp. 154–167.
Eliade M., *Traktat o historii religii*, transl. J. Wierusz-Kowalski, 2nd ed., Łódź 1993.
Frankowska M., *Mitologia Azteków*, Warszawa 1987.
Frazer J., *Czarownik, kapłan, król*, transl. I. Wajnberg, Kraków 2024.
Frazer J., *Złota gałąź*, transl. H. Krzeczkowski, Warszawa 1962.
Graves R., *Mity greckie*, transl. H. Krzeczkowski, Kraków 2022.
Graves R., Patai R., *Mity hebrajskie. Księga Rodzaju*, transl. R. Gromacka, Warszawa 2002.
Jakimowicz-Shah M., Jakimowicz A., *Mitologia indyjska*, Warszawa 1982.
Jung C., *Archetypy i symbole*, transl. J. Prokopiuk, Warszawa 1993.
Kubiak Z., *Mitologia Greków i Rzymian*, Kraków 2022.
Künstler M.J., *Mitologia chińska*, Warszawa 1985.
Lévi-Strauss C., *Struktura mitów* [in:] *idem*, *Antropologia strukturalna*, transl. K. Pomian, Warszawa 2000, pp. 185–216.
Lewis C.S., *Bóg na ławie oskarżonych*, transl. M. Mroszczak, Warszawa 1993.
Lipińska J., Marciniak M., *Mitologia starożytnego Egiptu*, Series: Mitologie Świata, Warszawa 1990.
Malinowski B., *Mit, magia, religia. Dzieła*, vol. 7, Warszawa 1990.
Margul T., *Mity sumeryjskie znad ujścia Eufratu i Tygrysu* [in:] *idem*, *Mity z pięciu części świata*, Warszawa 1996.
Składankowa M., *Georges Dumézil i trójdzielny paradygmat mitycznej wyobraźni*, "Literatura na Świecie" 1987, no. 11(196), pp. 321–331.
Szyjewski A., *Od Valinoru do Mordoru. Świat mitu a religia w dziele Tolkiena*, Kraków 2004.
Pattaro G., *Pojmowanie czasu w chrześcijaństwie* [in:] *Czas w kulturze*, ed. A. Zajączkowski, Warszawa 1988, pp. 291–329.
Rachet G., *Słownik cywilizacji egipskiej*, transl. J. Śliwa, Katowice 1994.

Summary

Michał Kowalski

Myth and Punishment

A review and comparison of myths of various peoples makes it possible to claim that mythologies create a kind of pattern of legal systems. Regardless of the various functions indicated by researchers into mythological systems, the analysis of the content of myths makes it possible to distinguish their functions: establishing law (in myths about the creation of the world) and

establishing the principles of justice (in so-called myths of the fall of humanity and myths of the end of the world). These mythologies contain clues about society's perception of punishment for those who do evil and about the reward system for those (the righteous) who are the guardians of the principles established at the creation of the world. Importantly, myths known from antiquity continue to function in various areas of contemporary popular culture, indicating the existence of a lasting sense of justice, independent of any changes in codified legal systems.

Keywords: myth, punishment, justice, end of the world.

Streszczenie

Michał Kowalski

Mit i kara

Przegląd i porównanie mitów różnych ludów pozwala stwierdzić, że mitologie tworzą swoiste wzorce systemów prawnych. Niezależnie od różnych ról przypisywanych systemom mitologicznym przez badaczy analiza treści mitów pozwala wyróżnić ich nastepujące funkcje: w niektórych mitach (dotyczących powstania świata) – w zakresie ustanawiania prawa, a w innych (mitach o upadku ludzkości i końcu świata) – w zakresie ustanawiania zasad sprawiedliwości. W mitologiach tych zawarte są wskazówki dotyczące społecznego postrzegania kary dla tych, którzy czynią zło, oraz systemu nagród dla tych („sprawiedliwych"), którzy od starożytności funkcjonują nadal w różnych działach współczesnej kultury popularnej, wskazując na istnienie trwałego poczucia sprawiedliwości, niezależnego od wszelkich zmian skodyfikowanych systemów prawnych.

Słowa kluczowe: mit, kara, sprawiedliwość, koniec świata.

Jadwiga Królikowska
University of Warsaw, Poland
j.krolikowska@uw.edu.pl
ORCID: 0000-0002-3270-6791

https://doi.org/10.26881/gsp.2025.4.09

A Contribution to a Sociological Analysis of Impunity

On 14 April 2024, the British newspaper *The Guardian* published an article entitled "My family's past, and Germany's, weighs heavily upon me. And it's why I feel so strongly about Gaza,"[1] in which the issue of impunity was treated in a special way. Eva Ladipo, a German journalist living in London, presented the fate of her immediate family, mainly people from the generation of her grandparents on both parents' sides. These were people who, as the author puts it, "facilitated the Third Reich and the Holocaust." Their participation in criminal activities of various types has been proved. Those people "had hundreds of thousands of lives on […] [their] […] consciences." Not only their family and the local community, who shared their fascist views, knew about their guilt, but also the justice system. The Nuremberg Tribunal and the common courts treated the participants in those criminal acts exceptionally leniently. The author admits that "Nazi perpetrators benefited more than anyone else" from this leniency.

In the article, the author deals with current events in the Middle East while referring to the history of her family. She appeals for peace. She cites the solutions adopted at the end of the Second World War in Europe as a model for ending the Middle East conflict. She points to the tragedy of that conflict, which is comparable to current events, and argues that it was not so much the formal decisions at that time regarding the principles of relations between the parties, but the practice of criminal impunity that brought Europe not only temporary peace, but peace for many years to come. In order to convince people of her proposal to end the conflict, Eva Ladipo reveals horrifying facts from the life of her family and writes: "Look at my family: for all his crimes, Uncle Walter did not face the death penalty. Instead, after six years, the life sentence imposed on my great-uncle in the Nuremberg trials was lifted and he was released in 1954. He died in the 1970s as a wealthy, respected man on the shores of one of Bavaria's prettiest lakes. His brother, my grandfather Paul Warlimont, was sentenced to only two years in prison for his mistreatment of factory workers. He was later awarded Germany's Order of Merit. My paternal grandparents, the very early Nazis, were also granted a rich and

[1] E. Ladipo, *My family's past, and Germany's weighs heavily upon me. And it's why I feel so strongly about Gaza*, "Guardian" 19 April 2024, https://www.theguardian.com/commentisfree/2024/apr/19/family-past-germany-gaza [accessed: 2025.08.14].

free post-war life. The clemency extended to all my forebears was clearly not in the service of justice. But it did serve the interests of peace."

Ladipo's seemingly logical argument, which is probably honest in intent, conceals an approval of the historically unprecedented impunity of the perpetrators of horrific crimes. She suggests that leaving criminal members of her family unpunished, or even pardoned, broke "the vicious circle of revenge after World War II and centuries of atrocities in Europe." The fact that the victors renounced revenge, Ladipo suggests, led to a miracle of peace in Europe for many years.

Ladipo's article in a large circulation daily newspaper contains a number of disturbing inaccuracies and misinterpretations of events that are difficult to agree with. It is not true that because the perpetrators of the crime, including her relatives, were not duly punished, "the vicious circle of revenge was broken" and peace arose in Europe. Why would not punishing the perpetrators of crimes contribute to peace? Would punishing them be detrimental to peace? The second untruth is that the winners renounced revenge. The winners waived punishment, not revenge. These two words mean something different. Revenge is usually an informal inflicting of suffering on someone, spontaneous and unlimited in its measure and type, and based on the (not always true) conviction of having been wronged by that person. More importantly, revenge is filled with emotion, anger, rage, and cruelty. It knows no saturation and does not need to have a formal framework. In the case of the war crimes and genocide mentioned, the issue was not revenge but criminal punishment. And it was the penalty that was waived. A penalty is imposed on the basis of law by an independent court in the name of the state.[2] Victims do not have to participate in the sentencing process. They are represented by institutions, mainly judicial authorities.

1. The social climate of impunity: conditions and consequences

The Second World War not only claimed millions of lives, but also involved millions of perpetrators in terrible crimes, who survived it. It was their fate that was decided in the immediate post-war period, when the victorious states put the leaders of the defeated state on trial. Although ultimately only a small number of perpetrators of crimes committed during the Second World War were punished, it was the beginning of the actual operation of the mechanism of international justice.[3] That was an important event for international legal culture because it based the criminal process on universal moral, social, and legal norms and on the definitions of crimes against humanity and

[2] J. Utrat-Milecki, *Podstawy penologii. Teoria kary*, Warszawa 2006, pp. 78–79. Also: *idem*, *Penologia ogólna. Perspektywa integralnokulturowa*, Warszawa 2022, pp. 252–254.

[3] J. Banaś, *Przez 18 lat po wojnie Niemcy salutowali esesmanom z Auschwitz*, "Gazeta Wyborcza" 6 September 2024; *Jak działała tzw. huśtawka Bogera?*, "Gazeta Wyborcza" 6 September 2024, https://wyborcza-1pl-k7uyxxmp005e.han.buw.uw.edu.pl/alehistoria/7,121681,31252617,jak-dzialala-tzw-hustawka-bogera-niemcy-dowiedzieli-sie-tego.html?do_w=164&do_v=787&do_st=RS&do_sid=1118&do_a=1118#S.popular-K.C-B.1-L.5.zw [accessed: 2025.08.14].

of genocide. Another important change was the change in the attitude of societies towards the guilt of the perpetrators of war crimes, consisting in the departure from the concept of peace based on "eternal oblivion and amnesty" (*perpetua oblivio et amnestia*), recorded in the Peace of Westphalia of 1648, which ended the Thirty Years' War.

Despite these positive changes, the settlements after the Second World War were far from the expectations of the victims and the more sensitive members of the perpetrators' society. Selective, drawn-out justice that selectively reached the perpetrators of war crimes meant that not only did the victims fail to obtain satisfaction, but the societies that absorbed the criminals persisted in being contaminated by an evil that had not been fully named and condemned. Just a few years after the war, the unprecedented slowness in bringing those responsible for war crimes to justice raised much controversy.[4] The 1960s in particular were full of protests in Germany against the occupation of high positions by people who had been perpetrators of crimes in the Nazi past. The decision to treat leniently the perpetrators of crimes during the Second World War was political in nature. Above all, it was supposed to bring about the consolidation of Western societies around new economic, social, and political goals. On the other hand, it was supposed to change the political arrangement in Europe and include post-war Germany in the structure of capitalist countries constituting a counterweight to the communist bloc. For various reasons it was calculated that the newly set goals could be achieved more effectively with the participation of those people. They distinguished themselves not only by their professional qualifications, discipline, and the habit of obedience to authority acquired from the old order, but also by their determination to prove themselves useful to the order that had ignored their past.[5] The past weighing on them caused them to support devotedly the system of which they were the greatest beneficiaries.[6]

A historical analysis of post-war impunity has revealed its specific features. Protection for criminals was provided not only by family members, friends, and followers of the same ideology, but also by state institutions and international organizations, which acted deliberately in a protective or dilatory manner, as if they were not at all focused on the fulfilment of obligations related to observing and enforcing the law. In essence, they sanctioned impunity. This led to situations in which the functions of the justice system were taken over by the victims themselves, who forced the perpetrators of crimes to be tried or even tried them themselves, an example of which was the kidnapping and trial of Eichmann.[7] The second disturbing phenomenon was the parallel use of the established system of norms and values in relation to other matters

---

[4] K. Jaspers, *The Question of German Guilt*, transl. E.B. Ashton with new introduction by J. Koterski, New York 1965.

[5] T.W. Adorno, *The Authoritarian Personality*, New York 1950.

[6] J. Simon, *Governing Through Crime*, New York 2007.

[7] H. Arendt, *Eichmann in Jerusalem*, New York 1963; *eadem*, *Eichmann in Jerusalem*, revised and expanded edition, New York 1964; K. Moczarski, *Conversations with an Executioner*, Englewood Cliffs 1981.

and the unquestioned approval of their validity in other areas of social life and towards other people. The privileged exclusion of certain cases and certain perpetrators from the normative order of the new order was particularly painful for the victims. They were the ones who were most likely to feel the hypocrisy of that situation in the legal, moral, social, and psychological context.

Apart from the perpetrators of wartime crimes, the most attentive observers of their post-war impunity were the victims. They, like the perpetrators, drew different, sometimes unforeseen, conclusions from that experience. For them, the awareness that despite the conditions for dealing with the past in accordance with law and morality, the criminals remained unpunished, was of great importance. They saw the impunity as evidence of the demoralization of entire societies and a further expression of contempt for them as victims. Once again they became victims and found themselves powerless, although the type of violence used against them had changed. It cannot be ruled out that they prepared themselves and their successors for subsequent potential threats so that such a situation could not happen again to their community. An important safeguard in this case was not only the acquisition of military, institutional, and political strength, but also the acquisition by the community of victims of a unique protected status.

Historical experience shows that for societies exhausted by war, what happened in the past loses its significance in comparison to what is happening now and what is portended in the future.[8] The past may move the conscience, but society does not focus on it when it needs to meet current needs. As a result, compassion for the victims is not followed by finding the truth about those responsible for their fate and bringing them to justice. Rather, we can observe a systemic tolerance towards the impunity of the perpetrators.[9] The mechanism of this psycho-social process is extremely complex. The issue of forgetting, ignorance, resignation, and tolerance is just one of several determinants of this situation. Over time, the general public's emotional distance from the past and reluctance to bear the costs of the process of settling accounts with it increase. It is not just about material or psychological costs, but often the most important political and image costs. No one wants the image of their own society to be forever marked by the cruelty and crimes committed in a single historical moment. As a result of these common tendencies in social consciousness, a slogan aimed to orient people's thinking and actions towards the future is much more easily accepted.

The settlement of the conflictual past is never what the victims expected.[10] As a rule, it is selective, superficial, and spread over time. Roman Kuźniar's bitter observation in the introduction to Rafał Lemkin's book *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* that even the Nuremberg

[8] P. Ricoeur, *Pamięć, historia, zapomnienie*, transl. J. Margański, Kraków 2006; *Pamięć zbiorowa i kulturowa. Współczesna perspektywa niemiecka*, ed. M. Saryusz-Wolska, Kraków 2009.

[9] The events of the Second World War are not unique; similar processes of impunity occurred after the genocide in Rwanda and after the activities of the Pol Pot regime in Cambodia.

[10] Cf. P. Machcewicz, A. Paczkowski, *Wstęp* [in:] *iidem*, *Wojna, wina polityka. Rozliczenie ze zbrodniami II wojny światowej*, Kraków 2021.

Tribunal managed to judge "a ridiculously small number of German criminals in the light of the hecatomb caused by the Third Reich during the Second World War"[11] shows the helplessness of the international community when it comes to a just settlement of the past. Victims may ask why, despite the favourable conditions for the most serious crimes to be brought to justice, perpetrators are allowed to escape justice in what often appears as a tacit collusion with them and a mockery of the victims.

The cynicism and hypocrisy of the process of settling accounts for war crimes not only sows the seeds of opposition among victims, but also persuades them to take actions and pursue their own interests that may not only be in line with the law, but also with moral and social principles. The post-war impunity observed around the world confirmed the victims of the Second World War in their belief that under appropriate conditions, the greatest crimes can go unpunished and that this does not require either the forgiveness of the victims or even the consent of the aggrieved parties. The impunity of war criminals has proved demoralizing not only for them but for everyone. It is as a result of this that the moral, social, and legal effects that are anticipated and described as the purposes and functions of punishment have been wasted.

2. Social contexts of impunity

Although impunity is a topic frequently present in journalism and private conversations, it has not been the subject of many scholarly studies. Apart from the general belief that impunity is wrong, demoralising, and causes an increase in crime and disrupts social life, it is rare to find a scholarly explanation of its mechanisms. The problem is that it is difficult to ask research questions on the issue of impunity. The basic ones concern the rules that govern it and its sources and circumstances. That is, when and why impunity occurs on a large scale, who is its beneficiary, and who is its victim, and what are its consequences for individual people and entire societies in the short and long term? It seems that the most important questions are those concerning everyday relations in a society in which there is an awareness of the impunity of certain groups of citizens. There are also questions about the involvement of various groups of citizens in building social, economic and cultural cohesion and, therefore, about the content and stability of the system of norms and values.

The analysis of the phenomenon of impunity presented here excludes cases in which, for extraordinary reasons, society consciously refrains from imposing punishment for acts that actually violate the law. These may be ceremonial moments or those related to defending the community from danger. In some cases, the phenomenon constitutes serious violations of legal norms, and social and moral rules. However, although these violations are obvious, the failure to punish their perpetrators

[11] R. Kuźniar, *Wstęp* [in:] R. Lemkin, *Rządy państw osi w okupowanej Europie*, Warszawa 2013, p. 19. Also: R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, New York 1944.

is not called impunity, because the circumstances of their occurrence remove the odium of a crime requiring punishment.[12] In many cultures, exclusions from the threat of punishment are legally and doctrinally sanctioned in criminal law as justification excluding the wrongfulness or at least the guilt of the perpetrator. These exceptional cases, understandable to society, do not arouse disapproval of the violation of legal norms or a sense of reprehensibility among observers of social life.

Dealing with the perpetrators of the most serious crimes, especially those committed by very large numbers of perpetrators during conflicts and wars, has always been very difficult. Such crimes are overcome in various ways in different organizational structures. Some of them refer to mediation mechanisms or restorative justice instruments embedded in the tradition of the cultural pattern of a given society. Others create new institutions to which they entrust the task of judging what has happened.[13] However, these are never perfect solutions. The point of view of those who have been wronged often differs from the perspective adopted by the authorities responsible for maintaining social order and the future of the community. Those who, from the perspective of power, are responsible for order and the future life of society, approach the issue of settlement with a practical attitude and – out of necessity – without too much moralizing. It is difficult to manage differently a society that was involved on a large scale on the side of the perpetrators of harm and suffering. This attitude, forced by the course of social life, cannot be understood as a lack of understanding of the situation or disregard for the victims. It is rather a shift in society towards rebuilding the social fabric, taking this experience as a warning.[14]

When perpetrators of terrible suffering are not severely punished or criminal justice is delayed, victims feel embittered and disregarded. The specific compensation they are offered is the public exposure of the evil that has occurred and its perpetrators, as well as their general condemnation. It is a symbolic gesture of depriving perpetrators of reasons for social respect, negating their choices and motives for their actions, as well as depriving them of the sense of satisfaction derived from participating in crimes.

The greatest attention is paid to impunity in research focusing on phenomena such as lawlessness,[15] crime and crime waves, genocide, and war crimes. Sometimes it is considered to be their cause and sometimes it is seen as a consequence. Following Emile Durkheim, it is assumed that impunity characterizes a state of anomie, a serious disturbance in the axionormative order, which leads to the loss of the socio-creative abilities of the social structure and the moral confusion of individuals.

Inconsistency in the axionormative system causes the community to split into substructures that are guided by various norms and compete with each other for power, symbols, tangible property, and status. Then, the impact of universal elements

---

[12] B. Malinowski, *Zwyczaj i zbrodnia w społeczności dzikich*, Warszawa 1984, pp. 45–84.

[13] There are many examples of disappointment with the adopted solutions. Here we can refer to the solutions adopted in Rwanda, the former Yugoslavia, and the Republic of South Africa.

[14] P. Machcewicz, A. Paczkowski, *Wina, kara, polityka*…

[15] G. Radbruch, *Filozofia prawa*, transl. E. Nowak, introduction J. Zajadło, R. Dreier, S.L. Paulson, Warszawa 2012.

of the system of norms and values weakens, if only because the division into Us and Them encourages the use of different measures in social relations and maintaining loyalty only to one's own group. The revival of manipulation techniques with the use of violence that accompanies it gives rise to a type of conflicted society, tainted by the inequality of citizens before the law.[16] Also when social control loses its basis in universal moral norms and becomes a one-sided control determined by a stratification system, the impunity of the privileged is supported by the ideology of having no alternative. It is intended to maintain the myth of the durability of public order based on inequality before the law.

The breakdown of the regulatory structure caused by removing the most important component of social control, namely criminal punishment applied on an equal basis to all citizens, creates a society in which violence and fear are constantly present.[17] Everyone experiences it, although for various reasons, with various intensity, and at various times. The victims suffer this oppression at a historic moment of their fragility, while the perpetrators of the crime have their imagination suggesting the coming of a revenge that may be harsher than punishment. The former are waiting for the situation to change; the latter are afraid of it.

Impunity introduces a kind of two planes of axionormative reality that interpenetrate each other in a given society. There is one in which respect for the axionormative system is maintained and serves to unify the social structure, and one in which a separate group of people enjoys the privilege of not adhering to the rules of social discipline. What is important is the proportions between these two spheres at a given historical moment. When activities that escape social control predominate, not only is the specific social order threatened, but the very survival of the community.

3. Impunity in the context of the definition of criminal punishment

Moving from the journalistic image of impunity to its academic/scholarly characterization requires the formulation of an operational definition of this phenomenon. This is intended to define its boundaries, to refer to the diversity of factors that cause it, and to determine its scale and effects. Like many concepts that have been borrowed from everyday language into scholarship, impunity is understood and defined in a variety of ways. Its meaning and significance are marked by a turbulent history. The precision and scope of the definition used in a specific situation are determined by the circumstances of its creation and the prospects for its application. Sometimes it is sufficient to refer to the most general understanding and define it in key words. But where a criminal decision is based on a definition, it must be precise and accurate. The consequences of adopting a specific formula in such conditions can be very serious both for individuals and for society as a whole.

---

[16] R. Collins, *Conflict Sociology. Toward an Explanatory Science*, New York 1975.

[17] D. Garland, *The Culture of Control*, Oxford 2001.

Given the great diversity of social situations that are cited as examples of impunity, it is necessary to provide an operational definition in specific analyses. This definition should meet two basic conditions: it should indicate the basis for including a given phenomenon in this category and clearly distinguish it from social phenomena that do not constitute impunity. It is, therefore, intended not only to indicate the constitutive features of the phenomenon defined as impunity, but also to provide conditions making possible the sharp exclusion of other social facts from this category. Fulfilling both conditions simultaneously is extremely important not only for achieving clarity of theoretical analysis, but also for the practical differentiation of real events.

The key to the analysis of impunity as a social and legal phenomenon is to indicate the definition of criminal punishment to which we refer when discussing impunity. According to the developed definition formulated by Jarosław Utrat-Milecki, criminal punishment is "social activities from the sphere of social control satisfying the needs of individuals and communities in terms of a sense of social order, justice and security, having a guiding principle, that is, intentions and goals that constitute the basis for rationalization, standards, and personnel and material facilities, as well as social functions understood as conscious and unconscious consequences, undertaken in organizational forms subject to institutionalization in legal regulations and decisions of courts and other authorized state bodies, if they meet the following characteristics:

- they are based on the recognition of the free will of the subject of interaction;
- they are a response to a strictly defined act of an entity that violates the social order in a harmful way *in abstracto* and *in concreto*;
- they are a response to guilt, that is, the allegeable perpetration by the subject of the action;
- they assume the final recognition of the entity's guilt by an authorized authority (court), in a manner consistent with previously adopted procedures;
- they are undertaken on the basis of consent to apply extraordinary levels of coercion and social violence against the entity;
- they are part of the process of consciously inflicting ailment on the subject by depriving him or her of socially valued goods;
- they express condemnation of the subject, which finds expression in the severance of existing social ties with him or her and negatively affects the possibility and manner of realizing his or her rights;
- they link the assessment of the act accused of the subject and the level of condemnation expressed and the suffering inflicted on him with the true axiological assumptions of the violated order;
- they are based on the institutionalization of a measure for the inflicted ailments;
- they provide for rules of public reconciliation with the subject of interventions, determining attempts to enable him or her to return to a state of normal functioning in society;
- they assume recognition of the law of pardon."[18]

[18] J. Utrat-Milecki, *Podstawy penologii*…, pp. 78–79.

The same author provides a short list of conditions that a social action must meet in order to be considered a criminal punishment.[19] He writes that "punishment, especially criminal punishment, includes the following components: 1) condemnation of human acts (actions and omissions) defined by law as to their form and content; 2) attribution of the condemned act to the punished person on the basis of law and in a manner specified by law; 3) intentionally and personally burdensome to the punished person; 4) imposition by an independent body (court) acting under the law on behalf of a given community; 5) specification in a statute of its forms and principles of administration and execution. Criminal penalty is therefore a series of actions taken on the basis of generally applicable law (*ius cogens*) and within the limits and forms provided for by it."[20]

Impunity is therefore established when a social subject acting of his or her own free will may be accused by an authorized authority (court) of violating the norms and values that build the social order and, in accordance with the established procedure, may apply to him or her certain types and degrees of ailment consisting in depriving him or her of socially valued goods to an extraordinary extent and may use coercion and violence. The power of pardon may be applied to this subject and a reconciliation procedure is provided for, which is intended to restore his or her normal functioning in society.

The above statements regarding criminal punishment make it possible for us to describe impunity as a situation in which, for various reasons, the process of condemning actions violating legal norms, as defined by the legal culture of a given society, does not take place. Impunity exists when the multi-stage process of punishment leading to the condemnation of the perpetrator has not been undertaken or has not been conducted properly, for example because it has been interrupted. When the symbolic condemnation contained in the imposition of a criminal penalty has not occurred, the ailments that result from it are also absent. Some of these are tangible, others social or psychological. An unpunished perpetrator is not affected by them; at most, he or she may feel remorse, if he or she is capable of feeling it.

The definition of criminal punishment helps to identify important aspects of situations of impunity. First of all, it shows its dangerous aspect in the form of a failure to satisfy "the need of individuals and communities for a sense of social order, justice, and security."[21]

The consistency of the conditions determining the imposition of criminal punishment with the axionormative foundations of the social order plays a fundamental role in protecting the justice system from destruction. Acts of administering criminal justice are of great importance as instruments for visualizing the validity of norms and values throughout social life. They are addressed not only to the perpetrators of norm

---

[19] J. Utrat-Milecki, *Z dziejów pojęcia kary kryminalnej* [in:] *Z dziejów afektu penalnego*, ed. J. Utrat-Milecki, Warszawa 2014, p. 73.

[20] *Ibid*.

[21] J. Utrat-Milecki, *Podstawy penologii*…, p. 78.

violations, but to society at large, where their relevance and importance are confirmed. Given the widespread awareness of the severity of criminal penalties compared to other tools of social control, great importance is attached to their justifications. What is important is not only those aspects of the application of punishment that are relevant to the persons involved in crime, but also those of its features that affect the life of society as a whole.[22] From the point of view of the sustainability of society and the effectiveness of state institutions, the issue of the social consequences of citizens' breaking the law is of key importance. Low consequences for the perpetrator in the form of a mild criminal reaction, disproportionate to the gravity of the crime, indicate the breakdown of state structures and their inability to fulfil their assigned functions. The fact that perpetrators of crimes perceive the weakness of the justice system encourages them to do what not only judges but also ordinary citizens fear, namely to take advantage of this situation and to increase further the profits from criminal activity.[23]

4. A short sociological definition of impunity

Efforts undertaken in the social sciences and law to define precisely the essence of penological phenomena serve to strengthen the rational foundations of social control and penal policy. In-depth knowledge of these social phenomena is intended to determine in what situations the social reaction to someone's action or omission should take a certain form, and in some cases the form of criminal punishment. The effort put into penological research is motivated to some extent by the attempt to reduce the scope of impunity, that is, the area of activities violating legal norms, which, contrary to the principles of social order, escape the jurisdiction of justice. Defining the rigours according to which criminal penalties are imposed makes possible the appropriate treatment of cases indicated as impunity. In the face of phenomena spontaneously defined by public opinion as impunity, criteria are introduced to assess a specific action as an unjustifiably unpunished crime. The procedure for dealing with an act defined as a crime and punished in accordance with accepted legal principles is a model for dealing with any action that is perceived as a crime. When public opinion perceives the absence of punishment as the final component of an established process of response to crime, many questions arise about the condition of the justice system in specific historical circumstances.

Impunity can be defined most briefly as a state or rather a social situation where criminal penalties are not applied to specific crimes or to a certain category of persons committing crimes, or to a selected group of persons committing specific crimes.[24] More

[22] D. Garland, *Punishment and Modern Society*, Oxford 1990.

[23] J. Królikowska, *Sędziowie o karze, karaniu i bezkarności*, Warszawa 2020.

[24] Cf. L. Zedner, *Social control* [in:] *Modern Social Thought*, ed. W. Outhwaite, Oxford 2006, pp. 596–598; also: J. Królikowska, *Bezkarność* [in:] *Granice prawa*, eds. P. Ostaszewski, K. Buczkowski, Warszawa 2020, pp. 841–859.

precisely, the issue of impunity is described as "a certain kind of groundless exclusion, granting someone or something the status of impunity in conflict with the applicable legal, social, and moral norms. It is impossible to identify all the factors determining the state of impunity, because its existence may be determined by a combination of unique circumstances. It is certain, however, that impunity is linked to the weakness or demoralization of the authorities, which is most visible during a coup d'état or war, and, therefore, to states of serious political instability, characterized by chaos in the axionormative system combined with the lack of real organizational possibilities to hold perpetrators of crimes accountable."[25]

The consequences of impunity are many. They are harmful to individuals and to the collective. In particular, its consequences for the state's organizational structure are destructive. The aim of social sciences is to study them thoroughly and present them to the general public, which is interested in organizing social order on axiological foundations that guarantee the equality of citizens before the law.

Literature

Adorno T.W., *The Authoritarian Personality*, New York 1950.

Arendt H., *Eichmann in Jerusalem*, New York 1963.

Arendt H., *Eichmann in Jerusalem*, revised and expanded edition, New York 1964.

Banaś J., *Przez 18 lat po wojnie Niemcy salutowali esesmanom z Auschwitz*, "Gazeta Wyborcza" 6 September 2024.

Collins R., *Conflict Sociology. Toward on Explanatory Science*, New York 1975.

Friedlander S., *The Years of Extermination: Nazi Germany and the Jews, 1939–1945*, New York 2007.

Garland D., *The Culture of Control*, Oxford 2001.

Garland D., *Punishment and Modern Society*, Oxford 1990.

Jak działała tzw. huśtawka Bogera?, "Gazeta Wyborcza" 6 September 2024, https://wyborcza-1pl-k7uyxxmp005e.han.buw.uw.edu.pl/alehistoria/7,121681,31252617,jak-dzialala-tzw-hustawka-bogera-niemcy-dowiedzieli-sie-tego.html?do_w=164&do_v=787&do_st=RS&do_sid=1118&do_a=1118#S.popular-K.C-B.1-L.5.zw [accessed: 2025.08.14].

Jaspers K., *The Question of German Guilt*, transl. E.B. Ashton with new introduction by J. Koterski, New York 1965.

Klee E., *Auschwitz. Medycyna III Rzeszy i jej ofiary*, Kraków 2009.

Królikowska J., *Bezkarność* [in:] *Granice prawa*, eds. P. Ostaszewski, K. Buczkowski, Warszawa 2020, pp. 841–860.

Królikowska J., *Sędziowie o karze, karaniu i bezkarności*, Warszawa 2020.

Kuźniar R., *Wstęp* [in:] R. Lemkin, *Rządy państw osi w okupowanej Europie. Prawa okupacyjne, analiza rządzenia, propozycje zadośćuczynienia*, Warszawa 2013, pp. 18–21.

Ladipo E., *My family's past, and Germany's weighs heavily upon me. And it's why I feel so strongly about Gaza*, "Guardian" 19 April 2024, https://www.theguardian.com/commentisfree/2024/apr/19/family-past-germany-gaza [accessed: 2025.08.14].

[25] J. Królikowska, *Bezkarność* [in:] *Granice prawa*…, p. 825.

Lemkin R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, New York 1944.
Machcewicz P., Paczkowski A., *Wstęp* [in:] *iidem*, *Wojna, wina polityka, Rozliczenie ze zbrodniami II wojny światowej*, Kraków 2021, pp. 9–20.
Malinowski B., *Zwyczaj i zbrodnia w społeczności dzikich*, Warszawa 1984.
Moczarski K., *Conversations with an Executioner*, Englewood Cliffs 1981.
Neitzel S., *Tapping Hitler's Generals, Transcripts of Secret Conversations, 1942–45*, Croydon 2007.
Radbruch G., *Filozofia prawa*, transl. E. Nowak, introduction J. Zajadło, R. Dreier, S.L. Paulson, Warszawa 2012.
Ricoeur P., *Pamięć, historia, zapomnienie*, transl. J. Margański, Kraków 2006.
Saryusz-Wolska M. (ed.), *Pamięć zbiorowa i kulturowa. Współczesna perspektywa niemiecka*, Kraków 2009.
Simon J., *Governing Through Crime*, New York 2007.
Utrat-Milecki J., *Penologia ogólna. Perspektywa integralnokulturowa*, Warszawa 2022.
Utrat-Milecki J., *Podstawy penologii. Teoria kary*, Warszawa 2006.
Utrat-Milecki J., *Z dziejów pojęcia kary kryminalnej* [in:] *Z dziejów afektu penalnego*, ed. J. Utrat-Milecki,, Warszawa 2014, pp. 66–130.
Zedner L., *Social control* [in:] *Modern Social Thought*, ed. W. Outhwaite, Oxford 2006, pp. 596–598.

Summary

Jadwiga Królikowska

A Contribution to a Sociological Analysis of Impunity

Impunity is a frequent topic in journalism and private conversation, but it is rarely discussed in academic studies. A sociological analysis of impunity is intended to provide insight into what the sources, circumstances, and consequences of the occurrence of this phenomenon are. In this article, an investigation of impunity is conducted in terms of definitions and indications of the aims and functions of criminal punishment. My analysis shows how the removal of criminal punishment from the catalogue of instruments of social control leads to the violation of the axionormative order, the disappearance of the sociogenic capacity of the social structure, and the moral confusion of individuals.

Keywords: punishment, impunity, anomie, war crime.

Streszczenie

Jadwiga Królikowska

Przyczynek do socjologicznej analizy bezkarności

Bezkarność jest częstym tematem w publicystyce i rozmowach prywatnych, ale rzadko omawianym w badaniach naukowych. Socjologiczna analiza bezkarności ma dostarczyć wiedzy o tym, jakie są źródła, okoliczności i konsekwencje wystąpienia tego zjawiska. W artykule badanie bez-

karności zostało przeprowadzone na tle definicji oraz wskazań dotyczących celów i funkcji kary kryminalnej. Analiza pokazuje, jak usunięcie kary kryminalnej z katalogu instrumentów kontroli społecznej prowadzi do naruszenia porządku aksjonormatywnego, zaniku zdolności socjotwórczych struktury społecznej oraz moralnego zagubienia jednostek.

Słowa kluczowe: kara, bezkarność, anomia, przestępstwo wojenne.

Mariusz Sztuka
Jagiellonian University, Poland
mariusz.sztuka@uj.edu.pl
ORCID: 0000-0001-6389-7634

https://doi.org/10.26881/gsp.2025.4.10

In Search of Well-being: The Problematic Nature of the Positive Turn in Criminology

1. Introduction

The opening text of Odo Marquard's series of essays published in the 1990s contains a significant forecast.[1] The German philosopher predicts the imminent emergence of projects in the social space that carry the demand for happiness on their banners. According to Marquard, this will be a consequence of the progressive destruction of theodicy, which posits that evil and misfortune find their justification as a means ultimately leading to happiness. Depriving evil of its expedient character breeds a tendency towards compensation: since the problem of unhappiness can no longer be solved by recognising its functional sense (its teleology), we must try to balance its presence in the world through an increment of happiness, which is what utilitarian social programmes are designed to do.

A relatively short time separates Marquard's prediction from the American Psychological Association's 1998 annual convention, where its newly elected president Robert Seligman called for a reevaluation of the field's past priorities by reorienting it towards the bright, positive sides of human life.[2] This event is considered the symbolic beginning of positive psychology. Psychology should focus on human happiness. This means paying attention to issues related to experiencing well-being, joy, satisfaction, pleasure, optimism, hope, forgiveness, and gratitude.[3] Its area of interest includes those states and personal qualities that in the previous (post-war) development of the field, according to adherents of the new trend, receded into the background, giving way to the study of dysfunctions, deficits, and disorders.

The call for a change in the way we view human affairs has reached far beyond the professional community of psychologists. The twenty-first century has become an arena for the growing reception of the style of approach to practical challenges that is

[1] O. Marquard, *Glück im Unglück: Philosophische Überlegungen*, München 1996, p. 23.
[2] M.E.P. Seligman, *The President's Address*, "American Psychologist" 1998, vol. 54, pp. 559–562.
[3] M.E.P. Seligman, *Positive Psychology, Positive Prevention, and Positive Therapy* [in:] *Handbook of Positive Psychology*, eds. C.R. Snyder, S.J. Lopez, New York 2002, p. 3.

inherent in positive psychology in relation to vast areas of social life. The expansion of the positive approach can be seen in the fields of economics, management, education, and health policy.[4] These processes are accompanied by the increasing presence of patterns of positivity in the media world, in people's daily lives, in their attitudes towards work, health, and their own bodies. All this leads us to see the positive turn as a phenomenon with a broader cultural dimension.

Finally, positive psychology also emerged as a fundamental source for the constitution of the criminological perspective to which it also lends its name. This is positive criminology. An important moment in the emergence of this perspective was the publication in 2015 of a collective study edited by Nati Ronel and Dana Segev entitled *Positive Criminology*,[5] preceded by an article several years earlier in which the term in the title first appeared.[6]

2. Always look on the bright side of criminology

How are the assumptions of positive psychology translated into the language of criminology?[7] The creators of the new approach speak on the subject, pointing out the central points of their interest. "Comparably to positive psychology, research and theory in positive criminology focuses on positive emotions, experiences and mechanisms that increase individuals' well-being and reduce their negative emotions, behaviors and attitudes."[8] It could be thought that representatives of the positive current representing other areas of practical application (managers, teachers, social workers, etc.) similarly address the issue. The point, however, is that criminology, by its nature, directs its attention to phenomena that fall into the categories of social evil and, thus, touches negativity in its most acute form.

In the theoretical writings in positive criminology, one will not find an answer to the issue of crime as a social phenomenon. In terms of the study of crime as one form of deviant behaviour, the proposals of the adherents of this trend rather emphasise the role and influence of positive personal qualities and states, seeing them as responsible for individual desistance from crime. At the same time, and this is typical of the whole positive turn, happiness and well-being are seen primarily as the result of the individual's own efforts, being a function of a change in his or her way of thinking

---

[4] A.M. Wood, A.T. Davidson, P.A. Linley, J. Maltby, S. Harrington, S. Joseph, *5 Applications of Positive Psychology* [in:] *Handbook of Positive Psychology…*

[5] *Positive Criminology*, eds. N. Ronel, D. Segev, New York–London 2015.

[6] N. Ronel, E. Elisha, *A different perspective: Introducing positive criminology*, "International Journal of Offender Therapy and Comparative Criminology" 2011, vol. 55, no. 2, pp. 305–325.

[7] It is important to clarify that, despite the similarity in their names, positive criminology and the positive school of criminology are distinct perspectives that differ fundamentally in their theoretical underpinnings.

[8] N. Ronel, D. Segev, *Introduction: 'The good' can overcome 'the bad'* [in:] *Positive Criminology*, eds. N. Ronel, D. Segev, New York–London 2015, p. 4.

and attitude towards reality. The efforts of researchers who focus on positivity should, therefore, be seen as directed at the practical, applied, or even methodological aspect of criminological knowledge. Positive criminology is first and foremost criminology in action. In Polish terms, this corresponds roughly to the field of resocialization pedagogy.

From positive psychology, the creators of the new criminological perspective also borrowed the gesture of distancing themselves from the discipline's earlier legacy by identifying the bulk of criminology's scientific and scholarly legacy and its practical consequences as laden with negativity. In their view, the negativity of the traditional approach was expressed in: (a) an excessive focus on deficits, or more generally, negative components of the offender's equipment, with an emphasis on pathogenesis; (b) the negative consequences of isolating criminal legal responses; (c) the negative effects on victims of crime; and (d) criminological prognosis, which refers to the measurement of risk factors defined as negative elements of the individual's situation.[9]

Although the field of positive criminology is primarily influenced by positive psychology, it also draws upon insights from various other approaches that inform scientific and scholarly discourse on crime and its prevention. These include restorative justice and the concept of reintegrative shaming, criminology as peacemaking, the concept of desistance from crime, therapeutic jurisprudence, and the Good Lives Model (GLM).[10]

The appeal of positive psychology has gained significant traction within the community of researchers and practitioners engaged in rehabilitation.[11] This is corroborated by a growing corpus of literature on this topic over the past few years. It suffices to point out that the adaptation of the positive approach is the subject of one of the most recent special issues of the *Criminal Justice Policy Review.*[12]

Positive criminology as a theory of practical action faces the same question, signalled earlier, about the chance of the actual implementation of happiness programmes in a social space marked by anguish and suffering. In particular, this concerns the environments of penitentiaries. Although there are already emerging attempts to empirically measure the well-being of inmates undergoing correctional treatment,[13]

---

[9] *Ibid.*, p. 3.

[10] Positive Criminology, https://positive-criminology.biu.ac.il [accessed: 2021.11.27].

[11] It is plausible to suggest that this is the reason for the popularity of positive criminology themes in the works of authors associated with resocialization pedagogy. See: M. Konopczyński, *Metody twórczej resocjalizacji. Teoria i praktyka wychowawcza*, Warszawa 2006; *idem*, *Creative Social Rehabilitation. Outline of the concept for developing potential*, "Polish Journal of Social Rehabilitation" 2014, no. 7, pp. 13–28; E. Wysocka, *Diagnoza pozytywna w resocjalizacji. Model teoretyczny i metodologiczny*, Katowice 2015; *eadem*, *Diagnoza pozytywna w resocjalizacji. Warsztat diagnostyczny pedagoga praktyka*, Katowice 2019; A. Dąbrowska, *Zasoby osobiste i społeczne a dobrostan psychiczny wychowanków młodzieżowych ośrodków wychowawczych*, Kraków 2023.

[12] "Criminal Justice Policy Review" 2023, vol. 34, no. 1.

[13] M. Turner, N. King, D. Mojtahedi, V. Burr, V. Gall, G.R. Gibbs, L. Flynn Hudspith, Ch.B. Leadley, T. Walker, *Well-being programmes in prisons in England and Wales: A mixed-methods study*, "International Journal of Prisoner Health" 2022, vol. 8, no. 3, pp. 259–274; A. Kyprianides, M.J. Easterbrook, *Social Factors Boost Well-Being Behind Bars: The Importance of Individual and Group Ties for Prisoner Well-Being*, "Applied

this is not without controversy. Indeed, even those who advocate the positive option recognise the problematic nature of such an endeavour. For instance, Stephanie J. Morse, Kevin A. Wright, and Max Klapow have highlighted the discrepancy in the scale of adaptation of positive psychology solutions within the context of community-based treatment and correctional settings.[14] These authors are inclined to explain this by an omission on the part of positive psychology, which programmatically removes from the field of attention the issues of "social ills, crime and addiction among them."[15] It is reasonable to consider an alternative explanation as well: happiness optimisation programmes may limit their own expansion when confronted with the irreconcilable reality of unhappiness.

Following on from above discussion, it is reasonable to inquire about the novelty of the positive turn advocated by criminologists. For instance, when positive criminology presents itself as "acceptance-based,"[16] it becomes evident that it is in opposition to the oppressive model of treating those who have committed crimes. The positive approach affirms the individual in isolation from his/her actions. The essence of this distinction (a person vs. his/her acts) is effectively articulated by the assertion that the knowledge of criminologists to date is primarily derived "from a perspective for the study of *behavior of criminals* rather than a study of *criminal behavior*."[17] Nevertheless, if such an accepting stance toward the individual perpetrator were to be a hallmark of the current positive criminology movement, one might ask which of the institutional rehabilitation models developed over the past century (not including the early stage of the cell system and those controversial approaches that combined rehabilitation with eugenics) was accompanied by a markedly distinct approach to this question. A rehabilitative ideal wherever it revealed its authentic, humanizing influence on the handling of perpetrators of social evil, directed a message towards them. This message was: "Regardless of the circumstances in which you find yourself as a result of your actions, you are more than the sum of your past behaviour." There followed a second, equally important message: "When you want to know how to do the right thing, you

---

Psychology: Health and Well-Being" 2020, no. 1, pp. 7–29; P. Ndung'u Muring'u, M. Kariuki, T. Njonge, *Influence of physiological stress coping strategies on the psychological well-being of life-sentenced inmates in maximum-security prisons in Kenya*, "Journal of Psychology, Guidance and Counseling" 2021, vol. 3, no. 1, pp. 242–258; Y. Deng, R. Xiang, Y. Zhu, Y. Li, S. Yu, X. Liu, *Counting blessings and sharing gratitude in a Chinese prisoner sample: Effects of gratitude-based interventions on subjective well-being and aggression*, "The Journal of Positive Psychology" 2018, vol. 14, issue 3, pp. 303–311; D.M. Boruc, *Poziom zadowolenia u skazanych odbywających karę pozbawienia wolności w zakładach karnych na terenie Polski*, "Przegląd Pedagogiczny" 2014, no. 2, pp. 235–246.

[14] S.J. Morse, K.A. Wright, M. Klapow, *Correctional rehabilitation and positive psychology: Opportunities and challenges*, "Sociology Compass" 2022, vol. 16, no. 1.

[15] *Ibid.*, p. 6.

[16] N. Ronel, *How can criminology (and victimology) become positive?* [in:] *Positive Criminology…*, p. 15.

[17] *Ibid*. It is also noteworthy that respect for the individual is not the exclusive attribute of criminologists engaged in positive change. In the latest, eighth edition of *Psychology of Criminal Conduct* by J. Bonta and D.A. Andrews (New York 2024), a book that presents the RNR model to which positive criminologists maintain a programmatic reserve, the term "offender" is replaced in the text by person-first, non-pejorative, and inclusive language, like "justice-involved persons."

should first know who you are." From such a perspective, positive criminology appears part of the same old story.

3. *Homo neoliberalis* means happy[18]

The broader background of the "positivity revolution" taking place before our eyes, which Marquard reveals in the passage quoted at the beginning of this article, is presented in a different way still in the analyses of representatives of critical social reflection. William Davies identifies two primary sources of this phenomenon, both of which are associated with the contemporary phase of global economic development.[19]

First, the growth of interest in the issue of individual happiness is rooted in the discovery of the importance of this state for employee effectiveness. Strategies developed within the framework of positive psychology, aimed at restoring optimism, improving well-being, and increasing a sense of happiness are part of a more general policy of overcoming negative (in an economic sense) states and feelings such as sadness, pessimism, a sense of hopelessness, and loneliness. The problem is that these negative elements appear as side effects of a culture based on individualism and the principle of competition. The positive turn is, thus, an attempt to cope with the problem of unhappiness, without having to go to its actual, structurally conditioned sources. Thus, it resembles the process of treating symptoms of a disease and not the genesis of the disease.[20]

Second, the intensification of discussions focused on individual well-being is linked to the ongoing advances in technological capabilities for reading human feelings and, consequently, recording and controlling them. The capacity of social media to modify mood through the selective presentation of content and the recording of physiological parameters corresponding to specific emotional states, represents merely a sample of the possibilities that are opening up for the management of feelings.[21] What is clear

[18] The notion of *homo neoliberalis* appears in critical analyses of modernity indicating the transformation of individual consciousness as a result of the processes of economization, marketization, and individualization of social life. See: T. Teo, *Homo neoliberalus: From personality to forms of subjectivity*, "Theory and Psychology" 2018, vol. 28, no. 5, pp. 581–599; D.A. Michałowska, *Changes in the Identity of Contemporary Man in the Context of Neoliberalism*, "Sensus Historiae" 2020, vol. 40, no. 3, pp. 83–95.

[19] W. Davies, *The Happiness Industry: How the Government and Big Business Sold Us Well-Being*, London–New York 2015, pp. 8–11.

[20] Although proponents of positive psychology are correct in asserting that the concentration of mainstream psychology on human dysfunction and disorder has not impeded the increase in cases of depression, one must also acknowledge the observations of Davies regarding the consistently rising prevalence of depression despite the surge in popularity of positive psychology (*ibid*., p. 194).

[21] The author makes reference to a number of other products that are used on a daily basis and which have the capacity to facilitate the monitoring of well-being (*ibid*., p. 10). The time elapsed since the publication of his book (2015) has undoubtedly resulted in the emergence of new devices and services of this kind, facilitated especially by the rapid development of AI technologies and big data in recent years.

here, not explicitly invoked by Davies, is the prospect of reading the positive turn in terms proposed by Michel Foucault, that is, as another unveiling of the ongoing discourse of power-knowledge ("Any critique of ubiquitous surveillance must now include a critique of maximization of well-being, even at the risk of being less healthy, happy and wealthy"[22]). The Foucauldian approach is used by Sam Binkley[23] to show how the notion of happiness promoted by positive psychologists serves to construct subjectivity under the conditions of the neoliberal model of society. An individual convinced of the importance of happiness as a personal resource, striving to optimize it, and willing to treat it as an object of management, is, at the individual level, a complement to the social and economic order of the late capitalist era. In a similar vein, there are also several researchers who are suspicious of the progress of happiness and well-being projects. The results of the systematic review published in 2023 demonstrate that a substantial proportion of critical studies of positive psychology are analyses of its underlying ideological framework.[24] The objective of the critical discussion is twofold: first, to demonstrate the role that positive psychology plays in perpetuating the neoliberal socio-economic model; second, to highlight the overt commercialization of the solutions promoted by the movement (marketization of happiness). What is the place of the problem that is the main thread of the present considerations in the discourse thus characterised? The lines of critical argumentation outlined above may prove valuable, especially when practically oriented criminology is inclined towards unreflective adaptation of the positive model. In Polish reality, this is the prospect of a probable evolution of concepts developed within social rehabilitation (resocialization pedagogy).

At this point, it is worth recalling that the issue of happiness, although not directly posed as a subject of reflection by criminologists, penitentiaries, or theorists of rehabilitation in recent decades, appeared at the very sources of the formation of the modern model for dealing with criminals. The utilitarian model of responding to crime, as put forward by Jeremy Bentham, is grounded in his philosophical formula of "the greatest happiness of the greatest number." Foucault's analyses, which are devoted to the anatomy of the Benthamian panoptic project in which this principle was embodied, in turn offers insight into the formation of the modern instruments of power, discipline, and surveillance.[25] This new type of power tactic involves the production of subjectivity that ensures the efficiency of its (power) mechanism. This is pointed out by researchers who have observed that, in everyday life, individuals acquire patterns of experiencing pleasure and ways of optimizing personal well-being, operating under the assumption of their own sovereign subjectivity.

---

[22] *Ibid*., p. 11.

[23] S. Binkley, *Happiness as Enterprise: An Essay on Neoliberal Life*, New York 2015.

[24] L.E. van Zyl, J. Gaffaneye, L. van der Vaart, B.J. Dikf, S. Donaldson, *The critiques and criticisms of positive psychology: A systematic review*, "The Journal of Positive Psychology" 2023, vol. 19, no. 2, pp. 206–235.

[25] M. Foucault, *Discipline and Punish: The Birth of the Prison*, London 1991.

In the case of positive criminology, yet another lesson comes from the deliberations of the author of *Discipline and Punish*. The creators and advocates of the positive turn in criminology generally do not hide their conviction that there is a paradigmatic breakthrough as a result of their proposals. A radical turn away from deficit-based knowledge and a focus on bright, positive elements of an individual's equipment (strength-based rehabilitation) is supposed to mean, as a consequence, a humanisation of the treatment of offenders. However, if one adopts the Foucauldian perspective, one should see here rather the repetition of the same procedures for improving surveillance, flowing from the very heart of the machinery of power. These are procedures that are secondarily (and, it might be said, "from the outside") ascribed the value of humanisation or rationalisation.

4. Beyond a one-sided vision of happiness

This is how *homo compensator*[26] and *homo neoliberalis* meet. They meet in a place where they should not be. It is a place inhabited by unhappy people, hopeless, excluded, discouraged, rejected, and marginalized, unable to cope with guilt, bearing the unbearable burden of punishment, experiencing humiliation, haunted by memories of the past, and forced to struggle against people like themselves. They meet in a place where, despite the best intentions of the organisers of their daily lives, the contemporary imperative of experiencing well-being does not find sufficiently convincing justifications, and where its realisation can at best serve to build a reality of appearances.

Does this clash with the reality of misfortune necessarily mean the definite failure of the practical projects of positive criminology? There is, in fact, something in the theoretical content of the positive movement that does not allow its premature disqualification. The point of reference is, of course, positive psychology. Its development over the past two decades has brought to the fore issues that were absent or only weakly present in the early stages of conceptualization. Authors concerned with this internal evolution of the positive project speak of its first and second waves. Positive psychology, in its first phase of development (first wave), operated quite freely with the opposition of happiness and unhappiness as unrelated elements of human destiny. This approach manifested a proclivity to conceptualize the subject in terms of a disjunctive binary opposition, whereby the two elements are conceived as mutually exclusive alternatives. Even when, in a more realistic version, the positive approach acknowledged the inevitability of the emergence of "negativity" within the context of human affairs, it was precisely as an aimless experience, devoid of meaning and significance. Such a simplistic vision may have served as an effective foundation for a popular interpretation of positivity, readily embraced by mass culture and aligning itself with the tenets of the neoliberal system. It is also unsurprising that it appeared to

[26] O. Marquard, *Philosophie des Stattdessen: Studien*, Stuttgart 2000, pp. 11–40.

be a fashionable and socially acceptable variant of Pollyanna-ism. In situations where the authentic experience of evil emerges, such as in the forms of pain, suffering, loss, or guilt, the prescriptions formulated on the basis of this positive perspective on reality are revealed to be grossly inadequate. With such circumstances in mind, the term "toxic positivity" is surely justified.[27]

Second wave positive psychology is evidence of the movement's internal evolution. A measure of its maturity is a more nuanced approach to the problem of well-being as a state that reveals its dual nature.[28] In such a view, closer to the realities of life, there is a place for negative feelings, experiences, and states whose presence need not be treated *a priori* as something unnecessary and exclusively harmful. Tim Lomas and Itai Ivtzan show particular examples of dualities that constitute human life situations, in which opposite poles form a dynamic system according to the formula *coincidentia oppositorum*: optimism *vs.* pessimism, self-esteem *vs.* humility, freedom *vs.* restriction, forgiveness *vs.* anger, and happiness *vs.* sadness.[29] Contrary to the naive claims of pop-psychology, none of the negative elements can be eliminated here without harming the process of the flourishing of the individual experiencing these ambivalences. A clear indication of such a mature view of positivity/negativity is provided by Polish psychologist Kazimierz Dabrowski's theory of positive disintegration.[30]

Thus, in light of the progress that has been made in the field of positive psychology, there is a need for positive criminology to see and recognise the duality of situations to which the principle of optimising well-being applies. Despite the apparent contradiction, it is only when positive criminology ceases to view unhappiness as a mere impediment to be discarded that it will be able to effectively address the challenges it faces.

Not surprisingly, positive criminology already has something important to say in this regard. In the positions presented, some writers on positive criminology express interest in the phenomenon of post-traumatic growth, seeing in it one of the possible mechanisms of personal change.[31] Similarly, they refer to the tradition of self-help groups based on the Twelve Steps programme of Alcoholics Anonymous.[32]

---

[27] See, for example: M. Lecompte-Van Poucke, *'You got this!': A critical discourse analysis of toxic positivity as a discursive construct on Facebook*, "Applied Corpus Linguistics" 2022, no. 1, pp. 1–9.

[28] P.T.P. Wong, *Positive psychology 2.0: Towards a balanced interactive model of the good life*, "Canadian Psychology/Psychologie Canadienne" 2011, vol. 52, no. 2, pp. 69–81; T. Lomas, I. Ivtzan, *Second Wave Positive Psychology: Exploring the Positive–Negative Dialectics of Wellbeing*, "Journal of Happiness Studies" 2016, vol. 17, no. 4, pp. 1753–1768; P.T.P. Wong, S. Roy, *Critique of positive psychology and positive interventions* [in:] *The Routledge International Handbook of Critical Positive Psychology*, eds. N.J.L. Brown, T. Lomas, F.J. Eiroa-Orosa, New York 2018, pp. 142–160.

[29] T. Lomas, I. Ivtzan, *Second Wave Positive Psychology…*, p. 1755.

[30] K. Dabrowski, *Positive Disintegration*, Boston 1964; *idem*, *Personality-Shaping Through Positive Disintegration*, Boston 1967.

[31] E. Elisha, N. Ronel, *Positive Psychology and Positive Criminology: Similarities and Differences*, "Criminal Justice Policy Review" 2023, vol. 34, no. 1, p. 10; K. Gueta, G. Chen, *'Pulling myself up by the bootstraps' Self-change of addictive behaviors from the perspective of positive criminology* [in:] *Positive Criminology…*

[32] G. Chen, K. Gueta, *15 Application of positive criminology in the 12-Step program* [in:] *Positive Criminology…*; E. Elisha, N. Ronel, *Positive Psychology…*, p. 9.

This example is noteworthy in that it relates to a path of personal development, for which the experience of misfortune is a foundational experience: "We admitted we were powerless over alcohol – that our lives had become unmanageable."[33] The reality of personal change for the alcoholic, the drug addict, the compulsive gambler, and anyone else who begins the journey of the Twelve Steps with the hope of freedom from compulsive behavior reveals authentic elements of joy and enthusiasm as well as despair. In this context, it is not out of place to mention Karl Jaspers' reflections on limit situations, including the experience of guilt.[34] Here we are touching on the question of the experience of "negativity" that cannot be compensated for – and is not worth compensating for – in the sense of fashionable positive projects, the advent of which was heralded by Marquard.

What the concept of positive criminology in its mature form could, thus, offer as a valuable contribution to broader criminological discourse is an argument for happiness "which always exists not only alongside misery or in spite of misery, but also as a result of misery."[35]

Literature

Binkley S., *Happiness as Enterprise: An Essay on Neoliberal Life*, New York 2015.

Boruc D.M., *Poziom zadowolenia u skazanych odbywających karę pozbawienia wolności w zakładach karnych na terenie Polski*, "Przegląd Pedagogiczny" 2014, no. 2, pp. 235–246.

Chen G., Gueta K., *15 Application of positive criminology in the 12-Step program* [in:] *Positive Criminology*, eds. N. Ronel, D. Segev, New York–London 2015, pp. 208–220.

Dabrowski K., *Personality-Shaping Through Positive Disintegration*, Boston 1967.

Dabrowski K., *Positive Disintegration*, Boston 1964.

Davies W., *The Happiness Industry: How the Government and Big Business Sold Us Well-Being*, London–New York 2015.

Dąbrowska A., *Zasoby osobiste i społeczne a dobrostan psychiczny wychowanków młodzieżowych ośrodków wychowawczych*, Kraków 2023.

Deng Y., Xiang R., Zhu Y., Li Y., Yu S., Liu X., *Counting blessings and sharing gratitude in a Chinese prisoner sample: Effects of gratitude-based interventions on subjective well-being and aggression*, "The Journal of Positive Psychology" 2018, vol. 14, issue 3, pp. 303–311.

Elisha E., Ronel N., *Positive Psychology and Positive Criminology: Similarities and Differences*, "Criminal Justice Policy Review" 2023, vol. 34, no. 1, pp. 8–19.

Foucault M., *Discipline and Punish: The Birth of the Prison*, London 1991.

Gueta K., Chen G., *'Pulling myself up by the bootstraps' Self-change of addictive behaviors from the perspective of positive criminology* [in:] *Positive Criminology*, eds. N. Ronel, D. Segev, New York–London 2015, pp. 221–233.

Jaspers K., *Philosophie*, Berlin 1932.

[33] The Twelve Steps, https://www.aa.org/the-twelve-steps [accessed: 2024.07.19].

[34] K. Jaspers, *Philosophie*, Berlin 1932.

[35] O. Marquard, *Glück im Unglück*…, p. 5.

Konopczyński M., *Creative Social Rehabilitation. Outline of the concept for developing potential*, "Polish Journal of Social Rehabilitation" 2014, no. 7, pp. 13–28.

Konopczyński M., *Metody twórczej resocjalizacji. Teoria i praktyka wychowawcza*, Warszawa 2006.

Kyprianides A., Easterbrook M.J., *Social Factors Boost Well-Being Behind Bars: The Importance of Individual and Group Ties for Prisoner Well-Being*, "Applied Psychology: Health and Well-Being" 2020, no. 1, pp. 7–29.

Lecompte-Van Poucke M., *'You got this!': A critical discourse analysis of toxic positivity as a discursive construct on Facebook*, "Applied Corpus Linguistics" 2022, no. 1, pp. 1–9.

Lomas T., Ivtzan I., *Second Wave Positive Psychology: Exploring the Positive–Negative Dialectics of Wellbeing*, "Journal of Happiness Studies" 2016, vol. 17, no. 4, pp. 1753–1768.

Marquard O., *Glück im Unglück: Philosophische Überlegungen*, München 1996.

Marquard O., *Philosophie des Stattdessen: Studien*, Stuttgart 2000.

Michałowska D.A., *Changes in the Identity of Contemporary Man in the Context of Neoliberalism*, "Sensus Historiae" 2020, vol. 40, no. 3, pp. 83–95.

Morse S.J., Wright K.A., Klapow M., *Correctional rehabilitation and positive psychology: Opportunities and challenges*, "Sociology Compass" 2022, vol. 16, no. 1, e12960.

Ndung'u Muring'u P., Kariuki M., Njonge T., *Influence of physiological stress coping strategies on the psychological well-being of life-sentenced inmates in maximum-security prisons in Kenya*, "Journal of Psychology, Guidance and Counseling" 2021, vol. 3, no. 1, pp. 242–258.

Ronel N., *How can criminology (and victimology) become positive?* [in:] *Positive Criminology*, eds. N. Ronel, D. Segev, New York–London 2015.

Ronel N., Elisha E., *A different perspective: Introducing positive criminology*, "International Journal of Offender Therapy and Comparative Criminology" 2011, vol. 55, no. 2, pp. 305–325.

Ronel N., Segev D., *Introduction: 'The good' can overcome 'the bad'* [in:] *Positive Criminology*, eds. N. Ronel, D. Segev, New York–London 2015, pp. 3–12.

Ronel N., Segev D. (eds.), *Positive Criminology*, New York–London 2015.

Seligman M.E.P., *Positive Psychology, Positive Prevention, and Positive Therapy* [in:] *Handbook of Positive Psychology*, eds. C.R. Snyder, S.J. Lopez, New York 2002, pp. 3–7.

Seligman M.E.P., *The President's Address*, "American Psychologist" 1998, vol. 54, pp. 559–562.

Teo T., *Homo neoliberalus: From personality to forms of subjectivity*, "Theory and Psychology" 2018, vol. 28, no. 5, pp. 581–599.

Turner M., King N., Mojtahedi D., Burr V., Gall V., Gibbs G.R., Hudspith L.F., Leadley Ch.B., Walker T., *Well-being programmes in prisons in England and Wales: A mixed-methods study*, "International Journal of Prisoner Health" 2022, vol. 8, no. 3, pp. 259–274.

Wong P.T.P., *Positive psychology 2.0: Towards a balanced interactive model of the good life*, "Canadian Psychology/Psychologie Canadienne" 2011, vol. 52, no. 2, pp. 69–81.

Wong P.T.P., Roy S., *Critique of positive psychology and positive interventions* [in:] *The Routledge International Handbook of Critical Positive Psychology*, eds. N.J.L. Brown, T. Lomas, F.J. Eiroa-Orosa, New York 2018, pp. 142–160.

Wood A.M., Davidson A.T., Linley P.A., Maltby J., Harrington S., Joseph S., *5 Applications of Positive Psychology* [in:] *Handbook of Positive Psychology*, eds. C.R. Snyder, S.J. Lopez, New York 2002, pp. 35–48.

Wysocka E., *Diagnoza pozytywna w resocjalizacji. Model teoretyczny i metodologiczny*, Katowice 2015.

Wysocka E., *Diagnoza pozytywna w resocjalizacji. Warsztat diagnostyczny pedagoga praktyka*, Katowice 2019.

van Zyl L.E., Gaffaneye J., van der Vaart L., Dikf B.J., Donaldson S., *The critiques and criticisms of positive psychology: A systematic review*, "The Journal of Positive Psychology" 2023, vol. 19, no. 2, pp. 206–235.

Summary

Mariusz Sztuka

In Search of Well-being: The Problematic Nature of the Positive Turn in Criminology

Positive criminology focuses on the practical dimension of criminological knowledge and, following in the footsteps of positive psychology, formulates proposals for responding to crime by appealing to the positive states of the recipient of rehabilitation efforts: his or her positive emotions, experiences, and personal resources. The purpose of this article is to review the main assumptions of the positive turn in criminology, taking into account both the influence of positive psychology and changes in the broader socio-cultural background. In the article, I draw attention to the possible problematic nature of transferring the solutions of positive psychology to the realm of rehabilitative settings. One partial solution to these challenges is the integration of the insights from the second wave of positive psychology. This entails a more nuanced understanding of the core concepts of happiness and well-being. Within such an approach, the meaning and significance of negative individual experiences is restored.

Keywords: positive criminology, positive psychology 2.0, social rehabilitation.

Streszczenie

Mariusz Sztuka

W poszukiwaniu dobrostanu – problematyczna natura pozytywnego zwrotu w kryminologii

Kryminologia pozytywna skupia się na praktycznym wymiarze wiedzy kryminologicznej i, idąc śladem psychologii pozytywnej, formułuje propozycje reagowania na przestępstwa poprzez odwoływanie się do pozytywnych stanów adresata oddziaływań resocjalizacyjnych: jego pozytywnych emocji, doświadczeń i zasobów osobistych. Celem artykułu jest przegląd głównych założeń zwrotu pozytywnego w kryminologii, biorąc pod uwagę zarówno wpływ psychologii pozytywnej, jak i zmiany w szerszym kontekście społeczno-kulturowym. W opracowaniu zwrócono uwagę na możliwą problematyczność przenoszenia rozwiązań psychologii pozytywnej na grunt środowiska resocjalizacyjnego. Częściowym rozwiązaniem tych problemów jest zintegrowanie spostrzeżeń drugiej fali psychologii pozytywnej. Wymaga to głębszego zrozumienia podstawowych koncepcji szczęścia i dobrostanu. W ramach takiego podejścia przywraca się znaczenie i wagę negatywnych doświadczeń jednostki.

Słowa kluczowe: kryminologia pozytywna, psychologia pozytywna 2.0, resocjalizacja.

Sławomir Redo[1]
United Nations Studies Association in Vienna, Austria
s@redo.net
ORCID: 0000 0003 2018 4217

https://doi.org/10.26881/gsp.2025.4.11

The "Polish Moment" and Criminological Aspects of the United Nations' Rule of Law

Putting the law above man is a problem in politics, which I compare to squaring the circle in geometry.[2]

The time given by history for experimentation has its limits.[3]

1. Introduction

For two reasons, the term "The Polish moment" came to my mind for the title of this article. The first came after reading studies of the works of Machiavelli and Montesquieu. With regard to Machiavelli, students of his *Discourses on the First Ten Books of Titus Livy* emphasise Machiavelli's influence on current politics. That influence destabilizes state institutions (the "Machiavelli moment"[4]). As regards Montesquieu, his intellectual contribution to the reform of institutions to establish the rule of law (RoL), based on the tripartite separation of powers, is emphasized by commentators. The "Montesquieu moment" is a period in which there is a significant opportunity or need to implement a new framework of governance that balances these powers – usually in political crises, revolutions, or during major constitutional reforms.

In my book *The Rule of Law in Retreat*, I compare these two modes of thought against the rules of formal logic, that is, I ask whether they meet the requirements of

[1] The author thanks Professor E.W. Plywaczewski for substantive comments on the content of this text. However, only the author is responsible for that content.

[2] J.-J. Rousseau, *Considerations on the Government of Poland, and on its Projected Reformation* [in:] *Collection complet des oeuvres, Geneva, 1780–1789*, vol. 1, no. 4, online edition www.rousseauonline.ch, version of 7 October 2012, ch. I, § 417.

[3] L.J. Gorizontov, *Paradoksy impierskoj polityki: poljaki w Rossii i russkije w Polsze (XIX – naczało XX v.)*, Moskva 1999, quoted after A. Nowak, *Powrót "Imperium zła". Ideologie współczesnej Rosji, ich twórcy i krytycy*, Kraków 2024, p. 250.

[4] J.G.A. Pocock, *The Machiavellian Moment*, Princeton 1975.

deduction or induction. I conclude that formally speaking, Montesquieu argues more rigorously and justly in "good faith"/honestly. Montesquieu's philosophy is an example of "benevolence" and the basis for "charity"; Machiavelli's argument is the opposite. It reflects a "thief's honour." Machiavelli lowers legal standards, and Montesquieu raises them.[5]

At the level of domestic law, neither Machiavelli nor Montesquieu is an appropriate example for strictly legal thinking. At the level of international law, Machiavelli and Montesquieu give us the beginnings of knowledge about political and philosophical paths of making and breaking laws in Europe and the world. However, Montesquieu also analyzes the effectiveness of law in various geopolitical and climatic conditions. Politicians, on the other hand, think more intuitively and alternatively than modally and argue according to the need of the moment to gain or maintain power. What counts more than good faith in the settlement of effects is goodwill if it results in a benevolent act.

As for the "Polish moment", since the end of 2023 (when a pro-democratic coalition regained power), this moment has been real but probated. This "moment" reverses acting in bad faith to acting in good faith (in the meaning of the UN Charter), that is, towards the restoration of RoL and the separation of powers in the spirit of Montesquieu's ideas. If this tendency continues, it has potentially a geopolitical impact on Europe and beyond, not to mention on a larger geopolitical scale, one that may matter from the UN rule-of-law perspective.

The UN identified its own breakthrough "moment" at the 2024 Summit for the Future.[6] The Summit of the Future Outcome Documents mentions "the rule of law" seven times with a view to transforming global governance.[7] On the one hand, the documents' contours were set by the risk of a Third World War and, on the other hand, outlined by a worldwide necessity to preserve peace and to give priority to RoL. Machiavelli and Montesquieu's views sharpen such contours, but similar contrasts exist in other legal cultures.

Second, I was motivated to write this text because of a seemingly unrelated press release. I learned from it about a programme of extensive municipal investments in Poland, accompanying the earlier and now modified project of the Central Communication Port (CCP). As compensation for the nuisance associated with its construction in the vicinity, these investments were to go to the residents of the surrounding areas. The information stated that the programme was to finance the modernization of roads burdened by heavy construction equipment, the expansion of the district hospital, support for the Volunteer Fire Brigade, the co-financing of

---

[5] S. Redo, *On the Dialogues in Hell between Machiavelli and Montesquieu from the perspective of climate change, migration, and the rule of law* [in:] *idem*, *The Rule of Law in Retreat. Challenges to Justice in the United Nations World*, Lanham, Md. 2022, ch. 12.

[6] GA/12641, *United Nations adopts ground-breaking Pact for the future to transform global governance*, 2 October 2024, https://bit.ly/3UYg0EX [accessed: 2025.05.10].

[7] Summit of the Future Outcome Documents, *Pact for the Future, Global Digital Compact and Declaration on Future Generations*, New York 2024.

recreation for children and young people, the construction of a playground, and the renovation of three altars in the local church. The programme also was to provide micro-grants for local social organizations.[8]

2. Top-down weakening of the checks and balances of power

Before returning to these investments and placing them in the more general context of international development aid, a strand in which the leaven of RoL may (but does not have to) lie, this text draws attention to the results of the latest research in political science on the widespread erosion of RoL. In addition to Poland, two world-renowned American political scientists point to "backsliding" in Bangladesh, Brazil, El Salvador, the Philippines, India, Mexico, Nicaragua, Tunisia, Turkey, Hungary, and the USA. In these twelve countries, each in its own way, there has been a systemic violation of RoL by representatives of a new political elite. In Brazil, Poland, and in the USA, it was possible to stop this process through elections. The analysis offered by these experts does not include African countries nor, obviously, the results of the November 2024 results elections in the USA, results that renewed the process of erosion.

A slightly older, separate, and more incisive sociological analysis of the transformational problems with RoL in Poland, Hungary, and in ten other former Eurasian so-called "people's democracies" highlights the emergence of a common denominator for their backsliding: the creation of a "mafia state" in those countries.[9] This type of "criminal state"[10] is not mentioned in official UN nomenclature, but non-governmental organisations in consultative status with the UN Economic and Social Council plainly call such countries "mafia states."[11]

In the early 1990s, with Professor Emil W. Plywaczewski, I worked on creating the initial premises of what in 2000 became the UN Convention against Transnational Organized Crime. In work on the convention, "mafia-ness" was eventually interpreted as the existence of a hierarchy of at least three members of the group. This definition played a role in the finalization of the UN definition of such a group, in the sense that it allows the possibility of criminal liability of a patron of one or more group for all its crimes, regardless of whether s/he personally committed a specific crime or not, or knew about it or not. It is enough to participate in such a group according to the continental principle of civil law, *association de malfaiteurs* ("criminal association"), and for the patron to tolerate such an organizational form. Government bodies,

---

[8] P. Nodzyńska, *Razem Party: MP Matysiak has undermined our trust. And we used to say "Paulina, it's a bad idea"*, "Gazeta Wyborcza" 3 January 2024, https://bit.ly/4dbSiM6 [accessed: 2025.05.10].

[9] B. Magyar, B. Madlovics, *A Concise Field Guide to Post-communist Regimes. Actors, Institutions, and Dynamics*, Vienna 2022; B. Magyar, *Hungary. Anatomy of a Mafia State. Is this the Future that Awaits Poland?*, transl. E. Sobolewska, foreword by R. Markowski, Warszawa 2018.

[10] D.O. Friedrichs, *Transnational crime and global criminology: Definitional, typological, and contextual conundrums*, "Social Justice" 2007, vol. 34, no. 2(108), pp. 4–18.

[11] *Intersections. Building blocks of a global strategy against organized crime*, Geneva 2024, p. 15.

corporations, and politicians can also be considered as perpetrators of organised crime if elements of the general definition of "transnational organised crime" are met.[12]

As noted, the convention does not speak of a "mafia state" or a "failed state." UN member states would neither redefine themselves as such states nor admit occasional political domination of internationally organised criminals. Nevertheless, this residual state form bordering on or amounting to a "failed state" is unofficially recognized in the UN circle of donors providing development assistance.

This misused assistance is called "fungibility", that is, the conversion of financial and material resources for purposes not previously agreed on in the development aid project and not authorized by the recipient of development aid. The criminological term "embezzlement" seems to be conceptually close to "fungibility." To name the above operation, criminology lacks appropriate terms and linguistic tools. It could be called the development of "political international organised crime."[13]

A vague idea of the risk of the emergence of political international organised crime emerges from an analysis of the results of Chinese development assistance provided to 106 countries in 2000–2014, that is, before the Belt and Road Initiative (2013–2049). The analysts conclude that when a donor gives recipients more freedom regarding their development flows, leaders can use resources to build and maintain policy support as a substitute for better economic performance facilitated by strong anti-corruption institutions. According to the evaluation, the absence of these institutions has also been an "institutional curse" to development aid provided through the Organisation for Economic Cooperation and Development (OECD), and has been a matter of "sixty years of experience with development aid from OECD donors." "Bad faith" can lead to corruption (in the sense of "grand corruption"), regardless of the source of foreign development aid.[14]

In public choice-real elections, such diverted and stolen funds can be seen as a tool for gerrymandering in the recipient country. This practice raises concerns about fairness and freedom of elections. Ideally, they must be carried out impartially, transparently, and fairly. Fairness and freedom also mean that all participants have an equal opportunity to express their views, cast their votes, and have those votes

---

[12] A. Schloenhardt *et al.*, *UN Convention against Transnational Organized Crime: A Commentary*, Oxford 2023, pp. 25–33 and 55–57; *Criminal association*, https://bit.ly/4ffrWus [accessed: 2025.05.10].

[13] In the case of receiving development assistance, according to the experience described above, the leading hallmark of political organized crime would be the general leadership of the main patron ("patronal") president or prime minister. By directing this aid through concentrated power over the redistribution of material goods to a party-defined circle of beneficiaries (for example, an ethnic group), it enables a selected group of potential beneficiaries to derive profits from profitable branches of the national economy by its own decisions. The beneficiary, via the role granted, is obliged to reciprocate (not necessarily financially) to the patron or other person or persons from the patron's party circle who are more privileged than the beneficiary. The patron does not have to be aware of the specific purpose and object of each such transaction. Still, the beneficiary must be absolutely loyal under penalty of exclusion from the circle of profiteers.

[14] S. Brazys, K.C. Vadlamannati, *Aid curse with Chinese characteristics? Chinese development flows and economic reforms*, "Public Choice" 2021, vol. 188, no. 3–4, pp. 407–430.

counted accurately. The weakness of international development aid, which can affect free and fair elections, has led to widespread money laundering: that is of funds originally legally obtained through development aid but not used for this agreed-upon purpose. In the absence of official figures, the United Nations Office on Drugs and Crime (UNODC) estimates that between 2% and 5% of global GDP is laundered each year. This ranges from EUR 715 billion to EUR 1.87 trillion per year.[15]

Michel Camdessus, former director of the International Monetary Fund (1987–2000), recently opined that the monetary value of illicit financial flows in Africa, including corruption, tax evasion, and illegal transfers from African countries abroad, is in total twice as high as the value of development aid received from abroad by these countries.[16] This is commonly misappropriated development aid. The perpetrators of embezzlement are not only the leaders of countries, but also those subordinate to them who are not criminally responsible for these embezzlements.

Money laundering is being addressed more effectively through the UN Convention against Transnational Organized Crime and the draft United Nations Framework Convention on International Tax Cooperation, which is currently underway. These are elements of a common legal order, but they are much less complete than the legal order of the European Union, which itself is also very far from ideal.[17]

3. The legitimacy and cost-effectiveness of RoL

A recent UN report reported that half of the world's GDP depends on "nature," and every US dollar invested in the recovery of nature creates up to $30 in economic benefits.[18] After a more in-depth analysis of the source cited by the authors of this report, it turns out that the profitability of an investment of one dollar is estimated to fluctuate *per capita* between seven and thirty dollars[19] in return, but this by no means concerns investments in the whole of nature, or even in its terrestrial part, but only concerning the reclamation of forest land.[20] However limited this estimate is, previous

---

15 *Money laundering*, "Europol", https://bit.ly/3WtE43R [accessed: 2025.05.10].

16 M. Camdessus, *Wyzwania i prognozy*, Warszawa 2019, p. 72; *Francuski ekonomista: Nie zatrzymamy migracji*, "Gazeta Wyborcza" 19 January 2019, https://bit.ly/43HLvXa [accessed: 2025.05.10].

17 I have outlined how the practice of international development assistance can be improved by reducing impunity and making the return of stolen and transferred resources more effective in general. See: S. Redo, *For the Rule of Law: Action-oriented comments on the 'shocking' judgment in the Case N.D. and N.T v. Spain* [in:] *O wolność i prawo. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Rzeplińskiemu*, eds. B. Błońska *et al.*, Warszawa 2022, pp. 309–322, https://bit.ly/3KBXTyE [accessed: 2025.05.10]; *idem*, *Whose rule of law and order*? [in:] *Reinvigorating the United Nations*, eds. M. Kornprobst, S. Redo, London 2024, pp. 57–79.

18 *Becoming #GenerationRestoration. Ecosystem Restoration for People, Nature and Climate*, UNEP, Nairobi 2021, p. 3, https://bit.ly/41bjKHp [accessed: 2025.05.10].

19 H. Ding *et al.*, *Roots of Prosperity: The Economics and Finance of Restoring Land*, Washington, DC 2018.

20 M. Verdone, A. Seidl, *Time, space, place, and the Bonn Challenge global forest restoration target*, "Restoration Ecology" 2017, vol. 25, no. 6, pp. 903–911.

econometric and criminological studies have confirmed the cost-effectiveness of crime prevention, especially for the youngest people and separately for adults and in combatting various types of crime.[21]

This evidence prompts us to consider approaches to recultivating RoL in the world. The most common approach follows correlates showing that stricter adherence to RoL, understood as the legal protection of property rights and contractual obligations, stimulates economic growth.[22] Concerning the abovementioned press report on local investments related to the CCP, this may be an indirect indication of their connection with the consolidation of RoL or even their implicit concurrence with the World Bank's skeletal definition of RoL. This reads: "Rule of Law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence."[23] This definition would have promoted the strengthening of RoL in Poland in 2015–2023, but the decision to donate funds for the renovation of three altars had nothing to do with it.

Sticking only to the above definition, I conclude that the Polish investor did not want to "rehabilitate" communal "land" in terms of its potential/prospective RoL value. Instead, the idea was to influence a community in favour of the ruling political elite before parliamentary elections by disregarding that value. This endeavour sought to maintain lawlessness rather than restore the rule of law. With this concept in mind (not in the ecumenical spirit of the innovative, progressive teaching of Thomas Aquinas[24]), the previous Polish government claimed to have introduced new social principles for the "re-Christianization" of the country to halt the erosion of "European values."[25]

From the point of view of political science and philosophy of law, this policy aimed at creating a so-called "civic religion", as advocated by Machiavelli. The author of the *Discourses* is not worried about the lack of innovation or the apparent religiousness of politics. He wants to discourage studying and learning constitutional law. In this way, Machiavelli advises strengthening government power over the intellectual elite. To discourage the use of RoL, he advocates the corruption of the elite's morality and ethics through a conservative interpretation of religion. His "moment" leads to a question that is by no means only crucial for the reconstruction of RoL in Poland. That question lies in the title of the next section of my article.

---

[21] J.J. Heckman, *The case of investing in disadvantaged young children* [in:] *Big ideas for children: Investing in our nation's future*, Washington 2008, p. 52; L.W. Sherman *et al.*, *Preventing crime: What works, what doesn't, what's promising: A report to the United States Congress*, Washington, D.C. 1997.

[22] S. Redo, *On education in the global Culture of Lawfulness* [in:] *Advancing Culture of Lawfulness: Towards the Achievement of the 2030 Agenda*, eds. E. Pływaczewski, S. Redo (Special issue – "Białostockie Studia Prawnicze" 2018, vol. 23, no. 3), pp. 27–42.

[23] World Bank, *Meta glossary*, https://bit.ly/4bZEfZh [accessed: 2025.05.10].

[24] Cf. L. Strauss, *What is Political Philosophy and Other Studies*, Chicago & London 1988, pp. 13, 31.

[25] N. Duelholm, *New Polish PM sees return to Christian roots as only way to stop Europe's decline*, "LifeSiteNews" 14 December 2017, https://bit.ly/3dobkkZ [accessed: 2025.05.10]; U. Ziemska, *Wydawnictwo Ordo Iuris trafiło na listę punktowanych wydawnictw naukowych. Jak wydawnictwa UJ i UW*, "Gazeta.pl" 11 November 2020, https://bit.ly/2JKnDx1 [accessed: 2025.05.10].

4. How can local RoL be planted and cultivated in international development aid from the bottom up?

The full definition of RoL adopted in 2018 by the UN General Assembly is as follows:

> [RoL] recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and are consistent with international law.[26]

Subjectively and objectively, this is an expanded definition of RoL, promoting greater equality implicitly concerning the right to property. The definition embraces the prosecutor's office, the prison system, and civil society, and all entities are subordinated to international law. However, to apply this expanded definition, neither the letter of the law itself nor its top-down implementation in the intergovernmental practice of development aid is sufficient.

For example, as reported in 2024, the US Agency for International Development (USAID) – now defunct – with a remarkable portfolio and range of development assistance projects, planned to allocate 25% of its funds directly to local organizations implementing its assistance.[27] That probably would have been a new average value.[28]

Localization should be a priority for properly configured development aid. This priority only incidentally coincided with development assistance for African countries financed by the Ministry of Foreign Affairs, responsible for awarding grants to Polish NGOs. In the official document of the Ministry for 2021–2030, there is a top-down institutional view:

> Peace and security are an absolute condition for development. And sustainable development means a greater chance for lasting peace and international stability. Only countries with strong and stable institutions, good governance principles are applied, human rights are respected, and citizens have an equal say in decisions on matters that affect them, have a chance for sustainable development.
>
> Therefore, we will support all partner countries in applying the principles of good governance by building such institutional systems that would be able to implement the policy of sustainable development, based on reliable knowledge of the sources and conditions that generate conflict and degradation situations on the scale of the entire civilization, as well as on the regional and local scale.[29]

---

[26] A/RES/73/195, *Global Compact for Safe, Orderly and Regular Migration*, 19 December 2018, § 15(d), https://bit.ly/40VMbZx [accessed: 2025.05.10].

[27] E. Miolene, *Are USAID localization results even worse than reported?*, "Devex" 20 June 2024, https://bit.ly/3zOBpcf [accessed: 2025.05.10].

[28] Cf. E. Miolene, *Why is localization surging in some countries and stalling in others?*, "Devex" 26 August 2024, https://bit.ly/3Z4lyAU [accessed: 2025.05.10].

[29] *Multiannual Development Cooperation Programme 2021–2030. Solidarity for Development*, Warszawa 2021, https://bit.ly/3zRyBef [accessed: 2025.05.10].

Time will reveal whether local communities will truly be actively included in these grants. Elevating moral and ethical standards necessitates establishing a grassroots catalyst for the Rule of Law. The assets seized from money laundering should meet the local community's materially and socially justified needs, incentivizing them on the basis of those needs. Such fund transfers foster positive relations between central and local authorities. They ensure that local needs are sustainably and appropriately met.[30] Meeting them is seen as fulfilling the following requirements:

- providing access to water and sanitation;
- implementing effective criminal prosecution of perpetrators of corruption, with an adequate penalty taking into account environmentally appreciated retribution and compensation for material, ethical, and moral damage caused to members of the local affected communities;
- ensuring safe foot-traffic at night in the area;
- awarding micro-grants;
- having accountable and fair local taxes enabling social investment;
- drawing on assistance in creating a participatory budget;
- providing training in preventing rigged tender procedures;
- training small entrepreneurs in the field of bookkeeping and accounting;
- offering assistance in introducing transparent sharing of the benefits of local taxes;
- teaching the principles of fair play in children's sports;
- promoting school and local self-government, etc.;
- mobilizing larger local communities for local projects;
- providing educational support for religious communities to prevent drug abuse in local communities;
- assisting religious communities in sex education to eliminate the culturally violent practice of female genital circumcision.

5. *Pro domo sua*

With such a listing, this text could end with the sacramental "Amen." However, this would simplify the role of religion in development aid, viewing it as a partner of the secular power, particularly in authoritarian contexts where it may actively and effectively promote a "civic religion." A clear example of this approach in Poland involved the government of the United Right (*Zjednoczona Prawica*). The government allocated funds to renovate several altars to foster good relations between the central authority and the local community.

With this example, I move from implementing the principles of international development assistance for bringing about RoL to assessing governments in Poland and other developed countries. By doing so, I note that these principles are common,

[30] E. Finkel, S. Gehlbach, *The Tocqueville Paradox: When Does Reform Provoke Rebellion?*, "Social Science Research Network" 4 November 2018.

even for organisers and technical assistance providers who, like the devil scared of holy water, are afraid of the religious value of the effectiveness of such assistance.

Thus, if any motivated investor were guided solely by secular rationalism, the spread of RoL under his/her banner would not have reached the roots of evil as thoroughly without religion as would have resulted from the requirements of the UN definition of RoL. This came into being seventy years after its nominal mention in the Universal Declaration of Human Rights, which was a result of the atrocities of the Second World War. Since then, the UN has distanced itself from such a drastically devalued interpretation of the truth. The UN operates under its own set of quasi-religious principles. It strives for goodness and charity as outlined in its foundational documents like the Charter of the United Nations and the Vienna Convention on the Law of Treaties. According to these articles of faith, the UN's philosophy of law and its legal instruments should be implemented with good faith. However, in the Middle Ages in England, the Cardinal Thomas Wolsey (1473–1530), a controversial advisor to King Henry VIII, noticed that it is not good faith that makes possible the fulfilment of treaty obligations but goodwill, that is, honesty, empathy, and inclusivity. There is no shortage of this in the UN Secretariat, but, in fact, it happens that it is lacking in UN member states, as well as good faith.

In his *Discourses*, Machiavelli maintains that the good (*virtù*) in politics arises, disappears, and returns.[31] The UN challenged this recurring cycle with its concept of "larger freedom," initially introduced in the UN Charter and subsequently reiterated in various legal documents and public declarations. The ebb and flow of this idea should not be interpreted through a Machiavellian lens. This is not because the idea of the UN idea ideologically suits a particular party (for example, the winners of the Second World War), but because the goal of "larger freedom" is supported by UN transformation instruments, such as the 2030 Agenda. Pursuing larger freedom is not just linear, but a progressive process of expanding it.[32]

6. Conclusions

In conclusion, one must retain great perseverance to restore good faith and will for more effective implementation of larger freedom and, thus, of the moralization of politics by RoL, that is, to move from merely squaring the circle to turning it into a regular dodecagon (see the motto to this article). Equality, writes Alexis de Tocqueville (1805–1859), the French political scientist, sociologist, and diplomat, whose genius was compared by his contemporary Zygmunt Krasiński to the mentality

[31] See: T. Flanagan, *Machiavelli and History: A Note on the Proemium to Discourses II,* "Reneissance and Reformation" 1971, vol. 8, no. 2, pp. 79–81.

[32] Cf. "*progressive encirclement*" (R. Gardiner, *Part II Interpretation applying the Vienna Convention on the Law of Treaties*, *A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning* [in:] *Treaty Implementation*, ed. R. Gardiner, 2nd ed., Oxford 2015, 2/55).

of Tacitus and Montesquieu,[33] is not an experience that can be imposed by force. It is only made possible by shaping new egalitarian customs and institutions aimed at their implementation.[34]

The listed above steps are, in fact, relevant in Poland and elsewhere in the world, and in any place where they have not been taken. The German sociologist Ralf Dahrendorf (1929–2009) prophetically emphasised the role of perseverance in post-1989 Poland and other countries of what were previously called people's democracies" He believed these countries would need six months to create a constitution, six years to institutionalize democracy, that is, to embody RoL in a parliamentary system with political and ideological pluralism, and sixty years to implement a democratic society.[35]

However, the time given by history and the actual paths and motives that create any moment also have geopolitical limitations. The UN Charter came out of the "San Francisco moment," but current geopolitical challenges have made that moment one of a past long gone. It is not easy to reignite faith in the UN, even if its Member States at the Summit for the Future solemnly recommitted themselves to RoL to transform global governance. Will the "Polish moment" continue in the future and matter for the United Nations Rule of Law in the world? I am ending this text not with a question mark but an exclamation mark, as in the appeal that emerges from the book by Stanisława Fleszarowa-Muskat: "*Tak trzymać!*" (Keep it up!).

Literature

A/RES/73/195, *Global Compact for Safe, Orderly and Regular Migration*, 19 December 2018, https://bit.ly/40VMbZx [accessed: 2025.05.10].

Becoming #GenerationRestoration. Ecosystem Restoration for People, Nature and Climate, UNEP, Nairobi 2021, https://bit.ly/41bjKHp [accessed: 2025.05.10].

Brazys S., Vadlamannati K.C., *Aid curse with Chinese characteristics? Chinese development flows and economic reforms*, "Public Choice" 2021, vol. 188, no. 3–4, pp. 407–430.

Camdessus M., *Wyzwania i prognozy*, Warszawa 2019.

Carothers T., Hartnett B., *Misunderstanding democratic backsliding*, "Journal of Democracy" 2024, vol. 35, no. 3, pp. 24–37.

Ciżewska-Martyńska E., *Reading Tocqueville in Poland*, "Leggere Tocqueville" 2023, no. 6, pp. 85–102.

Criminal association, https://bit.ly/4ffrWus [accessed: 2025.05.10].

Dahrendorf R., *Reflections on the Revolutions in Europe*, New York 1999.

Ding H. *et al.*, *Roots of Prosperity: The Economics and Finance of Restoring Land*, Washington, DC 2018.

[33] E. Ciżewska-Martyńska, *Reading Tocqueville in Poland*, "Leggere Tocqueville" 2023, no. 6, p. 94.

[34] A. de Tocqueville, *Democracy in America*, London 1998, Book IV, ch. IV (4), pp. 350–355. For more information, see: T. Słupik, *Tocqueville i problemy z naturą demokracji*, "Horyzonty Polityki" 2020, vol. 11, no. 34, pp. 67–86.

[35] R. Dahrendorf, *Reflections on the Revolutions in Europe*, New York 1999, p. 99.

Duelholm N., *New Polish PM sees return to Christian roots as only way to stop Europe's decline*, "Lifesitenews" 14 December 2017, https://bit.ly/3dobkkZ [accessed: 2025.05.10].

Finkel E., Gehlbach S., *The Tocqueville Paradox: When Does Reform Provoke Rebellion?*, "Social Science Research Network" 4 November 2018.

Flanagan T., *Machiavelli and History: A Note on the Proemium to Discourses II,* "Reneissance and Reformation" 1971, vol. 8, no. 2, pp. 79–81.

Friedrichs D.O., *Transnational crime and global criminology: Definitional, typological, and contextual conundrums*, "Social Justice" 2007, vol. 34, no. 2(108), pp. 4–18.

GA/12641, *United Nations adopts ground-breaking Pact for the future to transform global governance*, 2 October 2024, https://bit.ly/3UYg0EX [accessed: 2025.05.10].

Gadomski W., *Francuski ekonomista: Nie zatrzymamy migracji*, "Gazeta Wyborcza" 19 January 2019, https://bit.ly/43HLvXa [accessed: 2025.05.10].

Gardiner R., *Part II. Interpretation applying the Vienna Convention on the Law of Treaties* [in:] *Treaty Implementation*, ed. R. Gardiner, 2nd ed., Oxford 2015.

Gorizontov L.J., *Paradoksy impierskoj polityki: poljaki w Rossii i russkije w Polsze (XIX – naczało XX v.)*, Moskva 1999.

Heckman J.J., *The case of investing in disadvantaged young children* [in:] *Big ideas for children: Investing in our nation's future*, Washington 2008.

Intersections, *Building blocks of a global strategy against organized crime*, Geneva 2024.

Magyar B., *Hungary. Anatomy of a Mafia State. Is this the future that awaits Poland?*, transl. E. Sobolewska, foreword by R. Markowski, Warszawa 2018.

Magyar B., Madlovics B., *A Concise Field Guide to Post-communist Regimes. Actors, Institutions, and Dynamics*, Vienna 2022.

Miolene E., *Are USAID localization results even worse than reported?*, "Devex" 20 June 2024, https://bit.ly/3zOBpcf [accessed: 2025.05.10].

Miolene E., *Why is localization surging in some countries and stalling in others?*, "Devex" 26 August 2024, https://bit.ly/3Z4lyAU [accessed: 2025.05.10].

Money laundering, "Europol", https://bit.ly/3WtE43R [accessed: 2025.05.10].

Multiannual Development Cooperation Programme 2021–2030. Solidarity for Development, Warsaw 2021, https://bit.ly/3zRyBef [accessed: 2025.05.10].

Nodzyńska P., *Razem Party: MP Matysiak has undermined our trust. And we used to say "Paulina, it's a bad idea"*, "Gazeta Wyborcza" 3 January 2024, https://bit.ly/4dbSiM6 [accessed: 2025.05.10].

Nowak A., *Powrót "Imperium zła". Ideologie współczesnej Rosji, ich twórcy i krytycy*, Kraków 2024.

Pocock J.G.A., *Machiavellian Moment*, Princeton 1975.

Redo S., *For the Rule of Law: Action-oriented comments on the 'shocking' judgment in the Case N.D. and N.T v. Spain* [in:] *O wolność i prawo. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Rzeplińskiemu*, eds. B. Błońska *et al.*, Warszawa 2022, https://bit.ly/3KBXTyE [accessed: 2025.05.10].

Redo S., *On the Dialogues in Hell between Machiavelli and Montesquieu from the perspective of climate change, migration, and the rule of law* [in:] *idem*, *The Rule of Law in Retreat. Challenges to Justice in the United Nations World*, Lanham, Md. 2022.

Redo S., *On education in the global Culture of Lawfulness* [in:] *Advancing Culture of Lawfulness: Towards the Achievement of the 2030 Agenda*, eds. E. Pływaczewski, S. Redo (Special issue – "Białostockie Studia Prawnicze" 2018, vol. 23, no. 3), pp. 27–42.

Redo S., *Whose rule of law and order*? [in:] *Reinvigorating the United Nations*, eds. M. Kornprobst, S. Redo, London 2024, pp. 57–79.

Rousseau J.-J., *Considerations on the Government of Poland, and on its Projected Reformation* [in:] *Collection complet des oeuvres, Geneva, 1780–1789*, vol. 1, no. 4, online edition www.rousseauonline.ch, version of 7 October 2012.

Schloenhardt A. *et al.*, *UN Convention against Transnational Organized Crime. A Commentary*, Oxford 2023.

Sherman L.W. *et al.*, *Preventing Crime: What works, what doesn't, what's promising: A report to the United States Congress*, Washington, D.C. 1997.

Słupik T., *Tocqueville and the Problems with the Nature of Democracy*, "Horyzonty Polityki" 2020, vol. 11, no. 34, pp. 67–86.

Strauss L., *What is Political Philosophy and Other Studies*, Chicago & London 1988.

Summit of the Future Outcome Documents, *Pact for the Future, Global Digital Compact and Declaration on Future Generations*, New York 2024.

de Tocqueville A., *Democracy in America*, London 1998.

Verdone M., Seidl A., *Time, space, place, and the Bonn Challenge global forest restoration target*, "Restoration Ecology" 2017, vol. 25, no. 6, pp. 903–911.

World Bank, *Meta glossary*, https://bit.ly/4bZEfZh [accessed: 2025.05.10].

Ziemska U., *Wydawnictwo Ordo Iuris trafiło na listę punktowanych wydawnictw naukowych. Jak wydawnictwa UJ i UW*, "Gazeta.pl" 11 November 2020, https://bit.ly/2JKnDx1 [accessed: 2025.05.10].

Summary

Sławomir Redo

The "Polish Moment" and Criminological Aspects of the United Nations' Rule of Law

In international development aid (from 1948 to 2010), the rule of law (RoL) legitimized by the United Nations Charter and the Universal Declaration of Human Rights did not become the dominant feature of this aid. This is even less so now because, at the turn of the first and second decade of the twenty-first century, the general process of erosion of RoL in the world began. The UN can play a leading role in countering it. Recent empirical research suggests that the top-down weakening of the checks and balances on power causes erosion of RoL. This calls for countering impunity for perpetrators of abuse of power and those suspected of crime. Against the background of Polish and foreign experiences in restoring RoL to counteract traditional and political organised crime and corruption in the world, this article presents complementary/bottom-up ways of remedying erosion of RoL in international development aid, based on its UN definition.

Keywords: corruption, developmental aid, organised crime, rule of law, United Nations.

Streszczenie

Sławomir Redo

„Polski moment" i kryminologiczne aspekty ONZ-owskiego rządu prawa

W ramach międzynarodowej pomocy rozwojowej (1948–2010) praworządność, legitymizowana przez Kartę Narodów Zjednoczonych oraz Powszechną Deklarację Praw Człowieka, nie stała się dominującym motywem przewodnim tej pomocy. Jej obecność jest jeszcze mniej widoczna w XXI w., gdyż na przełomie pierwszej i drugiej dekady tego stulecia rozpoczął się ogólny proces erozji praworządności na świecie. ONZ może odgrywać wiodącą rolę w przeciwdziałaniu temu zjawisku. Najnowsze badania empiryczne sugerują, że erozja wynika z odgórnego osłabienia mechanizmów kontroli i równowagi władz. Wymaga to przeciwdziałania bezkarności sprawców nadużyć władzy oraz podejrzanych o przestępstwa. Na tle polskich i zagranicznych doświadczeń w przywracaniu praworządności w celu zwalczania tradycyjnej i politycznej przestępczości zorganizowanej oraz korupcji na świecie artykuł prezentuje komplementarne/oddolne sposoby rekultywowania praworządności w międzynarodowej pomocy rozwojowej, oparte na definicji ONZ.

Słowa kluczowe: korupcja, pomoc rozwojowa, przestępczość zorganizowana, rządy prawa, Narody Zjednoczone.

Paweł Petasz
University of Gdańsk, Poland
pawel.petasz@ug.edu.pl
ORCID: 0000-0003-2129-4784

https://doi.org/10.26881/gsp.2025.4.12

Incest as a Sexual Crime in Polish Criminal Law: A Relic of the Past or Still a Necessity in the Present?

In Article 201 of the Polish Penal Code of 1997, the legislator includes a criminal law regulation defining the crime of incest, according to which anyone who engages in sexual intercourse with an ascendant, descendant, adoptive person, adoptive parent, brother, or sister is subject to the penalty of deprivation of liberty for a term of between three months and five years. A legal provision of this type existed in each of the three Polish codes created in the twentieth century. The question arises whether in the contemporary criminal law of a democratic state governed by the rule of law, where in matters of human sexual behaviour the role of criminal law is primarily to safeguard sexual freedom and not decency in sexual matters, such a provision is actually needed, or perhaps whether its existence in criminal law is, in fact, unnecessary. To answer this question, it is necessary not only to analyse the statutory features of this act, but above all to examine the *ratio legis* of the criminal law norm related to it and the historical aspect of the whole issue.

In the Penal Code of 1997, in chapter XXV entitled "Crimes against sexual freedom and decency," the legislator includes a set of prohibited acts referred to in criminal law studies as "sexual offences"; this is also what these acts are called in judicial practice. It is worth considering for a moment what the term "sexual crime" actually means. It is not a legal term, which means it is not defined in any legal provision. The phrase "sexual crime" is not used anywhere in the code itself. Thus, it is a name created by legal doctrine; indeed, it is not an old name. It is also not a precise name. Marian Filar points out that the content and scope of the concept of "sexual crimes" may turn out to be both vague and controversial, *inter alia* because of its historical and territorial dynamism, as well as because the role and positioning of the sexual factor are decisive for the this term. Filar proposes that the term "sexual offences" should characterise only "sexually categorised" acts, that is, those in which sexual elements fall within the group of statutory features of the given offences.[1] According to M. Filar, sexual offences must objectively be of a sexual nature, not merely subjectively so; further the injured party must have been the actual possessor of the legal asset in question. There have

[1] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*, Toruń 1985, pp. 10–11.

been opinions in Polish criminal law doctrine that only those acts can be considered sexual crimes that are directly related to the sexual drive of the perpetrator and that are committed in order to satisfy such a drive on the part of the offender; possibly, however, a sexual crime could involve satisfying the sexual drive of another person.[2] This understanding is not correct, because it does not at all take into account that a sexual crime could be committed by a perpetrator, not for the purpose of satisfying his or her (or another person's) sexual drive, but also for other reasons. For example, the perpetrator could commit rape in order to show the victim that he had power over her, or to humiliate her. It can be assumed that in the case of sexual crimes, the main, but by no means sole, motivation of the perpetrator is to satisfy a sexual drive (his or her own or that of another person). There are also views that prohibited acts related to human sexuality should be divided into sexual offences and crimes of a sexual nature. The former would include prohibited acts which, in the structure of the provision, contain circumstances of a sexual nature, such as the crime of rape and sexual abuse of a minor; however, the latter would include all other acts which contain sexual elements and which do not belong within the catalogue of sexual offences, such as violating the bodily integrity of another person (for example, beating, when inflicting pain is a factor that is sexually arousing for the perpetrator).[3] For Jarosław Warylewski the term "sexual crimes" is "the most understandable, meaningful, synthetic and at the same time adequate term for defining those acts that were, are or may be prohibited by criminal law and at the same time are directly related to human sexual life."[4] It is worth noting that some authors use different names interchangeably, for example, Andrzej Marek uses the terms sexual offences, offences in the field of sexual intercourse, offences against sexual freedom or decency, and offences against freedom and decency in the field of sexual intercourse.[5] Filar, in turn, uses the following names interchangeably: sexual offences, offences in the field of sexual intercourse, offences in the field of sexual intercourse.[6]

In other countries, in criminal law studies and practice, very similar names are used. In English, American, and Canadian criminal law, the names sex crimes, sex offences, or sexual offences are used, also often interchangeably; in Spanish-speaking countries in criminal law, these are: *los delitos sexuales* or *los delitos contra la libertad sexual*; in French-speaking countries, they are: *les crimes sexuels*; and in German-speaking countries, they are: *die Sexualdelikten*, *die Sexualstraftaten*, and *die Straftaten der Sexualsphäre*. It is worth noting that all these names connect the crime with sex. Therefore, to sum up, I consider for the purposes of this work that the name sexual

---

[2] H. Rajzman, *Przestępstwa przeciwko wolności i godności człowieka (uwagi de lege ferenda)*, "Nowe Prawo" 1962, no. 3, p. 327; Z. Młynarczyk, *Sprawy o przestępstwa seksualne w aktualnej praktyce wymiaru sprawiedliwości*, "Nowe Prawo" 1969, no. 5, p. 797.

[3] T. Marcinkowski, *Medycyna sądowa dla prawników*, Szczytno 2010, p. 472.

[4] J. Warylewski, *Przestępstwa seksualne*, Gdańsk 2001, p. 16. All translations unless otherwise indicated are by me.

[5] A. Marek, *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1997, p. 496.

[6] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*…

crime refers to crimes related to sex and which are collected in chapter XXV of the Penal Code of 1997. The common denominator among all of them is "sex" and their perpetrators are referred to as sex offenders. This is a synthetic name that reflects the nature of the acts it concerns. I do not see the need to invent divisions of crimes into sexual and other, for example, those of sexual origin, of a sexual nature, etc. The name "sex crimes" is certainly not ideal, but so far no one has been able to propose a better one. The term is, thus, the best one and is commonly used in the world in the case of crimes directed against human sexual freedom and possibly so-called decency.

Sexual crimes, as indicated by the title of chapter XXV of the Penal Code, are directed against sexual freedom or decency. Some sexual crimes are directed against sexual freedom (for example, rape), some against decency (for example, incest), and some against both of these legal rights at the same time (for example, sexual intercourse with a minor under the age of fifteen). Since incest is a crime against decency and not against sexual freedom, below I only indicate briefly what the legal good in the form of sexual freedom is, and I focus rather on decency. As far as sexual freedom is concerned, it is a specific subject of protection in the case of the provisions of chapter XXV (but not all of them). It is certainly a significant merit of the creators of the 1997 Code that for the first time sexual freedom was formulated *expressis verbis* in the Polish Penal Code and immediately as a specific legal right in the institution of chapter XXV. This was not the case in either the Polish Penal Code of 1932 or the Penal Code of the Polish People's Republic of 1969. This state of affairs marks significant progress towards modernising Polish criminal law in the spirit of Western European law: sexual freedom has finally been recognised as an independent legal right and has been given an appropriate position. Some twenty-five years earlier, a similar situation occurred in the legal systems of countries located to the west of the Iron Curtain; for example in the Federal Republic of Germany, the chapter of the Criminal Code previously entitled "Crimes and misdemeanours against decency" (*Verbrechen und Vergehen gegen die Sittichkeit*) was replaced in 1973 by one entitled "Section Thirteen. Crimes against self-determination in the sexual field" (*Dreizehnter Abschnitt. Straftaten gegen die sexuelle Selbstbestimmung*).

Sexual freedom as a concept must be defined both in a positive sense, as "freedom to" and in a negative sense, as "freedom from."[7] Sexual freedom is the right of every person to choose a sexual partner, to choose a type of sexual contact, its place and time, as well as the type of sexual activities in which he or she participates. The scope of sexual freedom in a positive sense has not been defined in any legal act, but it can be assumed that it is very broad and refers to everything related to sex. Sexual freedom is also freedom from all types of coercion, and above all from physical, mental, or economic coercion. Sexual freedom is granted to every person and only a specific individual can make a decision about his/her sexual life; of course, a certain limitation here is an appropriate age, which in Polish law has been set at the age of fifteen, and the possession of a sound mind, because for a decision regarding sexual

[7] J. Warylewski, *Problematyka przedmiotu ochrony tzw. przestępstw seksualnych*, "Państwo i Prawo" 2001, no. 9, p. 77.

life to be legally relevant, it must be taken by a person who recognizes the significance of his or her act and can direct his or her own behaviour. Taking into account the level of intimacy of sexual relations and the importance of sexual life for human well-being, sexual freedom should be considered one of the fundamental human freedoms. Sexual freedom, therefore, also means freedom from sexual assault; it is part of a broader concept of freedom that comes in various forms.

Lech Gardocki claims that sexual freedom is not linked to morality, which is a certain system of social norms (mainly moral) regulating people's behaviour in the sexual sphere.[8] In the case of certain sexual offences, decency as sexual morality is an independent and equal subject of protection as compared to sexual freedom. It is not, in any way, the case that morality has a superior position over sexual freedom; moreover, such freedom is not, in any way, a derivative of morality. The fact that moral norms limit, but also guarantee, certain manifestations of sexual freedom does not mean that there is any special relationship between sexual freedom (that is, the generic subject of protection for some sexual crimes) and (sexual) morality (that is, the system of moral norms existing in a specific society).[9] Sexual freedom is not absolute; it is not limitless, because its limits are marked by law. The limits of sexual freedom are the freedoms and rights of other people, for example, the proper psychophysical development of a child in the case of the crime of sexual intercourse with a minor under fifteen years of age (Article 200 of the Penal Code of 1997); these limits also include, among other factors, decency, public health, and public order.

Until the second half of the twentieth century, decency was considered the subject of sexual crimes. It was a matter of morality in the sphere of human sexual life. Morality means a set of moral principles relating to human behaviour in the sexual sphere. It should be emphasised that morality is not unchanging and permanent, but is subject to change along with society. In the 1980s and 1990s, Polish criminal law theory was still dominated by views according to which morality played a dominant role in the area of sexual relations. For example, Kazimierz Buchała writes that if someone wants to formulate a generic object of protection common to these crimes, this would be morality in the sphere of sexual life rather than sexual freedom.[10] Similarly Witold Świda claims that sexual freedom is a specific derivative of morality in the sexual sphere, concluding that it is merely a manifestation of morality in the sexual sphere and, thus, concerns the moral norms accepted in society in this area.[11] Filar held the same opinion for a long time, stating that sexual freedom "does not seem to be an independent and autonomous value, but a derivative of another value, which is sexual customs established on the basis of current social relations."[12]

---

[8] L. Gardocki, *Prawo karne*, Warszawa 2015, p. 271.

[9] J. Warylewski, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *idem*, *Kodeks karny. Komentarz*, Warszawa 2001, p. 13.

[10] K. Buchała, *Prawo karne materialne*, Warszawa 1980, p. 669.

[11] W. Świda, *Prawo karne*, Warszawa 1986, pp. 497–498.

[12] M. Filar, *Przestępstwa w dziedzinie stosunków seksualnych* [in:] *System prawa karnego. O przestępstwach w szczególności. Tom IV. Część 2*, eds. I. Andrejew, L. Kubicki, J. Waszczyński, Wrocław–Warszawa–Kraków 1989, p. 152.

It is no exaggeration to say that decency as the subject of sexual crimes has been closely connected with morality. It was, therefore, a legal good of a general and abstract nature. Decency was identified with morality; it was simply morality in matters of human sexual life. This situation lasted for hundreds of years and was usually combined with rigour in matters of sex, as in medieval Europe. This, in turn, often involved excessive criminalization of sexual behaviour. It took a very long time to gradually move away from this type of penalization towards liberalization and towards limiting the role of the state and criminal law in matters related to human sexuality. Finally, it was recognized that criminal law serves as an *ultima ratio*, not a *prima ratio*, and that what is unethical, immoral, or even indecent does not necessarily require criminalization. The state's primary task is to protect sexual freedom, not to act as a guardian of morality in sexual matters. This libertarian approach identified sexual freedom as the primary good protected by criminal law provisions for sexual offences. In fact, it was not until 1964, at the Ninth Congress of the International Association of Criminal Law in The Hague, that strong positions emerged calling for the need to abandon the model in which criminal law protects decency in sexual crimes. These positions proclaimed the need for decriminalisation (for example, with regard to homosexual sex and prostitution) and for depenalisation (mitigating criminal penalties) of a large portion of sexual crimes. A directive on the criminalisation of crimes against the family and sexual morality (decency) was proposed. This emphasised the rationalisation of a libertarian and victim-oriented nature, replacing the previous rationalisation of a moralistic nature.[13]

The evolution of criminal law in this area did not only refer to doctrine, but also covered the courts; for example, in Poland from the 1970s (that is, after the entry into force of the Penal Code of 1969), references to decency as a subject of protection in sexual crimes were extremely rare[14]. The findings of the Congress were very important for the process of creating new law, both in Western Europe and in the Eastern bloc countries. This influence began to be visible, for example, in the titles of chapters in adopted or amended penal codes, including the Polish Code of 1969, where some of the offences contained in the Penal Code of 1932 in the chapter entitled "Prostitution" were moved to chapter XXII entitled "Crimes against Freedom." Crimes that were traditionally considered crimes against indecency and in which sexual freedom could not be the subject of the attack, such as incest, remained in the chapters protecting against indecency or were also included in new chapters on sexual freedom. This was because a solution was adopted, according to which the concept of sexual freedom was extended to include what is called "sexual shame" (sexual shyness), which may affect the injured party when he or she comes into contact with a sexual behaviour

[13] A. Wądołowska, *Wolność seksualna jako przedmiot ochrony prawnokarnej*, "Prokuratura i Prawo" 2007, no. 4, p. 139.

[14] Judgment of the Court of Appeal in Kraków of 4 April 1991, II AKz 28/91, "Krakowskie Zeszyty Sądowe" 1991, no. 4, pos. 16; Supreme Court judgment of 3 July 1975, II KR 66/75, "Orzecznictwo Sądu Najwyższego: Izba Karna i Wojskowa" 1975, no. 10–11, pos. 141; Supreme Court judgment of 14 March 1972, V KRN 33/72, "Orzecznictwo Sądu Najwyższego: Izba Karna i Wojskowa" 1972, no. 9, pos. 136.

or object, for example, pornography. Sexual shame is a feeling of embarrassment and unpleasantness that a person feels when he/she comes into contact with a perpetrator who seeks to sexually abuse him/her, but also when he/she comes into contact with a specific psychosexual stimulator against his/her will. Ultimately, it was assumed that the concept of sexual crimes should be constructed on this basis, that is, that sexual freedom and sexual shame are combined and therefore, for example, rape and the public display of pornographic content are not substantively different.[15] Similarly, incest is a sexual crime because, while violating decency, it also violates sexual shame. Over time, decency began to lose its importance as a protected legal interest in sexual crimes and was moved to the background, remaining a generic subject of protection only in the case of only a few sexual crimes, including the crime of incest under Article 201 Penal Code from 1997. Decency, as a set of moral rules relating to human sexual life and functioning in society, may be considered a legal good and, therefore, the subject of protection in the case of sexual crimes only to the extent that it does not limit human sexual freedom guaranteed by national and international law. The question arises whether such a violation of sexual freedom does not occur with the criminalisation of incest. This point is developed further at the end of this article.

The crime of incest (Latin, *incestus*) and the crime of rape are probably the two oldest types of sexual crimes. The prohibition of incest appears to have roots in many civilizations and legal systems around the world from ancient times. Of course, the limits of prohibited sexual relations between family members were defined in different ways, and incestuous relations between mother and son were usually punished most severely. At the same time, it should be recalled that there were also cultures in which incest was not marked pejoratively and was not subject to criminal sanctions, for example, in ancient Egypt, Persia, the lands of the Incas, and among some Germanic tribes. Only under the influence of Christianity did some societies begin to punish incestuous relationships.[16] In most civilizations, however, incest was punishable by law. The Code of Hammurabi provided the death penalty for sexual intercourse between a mother and her son, and sexual intercourse between father and daughter was punishable by exile.[17] Incest was also punishable by death in Hebrew law; prohibitions relating to incestuous sexual relations are found in the Third Book of Moses (the Book of Leviticus), according to which all incestuous relations were punishable by death by stoning, burning, or hanging.[18] In the ancient Greek polis, incest was often punishable by death or exile. In Roman law, incest was punished only in the event of an incestuous

[15] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*…, p. 26.

[16] *Encyklopedia podręczna prawa karnego*, ed. W. Makowski, Warszawa, p. 709, https://polona.pl/item-view/53c4ba94-e9da-47fc-9233-70c08c18c276?page=0 [accessed: 2025.08.1], p. 709. (The Encyclopaedia was published in the form of notebooks. Twenty-six issues were published in volumes 1–4 in the 1930s, with no specific year of publication indicated.)

[17] M. Stępień, *Kodeks Hammurabiego*, 2003, pp. 46–47, https://web.archive.org/web/20140116200939/http://www.pistis.pl/biblioteka/Hammurabiego%20kodeks.pdf [accessed: 2025.08.1].

[18] W. Bojarski, *Kara śmierci w prawach państw antycznych* [in:] *Kara śmierci w starożytnym Rzymie*, eds. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 15–16.

marriage (based on the law *lex Iulia de adulteriis*). Over time, when Christianity became the dominant religion in the Roman state at the end of the period of antiquity, canon law gained an increasingly stronger position and defined incest as a very serious crime, partly based on Jewish law and to some extent on *lex Iulia de adulteriis*. Interestingly, church law expanded the scope of prohibited incestuous relations by increasing the number of persons with whom sexual relations were considered incestuous, and at one point all relations up to the seventh degree of canonical kinship were considered incestuous. Pope Innocent had to introduce a reform in this respect and limit the list of relatives and affinities to the fourth degree of kinship of canonical commutation.

Canon law also gave rise to new problems related to incest, previously unknown in the Graeco-Roman world, because sexual intercourse between people connected by "spiritual kinship" (*cognatio spiritualis*) also began to be considered incestuous, which applied, for example, to godparents and their godson or goddaughter.[19] The law of the Lombards, who occupied a large area of Italy, also adopted many of the norms of Roman law and canon law; and sexual intercourse between the closest of relatives was punishable by death, while in the case of more distant relations the penalty was exile and confiscation of property.[20] Similar provisions were also in force in the law of the Franks, who conquered Gaul and then northern Italy and most likely also followed the norms of Roman law and canon law to some extent. In the Middle Ages, the *Constitutio Criminalis Carolina* criminalised incest by defining it broadly and insisting that sexual relations with a stepdaughter, stepson, and stepmother together with her stepchildren were also of such a nature. Later, the prohibition of incest was extended to siblings. The *Carolina* provisions became the foundation for the provisions contained in the *Theresiana*,[21] the *Leopoldina*,[22] and the *Josephine* Code.[23] In medieval English law, the penalty for incest was a wergild-type fine (that is, a monetary penalty, as in the case of murder) and the confiscation of property; the penalty depended on the degree of kinship.[24]

In Poland from the sixteenth through to the eighteenth centuries, land law did not contain penalties for incest, which does not mean that it was not punished, because it was and severely so, since in this case the Saxon municipal law common in

---

19 I. Grabowski, *Prawo kanoniczne według nowego kodeksu*, Lwów 1927, p. 415.

20 K. Koranyi, *Powszechna historia państwa i prawa*, vol. 2, Warszawa 1966, p. 219.

21 *Constitutio Criminalis Theresiana* (commonly known as the *Theresiana* and *Terezjana*) is a criminal code, covering substantive and procedural law, which was granted to the Austrian states by Empress Maria Theresa in 1768.

22 The *Leopoldina* is the common name for the penal code of 1786 issued by the Grand Duke of Tuscany, Leopold of Habsburg. The code was in the spirit of the Enlightenment and was the first European code to take into account the suggestions of Cesare Beccaria and the humanitarian school. In the *Leopoldina*, among other things, the death penalty, corporal punishment and shameful punishments were abolished, and universally applicable penalties involving solitary confinement were introduced.

23 The *Josephine* Code (German, *Josephina*) is the common name for the General Penal Code on Crimes and Punishments (German, *Allgemeines Gesetz über Verbrechen und derselben Bestrafung*). It was the penal code of Emperor Joseph II, from whom the common name is derived. It was in force from 1787 in the countries of the Habsburg Monarchy.

24 K. Koranyi, *Powszechna historia państwa i prawa*…, vol. 2, p. 260 and vol. 3, p. 296.

the Poland was applied. According to it, if incest was committed by members of the noble class who were related to each other in the direct line, they faced the penalty of death by beheading; similarly, the death penalty, this time by hanging (which was the standard for imposing the death penalty on the lower classes at that time), was imposed for incest among peasants. In practice, however, these punishments were imposed very rarely, and in addition, in the case of the peasantry, instead of hanging, the punishment was flogging combined with church penance.[25] This was most likely due to the fact that peasants were the property of their lord; so punishing them with death resulted in a reduction in the number of the lord's possessions. Incest itself was defined at that time in accordance with the relaxed provisions of canon law, that is, as sexual relations between relatives in the direct line or in the collateral line, as well as sexual relations between relatives by marriage up to the fourth degree. The Saxon law current in Poland made the type of punishment dependent on the degree of kinship, providing for *poena capita* for incest between forebears and descendants, flogging and permanent (perpetual) banishment for incest between collateral relatives, and finally, banishment and flogging for men and six months of imprisonment for women in the case of relatives by marriage.[26]

At the end of the eighteenth century and at the same time at the end of the existence of the First Polish Republic, as a result of the increasing importance of Enlightenment philosophy, penal regulations were also relaxed in relation to incest. There was "Mitigation of penalties applied in courts having jurisdiction in criminal cases. The very fact of shifting the centre of gravity to the penalty of imprisonment and not, as it had been so far, to the death penalty testifies to this tendency to mitigate penalties, and in addition, facts from court practice speak of this mitigation, when towards the end of Poland's existence we encounter cases of the application of imprisonment and corporal punishment where previously the qualified death penalty had been applied (that is, in 1792 for incest a sentence of half a year in prison and twenty-five lashes was given, when previously it would have been burning or another death penalty)."[27]

The first Polish penal code was created after the fall of the First Polish Republic,[28] that is, in the Kingdom of Poland in 1818.[29] In the Penal Code, in Article 445, section XIII,

---

[25] K. Kaczmarczyk, B. Leśnodorski, *Historia państwa i prawa Polski*, Warszawa 1966, p. 336 and 369.

[26] J. Warylewski, *Przestępstwa seksualne*…, p. 230.

[27] J. Rafacz, *Dawne polskie prawo karne. Część ogólna*, Warszawa 1932, p. 28, https://kpbc.umk.pl/dlibra/publication/71100/edition/77950/content [accessed: 2025.08.1].

[28] The Partitions of Poland were three partitions of the Polish–Lithuanian state that took place between 1772 and 1795. They meant the end of the existence of Poland for 123 years. The partitions were conducted by Russia, Prussia, and Austria, which divided Polish territory among themselves progressively in the process of territorial seizures and annexations. In the nineteenth century, Poland's lands were held by these three powers. Therefore, the criminal law of the three partitioning powers remained in force in Poland throughout the nineteenth century. This state of affairs lasted until the end of the First World War, the fall of imperial Russia, Germany, and Austria, and the rebirth of the Polish state.

[29] *Prawo Kodeksu Karzącego dla Królestwa Polskiego z 20 lipca 1818 r.*, "Dziennik Praw Królestwa Polskiego", vol. 5, no. 20, https://iura.uj.edu.pl/Content/3676/HTML/uwsp%C3%B3%C5%82cze%C5%9Bniony%20Kodeks%20karz%C4%85cy%201818.html [accessed: 2025.08.1].

which is entitled "On Offences Against Good Morals," there is a provision penalizing the crime of incest, according to which "Incest, that is, carnal intercourse between relatives in the ascending and descending line, that is, their relationship comes from the legitimate or illegitimate bed, shall be punishable by confinement in a public detention centre for a term of between one and three years." Additionally, Article 446 specifies that "Fornication between brothers and sisters, whether full or half, or fornication with the spouse of one of the parents, children or siblings, shall be punishable by imprisonment in a public detention facility for a period of three months to one year. In addition, the one of the guilty perpetrators may be prohibited from staying in a place."

The next legal act in force in the Polish lands under Russian occupation was the Russian Code of Capital and Corrective Penalties of 1845, which had been in force in the Kingdom of Poland since 1847. Incest was defined there as a conscious physical intercourse between two people, relatives or affinities to the extent that marriage is prohibited. The *ratio legis* of incest was indicated at the time; the justification for its criminality resulted from concerns about the health of future generations, as incestuous relations could negatively affect them. In addition, incest was said to undermine the morality of the family and society "by replacing pure affection and respect for elders with disorder and unbridled debauchery."[30] In the doctrine of criminal law of that time, it was stated that: "[…] it should be noted: that an incestuous relationship rarely occurs, similarly to the higher organized animals, as it is contrary to the physiological conditions of human nature, which seeks contrasts; that it is shrouded in secrecy; that bringing this act to light, and usually through human malice, causes even greater scandal. These considerations led Romanesque legislations, with the exception of Italian and Spanish, to remain silent about such acts. The Spanish Code took a middle path, punishing incest only when a man has carnal intercourse with his sister or a descendant, and inflicting only a punishment on the man, and a mild one at that, because it was equal to the punishment for the seduction of a minor by a guardian, teacher, etc."[31] It should be noted that the crime of incest was regulated in Article 1088 of the third chapter ("On crimes against family union") of the Code of 1845, in an extremely casuistic manner., According to this regulation, for incest between relatives in the direct, ascending, or descending line, regardless of the degree, the guilty were punished by deprivation of all rights and by exile to more distant places in Siberia, where, instead of being allowed to settle, they were to be imprisoned alone in a tower for ten years, and after that time, they were to be sent to a monastery for life in order to perform hard physical labour there. If the convicted persons belonged to one of the Christian denominations, then in addition to the above, they were also to be subjected to church penance in accordance with the law of their denomination. In turn, Article 1089 states that "for incest between collateral relatives, but also between close relatives up to the second

[30] S. Budziński, *O przestępstwach w szczególności. Wykład porównawczy*, Warszawa 1883, p. 247, https://books.google.pl/books?id=ThKup-xzcQ8C&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false [accessed: 2025.08.1].

[31] *Ibid*.

degree, those guilty of Orthodox religion will be punished, according to the closeness of the degree of kinship or affinity, according to the following rules: For incest between second-degree relatives, deprivation of all rights and exile to Siberia to be imprisoned there in a tower for five years, after which they will be sent to a monastery for life to perform hard labour there. For incest between relatives of the third degree or between relatives of the first degree, that is, with a father-in-law or mother-in-law, with a son-in-law or daughter-in-law committed: exile to a flat in the Tomsk or Tobolsk province, with confinement from one to three years, and if they are not exempted from corporal punishment by law, sending to correctional prison groups for a period of from two to six years, depending on the circumstances that increase or decrease their guilt. For incest between relatives of the fourth degree, that is, with a cousin or first cousin, with a cousin or first cousin, or between relatives of the second degree, that is, with the husband's brother or sister-in-law, with the wife's brother-in-law or sister, committed by imprisonment in a monastery for a period of six months to one year. In addition to this, all those guilty, in each case, will undergo ecclesiastical penance according to the decree of the spiritual superior. Those belonging to the Roman Catholic or other Christian denominations, for incest between relatives of the second degree or relatives of the first degree, will undergo: the same punishment as persons of the Orthodox denomination. For incest committed with relatives or affines of such degrees in which, according to the rules of their church, marriage may be permitted, they shall be subject to punishment only when the crime was connected with adultery, or when for some reason marriage between the guilty cannot be permitted. And in each case they shall also be subject to ecclesiastical penance according to the decree of their spiritual superiors."[32]

The last Russian legal act in force on Polish soil was the Penal Code of 1903, in which part twenty-seven, entitled "On Prostitution," defined the crime of incest. According to Article 518, the perpetrator of incest with a descendant or ascendant relative was punished with a hard prison sentence of one to four years (the ascendant) and with imprisonment of one to six years (the descendant). If the descendant was under fourteen years old, he was exempt from punishment. Moreover, in accordance with Article 519, the perpetrator of incest with a collateral relative of the second degree or with a descendant or ascendant of the spouse, or with the spouse of a descendant or ascendant relative, was punished with imprisonment from one to three years. As before, the *ratio legis* of punishability of incest was reduced to a primarily eugenic argument and the penalization of incest was explained by the fact that "The factual circumstances of incest were based on the principles of protecting the public interest and maintaining the proper fitness of the species, hence the issue of mutual consent is irrelevant here."[33]

---

[32] *Kodeks kar głównych i poprawczych*, Warszawa 1847, pp. 791–795, https://pbc.biaman.pl/dlibra/publication/4601/edition/4524/content [accessed: 2025.08.1].

[33] W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego i rosyjskiego obowiązującego w Polsce*, Warszawa 1924, p. 344.

In Polish territory under Prussian (later German) occupation, the German penal law of 1871 obtained. It contained a criminal law regulation on incest in § 173, according to which "For carnal intercourse between relatives in the ascending and descending line, the first shall be subject to a hard labour penalty of up to five years, the last to a prison sentence of up to two years. Carnal intercourse between relatives in the ascending and descending line, as well as between siblings, will be punished by imprisonment for up to two years. In addition to the prison sentence, the loss of civic rights may be imposed. Relatives and relatives in the descending line will not be punished if they have not yet reached the age of eighteen."[34]

In the Austrian penal law of 1852 (Austria was the third partitioning power), the provision of § 131 specified that incest between relatives in the ascending and descending line, regardless of whether the relationship was "legitimate or illegitimate," was punishable by imprisonment from six months to one year. In Austrian law, incest meant fornication (as the translations of the time defined it), which was considered to be sexual intercourse between two people related in the direct line, regardless of whether their relationship was based on legal status, and regardless of whether it was of a closer or more distant degree. Incest was considered a crime in the Austrian Code. In turn, the provision of § 501 of the Code criminalized prostitution between siblings or closest relatives by affinity. Such a crime was considered prostitution between: 1) siblings (both full and half; 2) stepson/stepdaughter and stepmother/stepfather; 3) son-in-law/daughter-in-law and mother-in-law/father-in-law; and 4) relatives by affinity in the degree of siblings. This type of prostitution was not a crime, but an offence punishable by strict detention from one to three months. In addition, the task of the competent authority was also to ensure that the separation of the perpetrators guilty of incest continued after the sentence had been served and that such separation constituted an obstacle for them to continue to maintain sexual relations with each other prohibited by law.[35]

In more recent times, the first Polish Penal Code after regaining independence, that of 1932, also regulated the crime of incest.[36] This code is generally a very interesting legal act, because on the one hand it combines modern (for those times) solutions, and at the same time, which is rarely emphasised in Polish scholarship, it

[34] *Kodeks karny Rzeszy Niemieckiej z dnia 15 maja 1871 r. z późniejszymi zmianami i uzupełnieniami po rok 1918 wraz z ustawą wprowadczą do Kodeksu karnego dla Związku Północno-Niemieckiego (Rzeczy Niemieckiej) z dnia 31 maja 1870 r. Przekład urzędowy Departamentu Sprawiedliwości Ministerstwa b. Dzielnicy Pruskiej*, Poznań 1920, https://iura.uj.edu.pl/Content/131/PDF/Kodeks%20karny%20Rzeszy%20NIemieckiej%2015%2005%201871z%20poz%20zm%20do%201918.pdf [accessed: 2025.08.1].

[35] E. Krzymuski, *Wykład prawa karnego ze stanowiska nauki i prawa austryackiego. Tom 2*, Kraków 1902, pp. 508–509, https://bibliotekacyfrowa.pl/dlibra/publication/27744/edition/34529/wyklad-prawa-karnego-ze-stanowiska-nauki-i-prawa-austryackiego-t-2-krzymuski-edmund-1851-1928 [accessed: 2025.08.1].

[36] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. – Kodeks karny (Dz. U. z 1932 r. Nr 60, poz. 571; Decree of the President of the Republic of Poland of 11 July 1932 – Penal Code, Journal of Laws 1932, No. 60, item 571).

is also in a sense a descendant of the three codes in force in the Polish lands during the partitions, that is, the Russian, German, and Austrian codes, from which various solutions were drawn when creating it. According to Article 206, anyone who has sexual intercourse with a relative in the direct line, a brother or sister, is subject to a prison sentence of six months to five years. The subject of the crime, as defined in the doctrine of the time, was the "proper development" of the human species. This is indicated by Juliusz Makarewicz, one of the creators of the Code, who wrote: "the basic idea of this provision is not so much the protection of the so-called sexual morality, but the protection of the species against endogamy leading to racial degeneration. The requirement of obligatory exogamy is not difficult to implement, since incest is limited to the ascending and descending lines (father with daughter, mother with son), or to sexual intercourse between brother and sister. Since it concerns racial purity, the issue of legitimate or illegitimate descent does not play any role." Makarewicz further writes that "the starting point for the criminality of incest is the protection of the species from degeneration."[37] Wacław Wincenty Makowski also writes in the same spirit. For him "the subject of legal protection in this case is the eugenic consideration, therefore the issue of kinship is not taken into account. Kinship is a relationship resulting from the fact of birth, therefore the provisions regarding incest cannot cover sexual relations between persons related on the basis of civil law (adoption)."[38] The focus here is on copulation with relatives in the direct line or with a brother or a sister; this is characteristic because this provision, unlike the one contained in the same Code, for example, under Articles 203 or 204, clearly places emphasis on copulation and not on an indecent act. At that time, vaginal intercourse is considered sexual intercourse, which correlates with the subject of the crime, because only as a result of such intercourse could fertilization occur. Makarewicz notes that "copulation is completed at the moment of joining the reproductive parts of persons of different sexes."[39] Makowski emphasises that incest is "a natural sexual intercourse, therefore any other lewd act will not be incestuous."[40] For the existence of the crime, it is irrelevant whether the copulation had ended. This is a result of the fact that incest is classified as a crime "causing danger."[41] Criminalized incest concerned ascendants, descendants, and siblings; it belonged to the group of so-called formal crimes.

During the communist dictatorship in Poland, in the new Penal Code of 1969[42] incest is described in Article 175, according to which anyone who engaged in sexual intercourse with a relative in the direct line, a brother or sister, or with a person in an adopted relationship, was subject to the penalty of imprisonment from six months to five years. In the case of this act, the protected good was primarily considered to be

---

37 J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1932, p. 303.

38 W. Makowski, *Kodeks karny. Komentarz*, Warszawa 1937, p. 598.

39 J. Makarewicz, *Kodeks karny*…, p. 303.

40 W. Makowski, *Kodeks karny*…, p. 598.

41 This is the same in Articles 215–222 of the Penal Code 1932.

42 Ustawa z dnia 19 kwietnia 1969 r. – Kodeks karny (Dz. U. z 1969 r. Nr 13, poz. 94; Act of 19 April 1969 – Penal Code, Journal of Laws 1969, No. 13, item 94).

decency in the sphere of sexual relations.[43] This time, in contrast to the Code of 1932, the *ratio legis* is based on the qualification of incest as a highly immoral act, clearly contrary to applicable social norms in this matter, and not on the eugenic argument referring to the possible harmfulness to the potential offspring of the perpetrators of incestuous relations.[44] The fact that the 1969 Penal Code also prohibits sexual intercourse between an adoptive parent and an adopted child (persons who are not biologically related) was indicative of a change in the justification for the criminalisation of incest compared to the period when the 1932 Code was in force. An additional premise for the allegedly new rationalisation of the law is the introduction of a new term instead of the term "copulates" from Article 206 of the Penal Code of 1932. The Penal Code of 1969 mentions "sexual intercourse" in Article 175. This constitutes a broader term, going beyond just vaginal intercourse. However, it should be noted here that, contrary to official claims regarding the abandonment of eugenic rationalization for penalizing incest, in reality many scholars of doctrine still refer to this argument when describing incest. For example, they explicitly state "the premise for penalization is not only eugenic, but also moral considerations."[45] In addition to decency, the subject of this crime is considered to be the proper functioning of the family and the development of minors; Filar points out that "Undoubtedly, an additional subject of protection here is also the social interest in the proper functioning and implementation of family tasks and the proper social and moral development of young people."[46]

Under the current Polish Penal Code of 1997, incest is regulated in Article 201, according to which: "Anyone who engages in sexual intercourse with an ascendant, descendant, adoptive person, adoptive parent, brother or sister shall be subject to the penalty of deprivation of liberty for a term of between three months and five years."[47] It is interesting to note that this provision has not undergone a single amendment since the adoption of the criminal law twenty-seven years ago. In terms of content, this provision does not differ substantially from the regulations previously adopted in the Codes of 1932 and 1969. Incest is, therefore, still seen as a so-called victimless crime, because there is no necessary and direct victim of an act of incest. In fact, Article 201 criminalizes consensual sexual intercourse between people. The provision uses the phrase "sexual intercourse" and not "sexual activity." This is very important because it means that Article 201 only penalizes vaginal, anal, and oral intercourse, as well as substitutes for these relationships, between the persons indicated in the content of the provision. Therefore, "other sexual activities" are not subject to criminalization, which

[43] M. Siewierski, *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1977, p. 444.

[44] I. Andrejew, *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] *idem*, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warszawa 1973, p. 515; *Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny (uzasadnienie)*, Warszawa 1968, p. 141.

[45] M. Siewierski, *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny...*, p. 444; K. Buchała, *Prawo karne materialne*, Warszawa 1980, p. 703.

[46] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*…, p. 84.

[47] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (tekst jedn.: Dz. U. z 2025 r., poz. 383 ze zm.; Act of 6 June 1997 – Penal Code, consolidated text: Journal of Laws 2025, item 383, as amended).

means that they are legal under Polish criminal law. This is precisely where a serious objection to this provision comes from. What does the provision of Article 201 of the Penal Code actually protect?

Almost a hundred years ago, it was pointed out that "Eugenic, ethical and social considerations speak in favor of punishing incest, but in addition to physical repulsion (*horror sanguinis*), eugenic moments seem to be fundamental. Statistics show that almost 80% of children born from such marriages are physically and morally crippled. In addition, the fact that from the point of view of the purity of family life, such a factual situation cannot go unpunished if society wants to protect itself from its disastrous effects speaks in favour of punishing incest."[48] According to another group of authors who conducted a broad review of published research results, the risk of negative health consequences for offspring from incestuous relationships is probably 7% to 31% higher than such a risk in the general population.[49] But nowadays, eugenic arguments are rejected, and rightly so. Or perhaps they are not rejected at all? After all, while work was still underway on the new Code, published works directly pointed to eugenic rationalization alongside that of the protection of sexual morality[50] and emphasised the alleged danger of producing "physically and mentally inferior offspring."[51] Let us acknowledge, however, that these are the private views of specific authors (although publicly expressed) and let us assume that the eugenic rationalization of Article 201 of the Penal Code does not exist. Besides, if we were to accept eugenic rationalization, then why criminalize sexual intercourse (and probably only vaginal intercourse) between people of the same sex? What would be the point? None. Similarly, there would be no sense in criminalizing incest between an adoptee and an adoptive parent, that is, people who are not biologically related to each other, and whose potential offspring, therefore, would not be at risk of alleged potential genetic defects.

So what speaks in favour of this provision, and what does it protect? All that remains is decency, the proper functioning of the family, and the development of the minor, when incest involves a minor. It is, therefore, necessary to consider the decency indicated in the area of sexual relations in the social sense and in the sphere of family relations. It is commonly accepted that incest is an act that violates morality. And in fact, it is. Moreover, incest significantly violates the norms in force in the area of sexual life relating to members of one family. This is precisely what results in the possibility of

---

[48] J. Macko, *Prostytucja. Nierząd – handel żywym towarem – pornografia ze stanowiska historji, etyki, higjeny i prawa*, Warszawa 1927, p. 160.

[49] L. Bennett, A.G. Motulsky, A. Bittles, L. Hudgins, S. Uhrich, D.L. Doyle, K. Silvey, C.R. Scott, E. Cheng, B. McGillivray, R.D. Steiner, D. Olson, *Genetic counseling and screening of consanguineous couples and their offspring: Recommendations of the National Society of Genetic Counselors*, "Journal of Genetic Counseling" 2002, vol. 11, no. 2, pp. 97–119; see also: M. Ciesielka, *Kazirodztwo w ujęciu genetycznym* [in:] *Kazirodztwo*, ed. M. Mozgawa, Warszawa 2016, pp. 271–280; A. Michalska-Warias, *Kazirodztwo a pokrewieństwo prawne i biologiczne* [in:] *Kazirodztwo*…, pp. 92–109.

[50] J. Baranowski, *Ratio legis prawnokarnego zakazu kazirodztwa*, "Przegląd Prawa Karnego" 1990, no. 3, p. 62.

[51] J. Leszczyński, *Przestępstwa tzw. seksualne w projekcie polskiego kodeksu karnego (wersja z grudnia 1991 r.)*, "Palestra" 1992, vol. 39, no. 9–10, p. 34.

qualifying the family[52] and its proper functioning as the subject of the crime of incest under Article 201. The provision penalizing incest, therefore, protects decency, and protects the proper functioning of the family. It also protects the proper psychophysical development of a minor. It is true that after the age of fifteen, a sane person can make any legally relevant decision regarding his or her own sexuality, and, thus, exercise the sexual freedom to which he or she is entitled. But this freedom is not unlimited, and in this case the law narrows the group of people with whom sexual intercourse can be engaged in in order to protect a minor from a negative transformation of his or her family relations, because the prevailing moral rules in this matter boil down to the fact that sexual intercourse is excluded within the family apart from between husband and wife. The penal provision of Article 201, therefore, criminalizes sexual intercourse between mother and daughter, as well as between brother and sister. This does not seem to arouse any social resistance; it is most likely accepted by the majority of society as a rightful reaction to breaking a taboo concerning sex between some family members.

But is it really? One should look closely at the statutory features of Article 201 of the Penal Code: the provision penalizes sexual intercourse, but why not other sexual acts, why not all sexual acts? After all, such a construction of the provision, and this construction is basically repeated from the Criminal Act of 1969, means that while the law responds to oral intercourse between a seventeen-year-old daughter and her forty-six-year-old father, it cannot respond when the daughter masturbates her father with her hand. Why is this so? It is because masturbating another person does not constitute sexual intercourse, because it is neither vaginal, anal, nor oral intercourse, nor does it belong to the category of substitutes for these types of intercourse. It is included in the concept of "other sexual activity." This means that either the legislator has missed something and forgot (and this has been the case since 1969) also to criminalise other sexual activities, or it must mean that in Polish society such behaviour as masturbating a parent (or grandfather, grandmother, etc.) does not constitute an act violating decency, nor does it affect the proper functioning of the family, and the proper psychophysical development of a minor. However, such behaviour certainly violates the morals prevailing in Poland and undermines the proper functioning of the family and the proper development of the child.

Thus, one asks why this type of behaviour was not covered by criminal prohibition. Further, if it is a matter of a mistake on the part of the legislator, then it is a mistake that has lasted for over half a century, if one considers both recent codes. Is it possible that the legislator has not been able to correct this type of legal defect for over fifty years? It seems doubtful, although not impossible. The current state of affairs means that the law does not fully protect either morality, the proper functioning of the family, or the proper psycho-physical development of a minor. An urgent change is necessary here,

[52] R. Krajewski, *Uzasadnienia kryminalizacji kazirodztwa*, "Prokuratura i Prawo" 2016, no. 6, pp. 5–28; M. Tomkiewicz, *Kazirodztwo a prawnokarna ochrona rodziny w Polsce*, "Profilaktyka Społeczna i Resocjalizacja" 2013, no. 21, p. 25.

one that I discuss at the end of this text. At this point, however, it is worth recalling Warylewski's words. He considers that "The prohibition of Article 201 of the Penal Code covers, in addition to heterosexual intercourse, also sexual intercourse between persons of the same sex. The concept of 'sexual intercourse' […] is broader in scope than the term 'copulation' and, unlike the latter – limited exclusively to normal heterosexual intercourse – it applies to both homosexual contacts between men and lesbian incest between women. However, it does not cover other sexual activities referred to in Article 197 § 2, Articles 198, 199 and 200 § 1 of the Penal Code. This fact confirms the thesis that Article 201 of the Penal Code does not really protect anyone or anything – it is only a mock-up […]. It does not protect minors from sexual abuse, unless it goes beyond the broad formula of 'other sexual activities'. It does not protect the health of offspring […]. It also does not protect the proper, whatever that means, functioning of the family, because it does not prohibit the stimulation and satisfaction of sexual drive in family arrangements, as long as the partners refrain from intercourse. As a result, contemporary Polish doctrine tries with some difficulty to indicate the proper subject of protection for this provision. It cannot be ruled out that the legislator also had some problems with this. The justification for the draft of the new Penal Code completely omits the issue of *ratio legis* of the prohibition of incest. Thus, it can probably be assumed – after all, there must be some justification for every criminalisation – that the legislator was guided by the same premises that accompanied the adoption of the Penal Code on 19 April 1969."[53]

Among Polish scholars of criminal law Violetta Konarska-Wrzosek considers that the provision protects morality in the sphere of sexual life applicable in our society and the proper functioning of the family. Every incestuous act violates the applicable moral norms and not all sexual activities undertaken in incestuous arrangements are equally immoral and dangerous to family relations or to the further functioning of the family in a way that allows a realization of its basic functions.[54] Mirosław Surkont believes that in the case of incest, the subject of the crime is morality, and that the concern for the health of any offspring, if it was taken into account by the authors of the Code, was only a secondary element[55]; this is also how Patrycja Kozłowska-Kalisz interprets this issue.[56] Joanna Piórkowska-Flieger writes that the subject of protection is socially established sexual morality, according to which sexual intercourse between persons who are closely related or who are connected by a legal relationship modelled

[53] J. Warylewski, *Rozdział IV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Przestępstwa przeciwko dobrom indywidualnym*, ed. J. Warylewski, series: System Prawa Karnego, vol. 10, Warszawa 2016, pp. 855–856; *idem*, *Glosa do uchwały Sądu Najwyższego z dnia 19 maja 1999 r., I KZP 17/99*, "Orzecznictwo Sądów Polskich" 1999, no. 12, p. 633; *idem*, *Karalność praktyk sadomasochistycznych a prawo do prywatności*, "Gdańskie Studia Prawnicze" 1999, vol. 4, p. 68.

[54] V. Konarska-Wrzosek, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, 6th ed., Warszawa 2023, LEX, commentary on Article 201 of the Polish Penal Code, point 1.

[55] M. Surkont, *Prawo karne. Podręcznik dla studentów administracji*, Sopot 1998, p. 173.

[56] P. Kozłowska-Kalisz, *Racjonalizacja penalizacji kazirodztwa* [in:] *Kazirodztwo…*

on a relationship of kinship (adoption) is immoral and therefore inadmissible.[57] For Gardocki, the reason for criminalizing incest is not clear. He writes that "It is known that in almost all known cultures incest was considered a terrifying act, as breaking a certain taboo. […] attempts were made to justify the criminality of incest by the harmfulness of incestuous relations to the health of potential offspring. […] the reasons for punishing incest are of an emotional nature, and the reason for this emotion is not yet entirely clear."[58] In Filar's opinion, the subject of protection with regard to incest is sexual custom understood in a moralistic manner,[59] and not sexual freedom and the health of potential offspring resulting from incestuous sexual intercourse.[60] Paweł Daniluk writes that the criminalisation of incest is strongly connected with the protection of moral norms.[61] The problem of defining the protected interest in the case of the crime of incest has existed since the development of contemporary Polish criminal law. The justification for the criminalization of incest has undergone changes over the years, which is reflected in the statutory definition of its characteristics.[62]

How then can one answer the question posed in the title of this article: is the notion of incest a relic of the past or is it a necessity of the present? Should it be removed from the catalogue of prohibited acts, or is its existence there necessary to protect the legal interests indicated above? In my opinion, the answer goes beyond binary thinking, because such thinking leads to oversimplification, going to extremes, and thus missing what lies in the middle. Therefore, the response should not be limited solely to a vote in favour of completely removing the provision on incest from the Penal Code, as Warylewski and Katarzyna Banasik[63] propose, but it also cannot mean recognising that the current wording of the provision is optimal (because it definitely is not) and not subjecting it to any change.

I am of the opinion that criminal law, like almost everything in the world around us, is subject to change, and it is good when these changes constitute an evolution

---

57 J. Piórkowska-Flieger, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. T. Bojarski, Warszawa 2016, p. 583.

58 L. Gardocki, *Prawo karne*…, pp. 276–277.

59 M. Filar, *Przestępstwa seksualne w nowym kodeksie karnym* [in:] *Nowa kodyfikacja karna. Krótkie komentarze*. *Zeszyt 2*, ed. L. Bogunia, Warszawa 1997, p. 45.

60 M. Filar, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2012, p. 1014.

61 P. Daniluk, C. Nowak, *Kazirodztwo jako problem karnoprawny (dwugłos)*, "Archiwum Kryminologii" 2007–2008, vol. 29–30, p. 475; see also: L. Falandysz, *O koncepcji tzw. "przestępstw bez ofiar"*, "Państwo i Prawo" 1978, issue 8–9, p. 107.

62 K. Nazaruk, *Kazirodztwo. Aspekty prawnokarne i kryminologiczne*, "Ius Novum" 2022, vol. 16, no. 2, p. 22; M. Płatek, *Kodeksowe ujęcie kazirodztwa – pozorny zakaz i pozorna ochrona* [in:] *Kazirodztwo*…, pp. 133–136; K. Banasik, *Karalność kazirodztwa jako naruszenie wolności seksualnej* [in:] *Konteksty prawa i praw człowieka*, ed. Z. Dymińska, Kraków 2012, p. 37 ff.; V. Konarska-Wrzosek, *Przedmiot ochrony przy typie przestępstwa kazirodztwa* [in:] *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, ed. Ł. Pohl, Poznań 2009, pp. 290–292.

63 See: J. Warylewski, *Rozdział IV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Przestępstwa przeciwko dobrom indywidualnym*…, p. 859; K. Banasik, *W kwestii penalizacji kazirodztwa*, "Prokuratura i Prawo" 2011, no. 4, pp. 65–72.

and not a degradation. Over the last hundred years, criminal law in the field of sexual offences has undergone a major evolution, including in the field of sexual offences, where the main generic subject of acts so defined has become sexual freedom, which in most cases has replaced decency in relation to these crimes. However, there are still a few acts where morality is the main legal good threatened by the perpetrator, and the crime of incest is certainly one of them. I believe that, although incest is a socially harmful act that affects morality and the family, when it concerns only adults, it should no longer be criminalized. Why? I argue this because it is not the role of the state to guard morality, either religious morality, or ideological morality, or morality of habits, and even less so to guard morality in matters related to sex. An ancient Roman legal maxim is: *volenti non fit iniuria* (to a willing person, injury is not done). If sane adults, that is, those over eighteen years of age, make a joint decision regarding their sexual life, despite their kinship, then although it may violate social mores, and however indecent or even repulsive it may seem, that decision should not be subject to penalisation. An adult has every right, arising from his or her sexual freedom, to make whatever decisions he or she wants in this regard, even if they seem wrong to others. It is high time for the state to withdraw in this area, to apply in practice the principle of criminal law as the *ultima ratio* and to stop punishing sexual intercourse (since this is the only thing that is currently of interest to the law) in cases of this type of incest.

However, I am not in favour of complete decriminalisation of incestuous relationships. I also believe it is high time to move toward decriminalising incest under Article 201 of the Penal Code, though not completely. I believe that although incest is a socially harmful act that harms both morality and the family, as well as the proper psychophysical development of a minor (if he or she is a participant in the act), if it only affects adults, it should no longer be a subject of criminal law. Certainly, such behaviour is not consistent with the moral norms prevailing in Poland, and in most cases, incestuous behavior violates the foundations of a properly functioning family, but with the evolution of criminal law and its ultimate reduction to *ultima ratio*, that is, the last resort used by the state to solve specific social problems, I am of the opinion that it is time following the example of a large number of countries to move away from penalizing this type of behaviour between adults. For example, in 2025, incest between adults was legal in Argentina, Belgium, Brazil, France, Spain, Japan, South Korea, Latvia, the Netherlands, Portugal, Russia, and Turkey, among others. However, I agree with Konarska-Wrzosek regarding the issue of so-called potential incestuous offspring. People should be able to do whatever they want, as long as they do not violate the rights and freedoms of others. If, as a result of their behaviour, they bring a new human being into being, their actions go beyond this libertarian approach, because they actually influence the entire life of that child, and in an incestuous relationship it is difficult to consider this influence positive or even neutral.

In the case of offspring from an incestuous relationship, the child born as a result of this act may essentially be deprived of the chance to lead what can be called a normal life and, through no fault of his or her own, may suffer the consequences of the pathological sexual relationship through which he or she came into this world.

These are arguments that should be reflected in criminal laws, which could have a preventive effect on individuals engaging in incestuous intercourse and prevent the creation of offspring from such sexual relationships. Therefore, Article 201 of the Penal Code should be amended to include a § 2, the content of which would essentially be identical to that currently contained in § 1, with the difference that it would include the phrase "if pregnancy results from the act." Thus, incest in this case would practically boil down to sexual intercourse between close relatives of the opposite (biological) sex and in the form of vaginal intercourse, as this can lead to conception. Based on the modified proposal put forward by Konarska-Wrzosek (cited earlier), this crime would include pregnancy as a consequence of the perpetrators' conduct. This would be a consequential crime. However, the result of incestuous sexual intercourse could be both intentional and unintentional, as it is not the intention that is important here, but the effect, which is pregnancy. Issues related to whether the incestuous conception of a child was intentional or not would be taken into account when determining the penalty. The *sine qua non* premise for criminalizing such incest would be a participant's pregnancy, not the child's birth, which would prevent a possible illegal termination of pregnancy or the birth of a live child. Contrary to Konarska-Wrzosek's proposal, this would not constitute a qualified form of incest punishable by a harsher penalty than the act currently described in Article 201.

I am in favour of modifying the regulations in this direction, so as to criminalize incest when at least one of the participants in such sexual activity is a minor, that is, a person under eighteen years of age. I believe that this would be sufficient to guarantee proper criminal protection of a minor against indecent sexual acts within family relations, which should protect both the proper functioning of the family and the proper development of the minor in question.

As part of my *de lege ferenda* recommendation, I propose amending the provision of Article 201 and giving it the following wording:

> Article 201. § 1. Whoever engages in sexual intercourse with a descendant, adoptee, brother, or sister, if such person is a minor, shall be subject to the penalty of imprisonment for a term of between three months and five years.
> § 2. Whoever engages in sexual intercourse with a descendant, adoptee, adoptive parent, brother, or sister shall be subject to the penalty specified in § 1 if the act results in pregnancy.

The proposed provision, designated § 1, narrows the scope of entities participating in criminalised incest. The ascendant and adoptive parent are omitted, as it is impossible for an ascendant to be a minor at the same time, just as it is impossible under Polish law for an adoptive parent to be a minor. In the case of the proposed amendment, incest constitutes a crime when even one of the participants is a minor. The generic subject of the offence under Article 201 § 1 remains decency, while the individual subject is the proper psychophysical development of the minor and the proper functioning of the family. Should incest, as penalized in Article 201 of the Penal Code, cover, as it currently does, only sexual intercourse, that is, vaginal, anal, and oral intercourse and their substitutes, or should it also encompass other sexual acts? Given that other

sexual acts constitute less of an intrusion into a person's intimate sphere, and above all, that incest occurs with the consent of the participants, I do not believe it would be appropriate to expand the sphere of sexual life to include a prohibition on engaging in other sexual acts between designated individuals in the case of incest. Of course, from a moral perspective, the behaviour will still seem extremely inappropriate, yet it should not be subject to criminal liability.

Finally, it is worth emphasising that human freedoms and rights, including sexual freedom, are universal in nature, and the task of the state applying criminal law is to protect these freedoms and rights. In the case of sexual crimes, such a good is primarily sexual freedom, while decency has nowadays, as a result of the evolution of both society and law, faded into the background. The state should not be allowed to excessively restrict sexual freedom, except in necessary cases, in order to guarantee general and abstract moral norms relating to human sexuality. I believe that incestuous relationships between sane adult people do not fall into this category.

Literature

Andrejew I., *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] *idem*, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warszawa 1973.

Banasik K., *Karalność kazirodztwa jako naruszenie wolności seksualnej* [in:] *Konteksty prawa i praw człowieka*, ed. Z. Dymińska, Kraków 2012, pp. 37–46.

Banasik K., *W kwestii penalizacji kazirodztwa*, "Prokuratura i Prawo" 2011, no. 4, pp. 65–72.

Baranowski J., *Ratio legis prawnokarnego zakazu kazirodztwa*, "Przegląd Prawa Karnego" 1990, no. 3, pp. 62–66.

Bennett L., Motulsky A.G., Bittles A., Hudgins L., Uhrich S., Doyle D.L., Silvey K., Scott C.R., Cheng E., McGillivray B., Steiner R.D., Olson D., *Genetic counseling and screening of consanguineous couples and their offspring: recommendations of the National Society of Genetic Counselors*, "Journal of Genetic Counseling" 2002, vol. 11, no. 2, pp. 97–119.

Bojarski W., *Kara śmierci w prawach państw antycznych* [in:] *Kara śmierci w starożytnym Rzymie*, eds. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 9–22.

Buchała K., *Prawo karne materialne*, Warszawa 1980.

Budziński S., *O przestępstwach w szczególności. Wykład porównawczy*, Warszawa 1883, https://books.google.pl/books?id=ThKup-xzcQ8C&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false [accessed: 2025.08.1].

Ciesielka M., *Kazirodztwo w ujęciu genetycznym* [in:] *Kazirodztwo*, ed. M. Mozgawa, Warszawa 2016, pp. 271–280.

Daniluk P., Nowak C., *Kazirodztwo jako problem karnoprawny (dwugłos)*, "Archiwum Kryminologii" 2007–2008, vol. 29–30, pp. 475–487.

Falandysz L., *O koncepcji tzw. "przestępstw bez ofiar"*, "Państwo i Prawo" 1978, issue 8–9, pp. 105–113.

Filar M., *Przestępstwa seksualne w nowym kodeksie karnym* [in:] *Nowa kodyfikacja karna. Krótkie komentarze. Zeszyt 2*, ed. L. Bogunia, Warszawa 1997, pp. 7–64.

Filar M., *Przestępstwa seksualne w polskim prawie karnym*, Toruń 1985.

Filar M., *Przestępstwa w dziedzinie stosunków seksualnych* [in:] *System prawa karnego. O przestępstwach w szczególności. Tom IV. Część 2*, eds. I. Andrejew, L. Kubicki, J. Waszczyński, Wrocław–Warszawa–Kraków 1989, pp. 149–218.

Filar M., *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2012.

Gardocki L., *Prawo karne*, Warszawa 2015.

Grabowski I., *Prawo kanoniczne według nowego kodeksu*, Lwów 1927.

Kaczmarczyk K., Leśnodorski B., *Historia państwa i prawa Polski*, Warszawa 1966.

Konarska-Wrzosek V., *Przedmiot ochrony przy typie przestępstwa kazirodztwa* [in:] *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, ed. Ł. Pohl, Poznań 2009, pp. 287–296.

Konarska-Wrzosek V., *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, 6th ed., Warszawa 2023, LEX, pp. 1048–1106.

Koranyi K., *Powszechna historia państwa i prawa*, vol. 2–3, Warszawa 1966.

Kozłowska-Kalisz P., *Racjonalizacja penalizacji kazirodztwa* [in:] *Kazirodztwo*, ed. M. Mozgawa, Warszawa 2016, pp. 47–61.

Krajewski R., *Uzasadnienia kryminalizacji kazirodztwa*, "Prokuratura i Prawo" 2016, no. 6, pp. 5–28.

Krzymuski E., *Wykład prawa karnego ze stanowiska nauki i prawa austryackiego. Tom 2*, Kraków 1902, https://bibliotekacyfrowa.pl/dlibra/publication/27744/edition/34529/wyklad-prawa-karnego-ze-stanowiska-nauki-i-prawa-austryackiego-t-2-krzymuski-edmund-1851-1928 [accessed: 2025.08.1].

Leszczyński J., *Przestępstwa tzw. seksualne w projekcie polskiego kodeksu karnego (wersja z grudnia 1991 r.)*, "Palestra" 1992, vol. 39, no. 9–10, pp. 30–39.

Macko J., *Prostytucja. Nierząd – handel żywym towarem – pornografia ze stanowiska historji, etyki, higjeny i prawa*, Warszawa 1927.

Makarewicz J., *Kodeks karny z komentarzem*, Lwów 1932.

Makowski W. (ed.), *Encyklopedia podręczna prawa karnego*, Warszawa, https://polona.pl/item-view/53c4ba94-e9da-47fc-9233-70c08c18c276?page=0 [accessed: 2025.08.1].

Makowski W., *Kodeks karny. Komentarz*, Warszawa 1937.

Makowski W., *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego i rosyjskiego obowiązującego w Polsce*, Warszawa 1924.

Marcinkowski T., *Medycyna sądowa dla prawników*, Szczytno 2010.

Marek A., *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1997.

Michalska-Warias A., *Kazirodztwo a pokrewieństwo prawne i biologiczne* [in:] *Kazirodztwo*, ed. M. Mozgawa, Warszawa 2016, pp. 92–109.

Młynarczyk Z., *Sprawy o przestępstwa seksualne w aktualnej praktyce wymiaru sprawiedliwości*, "Nowe Prawo" 1969, no. 5, p. 797.

Nazaruk K., *Kazirodztwo. Aspekty prawnokarne i kryminologiczne*, "Ius Novum" 2022, vol. 16, no. 2, pp. 21–38.

Piórkowska-Flieger J., *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. T. Bojarski, Warszawa 2016, pp. 560–595.

Płatek M., *Kodeksowe ujęcie kazirodztwa – pozorny zakaz i pozorna ochrona* [in:] *Kazirodztwo*, ed. M. Mozgawa, Warszawa 2016, pp. 124–163.

Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny (uzasadnienie), Warszawa 1968.

Rafacz J., *Dawne polskie prawo karne. Część ogólna*, Warszawa 1932, https://kpbc.umk.pl/dlibra/publication/71100/edition/77950/content [accessed: 2025.08.1].
Rajzman H., *Przestępstwa przeciwko wolności i godności człowieka (uwagi de lege ferenda)*, "Nowe Prawo" 1962, no. 3, pp. 326–334.
Siewierski M., *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1977.
Stępień M., *Kodeks Hammurabiego*, 2003, https://web.archive.org/web/20140116200939/http://www.pistis.pl/biblioteka/Hammurabiego%20kodeks.pdf [accessed: 2025.08.1].
Surkont M., *Prawo karne. Podręcznik dla studentów administracji*, Sopot 1998.
Świda W., *Prawo karne*, Warszawa 1986.
Tomkiewicz M., *Kazirodztwo a prawnokarna ochrona rodziny w Polsce*, "Profilaktyka Społeczna i Resocjalizacja" 2013, no. 21, pp. 25–44.
Warylewski J., *Glosa do uchwały Sądu Najwyższego z dnia 19 maja 1999 r., I KZP 17/99*, "Orzecznictwo Sądów Polskich" 1999, no. 12, pp. 633–637.
Warylewski J., *Karalność praktyk sadomasochistycznych a prawo do prywatności*, "Gdańskie Studia Prawnicze" 1999, vol. 4, pp. 53–81.
Warylewski J., *Problematyka przedmiotu ochrony tzw. przestępstw seksualnych*, "Państwo i Prawo" 2001, no. 9, pp. 75–79.
Warylewski J., *Przestępstwa seksualne*, Gdańsk 2001.
Warylewski J., *Rozdział IV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Przestępstwa przeciwko dobrom indywidualnym*, ed. J. Warylewski, series: System Prawa Karnego, vol. 10, Warszawa 2016.
Warylewski J., *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *idem*, *Kodeks karny. Komentarz*, Warszawa 2001.
Wądołowska A., *Wolność seksualna jako przedmiot ochrony prawnokarnej*, "Prokuratura i Prawo" 2007, no. 4, pp. 133–146.

Summary

Paweł Petasz

Incest as a Sexual Crime in Polish Criminal Law: A Relic of the Past or Still a Necessity in the Present?

The article deals with the crime of incest in Polish criminal law. The author analyzes the justification for the existence of the legal prohibition of incest. He examines this issue based on a historical outline and the views of scholars of the doctrine of criminal law. The author proposes the creation of a draft provision *de lege ferenda*.

Keywords: incest, sexual crime, sexual freedom, decency.

Streszczenie

Paweł Petasz

Kazirodztwo jak przestępstwo seksualne – relikt przeszłości czy wciąż konieczność teraźniejszości?

Artykuł traktuje o przestępstwie kazirodztwa w polskim prawie karnym. W opracowaniu przeanalizowano uzasadnienie istnienia prawnego zakazu kazirodztwa. Autor, badając tę problematykę, odwołuje się do kontekstu historycznego oraz poglądów przedstawicieli doktryny prawa karnego. W końcowej części opracowania sformułowano projekt przepisu w ramach postulatu *de lege ferenda*.

Słowa kluczowe: kazirodztwo, przestępstwo seksualne, wolność seksualna, obyczajność.

Katarzyna Wiśniewska
University of Warsaw, Poland
ka.wisniewska7@uw.edu.pl
ORCID: 0009-0006-4151-5846

https://doi.org/10.26881/gsp.2025.4.13

"Fair" and "Inclusive": The Standard of Criminal Proceedings Involving Suspects and Defendants with Special Needs

Heightened public consciousness of the necessity of implementing measures to enhance the functionality of individuals with special needs within society has led to alterations in criminal proceedings. There is a growing recognition among criminal justice professionals[1] and decision-makers of the necessity of providing assistance or adjustments to participants in the criminal justice process who, because of their characteristics or circumstances, may require such support to fully exercise their procedural rights and participate effectively in the process.[2] Nevertheless, the efficacy of the solutions implemented has not yet been fully achieved for all groups with special needs who play different roles within the criminal justice process. This situation is the result of several factors. It is worth setting out the perspectives that are frequently articulated in ongoing discourses and analyses pertaining to this subject matter. First, the noticeable difficulties in implementing adaptations for participants in the criminal justice process can be attributed to the challenge of "codifying" or "universally defining" the concept of vulnerability.[3] Second, these difficulties are a consequence

[1] For example: K. Girdwoyń, *Right to appropriate representation of defendants with intellectual disabilities in criminal proceedings*, "Ius Novum" 2020, vol. 14, no. 3, pp. 67–86; J. Nowakowska, *Wczesna identyfikacja osób wymagających szczególnego traktowania, będących uczestnikami postępowania karnego* [in:] *Osoby z niepełnosprawnością intelektualną. Z uwzględnieniem wyników badań przeprowadzonych przez pracowników Biura Rzecznika Praw Obywatelskich*, eds. E. Dawidziuk, M. Mazur, Warszawa 2017, p. 160; F. Gerry, P. Cooper, *Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility*, "Journal of Judicial Administration" 2017, vol. 26, no. 4, pp. 265–275.

[2] For example, Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02); Article 13 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to inform a third party of a deprivation of liberty and the right to communicate with third parties and consular authorities during a deprivation of liberty; Article 9 Directive 2016/19 on mutual legal assistance to suspects and accused persons in criminal proceedings and to requested persons in European Arrest Warrant proceedings; Article 3(2) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

[3] The Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable suspects or accused in criminal proceedings (2013/C 378/02) provides a definition that refers to

of the specificity of the solutions, which are intended to respond to the needs of the participants in a criminal trial. Third, problems stem from the insufficient abilities of those involved in criminal proceedings to identify potential vulnerabilities[4] and to implement measures to prevent their occurrence. Fourth, difficulties are also due to challenges in accurately assessing the efficacy of procedural safeguards for vulnerable persons.

This article identifies the standards set out by the Council of Europe for the treatment of suspects and defendants who have been recognized by European and international bodies as having special needs, or who have defined themselves as such. Analysis of individual cases addresses two key questions: first, whether the current jurisprudence of the European Court of Human Rights provides adequate guidance to national authorities (both legislative and judicial) on how to address the rights of persons with special needs; and second, whether such persons require additional attention from those conducting criminal proceedings.

1. The concept of vulnerability

It is crucial to identify the scope of the term vulnerable person within the Council of Europe framework. It is worth noting that the term vulnerable is derived from the Latin word "*vulnus*," meaning "wound."[5] The term vulnerable refers to an individual who is "susceptible to harm, influence or attack, whether physical or mental."[6] The term has analysed in a variety of ways in the relevant literature. Martha Albertson Fineman defines vulnerability as "a universal, inescapable, enduring aspect of the human condition."[7] Although the word vulnerability is not explicitly referenced in the text of the European Convention on Human Rights,[8] its meaning is nevertheless inferred

"all suspects or defendants who, owing to their age, mental or physical condition or disability, are unable to understand and participate effectively in criminal proceedings," but this is not binding and, as argued in the literature, not fully accepted (for example, L. Mergaerts, *European guarantees for vulnerable suspects and defendants: Good intentions but limited impact in national procedures*, 2020).

[4] M. Vaughan, R. Milne, J. Cherryman, G. Dalton, *Managing investigative interviews with vulnerable suspects in the UK: Do specialist interview managers (IM's) understand vulnerability? Psychology*, "Crime & Law" 2024, pp. 1–20.

[5] B.S. Turner, *Vulnerability and Human Rights*, University Park 2006; A. Adamska-Gallant, *Vulnerable Witnesses in Practice of International Courts – Definition and Trauma as the Key Risk Factor*, "Peace Human Rights Governance" 2024, vol. 8, no. 1, pp. 53–74.

[6] See: *vulnerable* [in:] *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/vulnerable [accessed: 2024.09.2].

[7] M.A. Fineman, *The vulnerable subject: Anchoring equality in the human condition*, "Yale Journal of Law & Feminism" 2008, vol. 20, no. 1, p. 8.

[8] The absence of such a formulation is due, on the one hand, to the construction of the ECHR, but also to the fact that the notion of vulnerability is found in more recent instruments of the European order, including the Council of Europe, such as the Council of Europe Convention on preventing and combating violence against women and domestic violence, or Recommendation No. (97) 13 of the Committee of Ministers of the Council of Europe to Member States concerning intimidation of

from the case law of the Strasbourg Court (hereafter referred to as the European Court of Human Rights, ECtHR, or the Court).[9] References to it can be found not only in judgments delivered in the context of criminal proceedings (that is, those on which I focus in this article), but also (or even primarily) connected with other aspects of the activities of public authorities.[10] According to relevant literature, the Court's concept of vulnerability has three characteristics: it is relational, specific, and harm-based.[11]

In the context of criminal proceedings, the Court refers to the concept of vulnerability in relation to the situation of suspects, accused and convicted persons, as well as victims.[12] Drawing on the Court's case law to date, it can be said that vulnerability in the course of criminal proceedings or at a particular stage of such proceedings is determined both by factors of a subjective nature, that is, those relating to the characteristics or profile of the person or his or her state of health, and by factors of an objective nature, that is, those relating to the circumstances of the commission of the offence, detention, or interrogation. In its case law, the Court has thus far considered minors[13] or juveniles,[14] individuals diagnosed with a mental illness,[15] persons with disability,[16] persons suffering from addiction[17] or intoxication,[18] and individuals for whom the language of the proceedings is not their native language[19] as "vulnerable suspects" and "vulnerable defendants." The ECtHR has identified detention or imprisonment[20]

witnesses and the rights of the defence (adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Committee of Ministers), and at European Union level in the Directives on procedural rights.

[9] See the judgment of ECtHR in *Chapman v United Kingdom* (GC), 2001, which is considered the starting point for the creation of the concept of vulnerability in ECtHR jurisprudence.

[10] O.M. Arnardóttir, *Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?*, "Oslo Law Review" 2017, vol. 4, issue 3, pp. 150–171; L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law*, "International Journal of Constitutional Law" 2013, vol. 11, no. 4, pp. 1056–1085; M. Domańska, *People with Disabilities as a Vulnerable Group. The Concept of Protection of the Rights of Vulnerable Groups*, "Białostockie Studia Prawnicze" 2018, vol. 23, no. 4, p. 33; I. Truscan, *Considerations of vulnerability: From principles to action in the case law of the European Court of Human Rights*, "Retfærd (Nordic Journal for Law and Justice)" 2013, vol. 36, no. 3/142, pp. 64–83.

[11] L. Peroni, A. Timmer, *Vulnerable Groups*…, p. 1060.

[12] L. Grans, *The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights*, "Women & Criminal Justice" 2023 [published online], pp. 1–16.

[13] ECtHR (Grand Chamber), judgment of 11 July 2002 in *V. v the United Kingdom*, application no. 24888/94; ECtHR, judgment of 27 April 2017 in *Zherdev v Ukraine*, application no. 34015/07; ECtHR (Grand Chamber), judgment of 27 November 2008 in *Salduz v Turkey*, application no. 36391/02.

[14] ECtHR, judgment of 24 January 2019 in *Knox v Italy*, application no. 76577/13.

[15] ECtHR (Grand Chamber), judgment of 27 November 2008 in *Salduz v Turkey*, application no. 36391/02.

[16] ECtHR judgment of 12 June 2025 in *Krpelik v the Czech Republic*, application no. 23963/21.

[17] ECtHR, judgment of 8 February 2024 in *Bogdan v Ukraine*, application no. 3016/16; ECtHR, judgment of 31 March 2009 in *Płonka v Poland*, application no. 20310/02.

[18] ECtHR, judgment of 11 May 2023 in *Lalik v Poland*, application no. 47834/19.

[19] ECtHR, judgment of 24 January 2019 in *Knox v Italy*, application no. 76577/13.

[20] ECtHR (Grand Chamber), R, judgment of 27 June 2000 in *Salman v Turkey*, application no. 21986/93; ECtHR, judgment of 13 September 2011 in *Mehmet Şerif Öner v Turkey*, application no. 50356/08.

and participation in proceedings in a country other than the country of residence of the accused[21] as examples of a "vulnerable situation." It is also important to note that the Court recognises that being a suspect in criminal proceedings and being a detained person is a challenging situation, both in terms of the stress involved and the complexity of the rules of criminal procedure. As a result, a suspect may to some extent be considered a "vulnerable person" or a person in a "vulnerable situation"[22] simply by being in these circumstances. Procedural guarantees serve to mitigate the additional distress that may be experienced in such circumstances.

The lack of clarity of the concept of vulnerability at the level of national or European legislation gives rise to difficulties and doubts in practice. At the same time, the use of this concept by the Court in assessing the implementation of fundamental rights and freedoms and in determining the actual situation of a person has a certain value and, from a practical point of view, an advantage.[23] It makes it possible to include within the scope of this category all those who require special protection, without being limited to a closed or precisely defined catalogue of characteristics or circumstances. At first sight, therefore, the advantages of this concept are noticeable, particularly in a situation as complex and individual as a criminal trial.[24] However, further reflection is required to ascertain whether this approach also has disadvantages and whether it leads to negative consequences or is a source of unintended injustice.

2. Overall fairness of the trial

The starting point for interpreting the Council of Europe standard for the treatment of defendants and suspects with special needs in criminal proceedings is an analysis of Article 6 of the European Convention on Human Rights (hereafter, ECHR or the Convention).[25] Article 6 of the Convention provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to decide on his civil rights and obligations or the merits of any criminal charge against him."[26] The specific nature of criminal proceedings is underlined by the inclusion in paragraph 3 of Article 6 of specific procedural guarantees, including that the accused (a) be informed promptly, in an intelligible language, of the nature and cause of the accusation; (b) have adequate time and facilities for the preparation

[21] ECtHR, judgment of 24 January 2019 in *Knox v Italy*, application no. 76577/13.

[22] E.g. ECtHR (Grand Chamber), judgment of 27 November 2008 in *Salduz v Turkey*, application no. 36391/02, para. 54; ECtHR, judgment of 28 October 2010 in *Leonid Lazarenko v Ukraine*, application no. 22313/04, para. 50.

[23] O.M. Arnardóttir, *Vulnerability under Article 14*…

[24] Por. L. Peroni, A. Timmer, *Vulnerable Groups*…

[25] Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950.

[26] Article 6, Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950.

of a defence; (c) defend himself in person or through legal assistance and, if lacking sufficient means to pay for legal assistance, be assisted free of charge by legal counsel appointed *ex officio* when the interests of justice so require; (d) examine or cause to be examined the witnesses against him/her; (e) examine or have examined witnesses against him/her and require the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; and (f) have the free assistance of an interpreter if he/she does not understand or speak the language used in court.

The definition of procedural fairness in the Convention is clarified through interpretation by the European Court of Human Rights as a result of individual cases brought by applicants in different factual and legal situations. The variety of cases brought before the Court makes it possible to clarify the standards of the ECHR based on current problems faced by participants in criminal proceedings and, on the other hand, to take into account in the Court's positions the current realities of the functioning of the criminal justice system. To answer the question posed in the introduction of the text, that is, how the standard of conduct is defined at the European level in the situation of the participation of persons with special needs, it is necessary to answer the question of whether "sensitivity to these needs" is inscribed both in the general concept of "fairness/justice of criminal proceedings" formulated in paragraph 1 and whether it constitutes an ancillary element to each of the specific procedural guarantees set forth in paragraph 3 of Article 6. To do so, it is necessary to determine the relationship between the general concept of "fairness of proceedings" set out in Article 6(1) and the individual guarantees listed in Article 6(3).

In recent years, this discussion has been actively pursued at both the academic and the jurisprudential levels. The debate also encompasses cases involving defendants and suspects with special needs. This article addresses the question of access to a lawyer at the first stage of proceedings for persons who can be considered vulnerable. The choice of this topic is not arbitrary. The right to a defence and the possibility of being assisted by a lawyer are among the cornerstones of criminal proceedings. Furthermore, this is an issue that still arouses much emotion and an area in which the Court's position is still evolving.

The *Salduz v Turkey* case[27] is a significant contribution to this discussion; it has been seen by numerous legal professionals as both a groundbreaking and a crucial development.[28] The Salduz case concerned a juvenile suspected of terrorist acts, thus a person who under European and international standards is considered to require special adjustments due to his age. In his application to the Court, the applicant alleged a violation of Article 6 § 3(c), in conjunction with Article 6 § 1, of the Convention on the ground that he had not had access to legal assistance during his detention, which

[27] ECtHR (Chamber), judgment of 26 April 2007 in *Salduz v Turkey*, application no. 36391/02; ECtHR (Grand Chamber), judgment of 7 November 2008 in *Salduz v Turkey*, application no. 36391/02.

[28] W. Jasiński, *Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego: standard strasburski*, "Europejski Przegląd Sądowy" 2019, no. 1, pp. 24–30.

had led to his confession to the alleged acts. His interrogation was conducted without the presence of a lawyer, as he was subject to the procedural measures applicable to individuals suspected of involvement in terrorist acts. During a subsequent interrogation, conducted by the public prosecutor and the judge, the applicant denied any involvement in the crime and claimed that his earlier confession had been obtained through coercive actions by the police. In its judgment of 26 April 2007, the Chamber of the Court determines that no violation of Article 6 § 3(c) of the Convention had occurred.[29] The Chamber observes that the applicant had been represented by counsel throughout the trial and appeal proceedings and that the applicant's statements to the police did not constitute the sole basis for the conviction. In the Chamber's view, the applicant was afforded the opportunity to challenge the prosecution's allegations in a manner that did not place him at a substantial disadvantage in comparison to the opposing party. Furthermore, the Chamber observes that the national court had considered the circumstances surrounding the applicant's arrest, expert opinion, and the testimony of witnesses in determining the applicant's sentence. In light of these considerations, the Chamber finds that the lack of legal assistance during the period of police custody did not affect the fairness of the applicant's trial as a whole. The Chamber's decision does not make any reference to the applicant's age or the specific procedural situation that this entails. Nevertheless, such a reference can be found in the dissenting opinion of Judges F. Tulkens and A. Mularoni, who do not share the majority view. In the grounds of their opinion, they stress that the applicant was a minor and that he faced a sentence of several years' imprisonment for the alleged offence.[30] They conclude their opinion by stating that: "The purpose of the Convention is to protect rights that are not theoretical or illusory, but practical and effective. This principle also applies to the right to legal aid. As we all know, key moments in criminal proceedings occur at the very beginning, with the first stages of police intervention, which can ultimately and irreversibly determine the outcome of the proceedings."[31]

The Grand Chamber of the Court modified the Chamber's decision and in its judgment of 7 November 2008 finds a violation of Article 6(3)(c) in conjunction with Article 6(1) of the Convention.[32] The Grand Chamber's reasoning is based on several fundamental assumptions concerning, on the one hand, the situation of the accused and, on the other hand, the nature of the right to a fair trial and the importance of access to a lawyer for this right. From the perspective of this article, it is important to note that in this landmark decision, the Court stresses the particular importance of the applicant's age. It is emphasised that this constitutes one of the most significant aspects of the case.[33] The Grand Chamber holds that, in the circumstances, there had been a violation of Article 6(3)(c) of the Convention, read in conjunction with

[29] ECtHR (Chamber), judgment of 26 April 2007 in *Salduz v Turkey*, application no. 36391/02.
[30] Separate opinion to the judgment of the ECtHR (Chamber) of 26 April 2007 in *Salduz v Turkey*, application no. 36391/02, para. 3.
[31] *Ibid.*, para. 6.
[32] ECtHR (Grand Chamber), judgment of 7 November 2008 in *Salduz v Turkey*, application no. 36391/02.
[33] *Ibid.*, para. 60.

Article 6(1). The ECtHR accepts that, although the applicant had had the opportunity to challenge the evidence against him at trial and subsequently on appeal, the fact that he had not had access to a lawyer while in police custody had irreparably prejudiced his rights of defence. Thus, in the present case, it was the failure to implement the procedural guarantee in paragraph 3 that determined the violation of the fairness of the proceedings.

A review of the judgment reveals that the pivotal argument presented by the judges pertains to the profile of the applicant, a minor (sixteen years of age) subjected to a distinct criminal procedure for those accused of terrorist activities, and the absence of guarantees of his fundamental right to legal representation. This aspect of the case was not accorded the same level of significance by the Chamber that had previously adjudicated it. In this context, it is clear that the Grand Chamber evaluates the significance of the absence of legal aid with greater precision, considering its impact on the overall fairness and legitimacy of the procedural steps. This is particularly relevant given that the applicant was placed in a challenging situation, which exposed him to the additional disadvantage of an unfair procedure and outcome. This aspect of the Court's decision is particularly emphasized by the doctrinal commentators.[34] It is highlighted that the extent of the right to legal counsel is contingent upon the specific circumstances of the individual facing criminal charges.[35] As Małgorzata Wąsek-Wiaderek observes in the initial post-Salduz judgments, the importance of ensuring access to legal representation and its implications for the admissibility of evidence obtained in the absence of such representation is underscored by the ECtHR, particularly in cases involving "vulnerable suspects."[36] Wąsek-Wiaderek emphasises that the European Court of Human Rights has acknowledged that individuals in such circumstances are not in a position to evaluate their legal situation and deliberately exercise their right to remain silent, even if they have been adequately informed of this right.[37] Subsequently, these cases contributed to the establishment of standards that were made applicable to all suspects. In the literature, the judgments in *Lazarenko v Ukraine*[38] and *Potcovă v Romania*[39] and,[40] among others, have been cited to demonstrate the expansion of the Salduz doctrine's scope of interpretation. It is worth

---

[34] A. Sakowicz, *Suspect's access to a lawyer at an early stage of criminal proceedings in view the case-law of the European Court of Human Rights*, "Revista Brasileira de Direito Processual Penal" 2021, vol. 7, no. 3, pp. 1979–2014.

[35] A. Sakowicz, *Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy*, "Europejski Przegląd Sądowy" 2019, no. 1, pp. 47–53.

[36] M. Wąsek-Wiaderek, *Model zakazów dowodowych z perspektywy Konwencji i orzecznictwa ETPCz* [in:] *Nowe spojrzenie na model zakazów dowodowych w procesie karnym*, eds. J. Skorupka, A. Drozd, Warszawa 2015, p. 38.

[37] *Ibid.*

[38] ECtHR, judgement of 28 October 2010 in *Leonid Lazarenko v Ukraine*, application no. 22313/04.

[39] ECtHR, judgment of 17 December 2013 in *Potcovă v Romania*, application no. 27945/07, para. 25–32.

[40] M. Wąsek-Wiaderek, *Model zakazów dowodowych*…, p. 38; A. Sakowicz, *Suspect's access to a lawyer*…

noting that in the case of *Lazarenko v Ukraine*, the Court refers to the "vulnerability of the applicant's position" resulting from the specific procedural situation in which the applicant found himself because of the actions of the investigators.[41] This suggests that in this judgment, the ECtHR adopts a broad interpretation of the concept of vulnerability in the context of criminal proceedings.

In order to further define the Court's approach to assessing the fairness of proceedings for vulnerable suspects, it is useful to consider the case of *Ibrahim and Others v United Kingdom*.[42] While the Court does not identify the applicants in this case as vulnerable suspects, the case's circumstances are worth considering. First, it represents a departure from the *Salduz* doctrine. Second, the case is regarded as being of some significance in terms of the Court's previous views on access to legal counsel in the early stages of legal proceedings. Third, the view of the Court expressed in the case has been confirmed in subsequent judgments of the Court, such as *Simeonovi v Bulgaria*[43] and *Beuze v Belgium*.[44] Fourth, the Court sets out the factors relevant to the assessment of the fairness of the proceedings as a whole in that judgment.[45]

Without citing the entire decision, which is unnecessary given the scope of this article, it is important to note that the Court indicates in reference to its previous case law that "The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case […]. The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings […]."[46] In light of these considerations, the ECtHR acknowledges that "Compliance with

[41] See para. 54 of the *Lazaranko v Ukaine*: "The Court observes that the applicant was arrested and questioned as the suspect of a non-aggravated premeditated murder punishable by a fixed term of imprisonment (see paragraph 8 above). Having regard to the facts of this case, namely, the discovery of both the victim's dead body and his stolen car prior to the applicant's arrest (see paragraphs 6–7 above), the Court considers that at the time of the arrest, the investigator had every reason to suspect the applicant of premeditated murder for profit, punishable either by a fixed term of imprisonment or life imprisonment, and thus warranting his obligatory legal representation. Accordingly, the Court does not rule out that, as argued by the applicant, the charges against him were artificially mitigated at that stage with a view to circumventing that legal safeguard. The Court is also mindful of the specificity of the aforementioned ground for obligatory legal representation, which the applicant could hardly have been expected to rely on, since any aggravation of the charges against him would obviously have run counter to his interests. This circumstance demonstrates the vulnerability of the applicant's position and his real need for legal assistance, which was effectively denied because of the way in which the investigator exercised his discretionary power in classifying the crime being investigated (see and compare with *Yaremenko v Ukraine*, no. 32092/02, § 88, 12 June 2008)."

[42] ECtHR, judgment of 13 September 2016 in *Ibrahim and Others v the United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09.

[43] ECtHR (Grand Chamber), judgment of 12 May 2017 in *Simeonovi v Bulgaria*, application no. 21980/04.

[44] ECtHR (Grand Chamber), judgment of 9 November 2018 in *Beuze v Belgium*, application no. 71409/10.

[45] ECtHR, judgment of 13 September 2016 in *Ibrahim and Others v the United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09.

[46] *Ibid.*, para. 250.

the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 […]. However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole."[47] The Court, therefore, rejects the interpretation of the standard concerning access to a lawyer and the consequences of failure to provide one, as formulated by some academics and practitioners based on the *Salduz* judgment, according to which a failure to provide access to a lawyer at the initial stages of the proceedings and to base a decision on this always prejudices the fairness of the proceedings within the meaning of Article 6(1). As a result, the judgment has been the subject of considerable criticism.[48]

From the perspective of this article, it is of the utmost importance to indicate that the Court enumerates and identifies the circumstances necessary for an examination of the fairness of criminal proceedings as a whole. It is of particular significance to stress that the initial issue identified by the Court pertains to the assessment of whether the applicant was a vulnerable individual on account of his age or mental health. The identification of this aspect of the case as the first demonstrates that both the Court and the national authorities should be particularly attentive and vigilant when dealing with criminal proceedings involving young, elderly, and disabled persons alike. They should also examine whether such circumstances are present in such a case. Furthermore, the fairness of the proceedings is influenced by factors related to the broader process of evidence and assessment, including:

- The legal framework governing the pre-trial phase and the admissibility of evidence, and compliance with that framework; where the exclusionary rule applies, it is particularly unlikely that the proceedings as a whole could be considered unreliable.
- The ability to challenge the authenticity of evidence and to object to its use.

---

[47] *Ibid.*, para. 251.

[48] Dissenting and separate opinion to the judgment of 13 September 2016 in *Ibrahim and Others v the United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09, para. 251. This criticism is expressed in: R. Goss, *The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze*, "Human Rights Law Review" 2023, vol. 23, no. 4, pp. 1–23; A. Sakowicz, *Suspect's access to a lawyer…*; E. Celiksoy, *Ibrahim and Others v. UK: Watering down the Salduz principles?*, "New Journal of European Criminal Law" 2019, vol. 9, no. 2, pp. 229–246.

- The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability and relevance, taking into account the degree and nature of coercion.
- The nature of the wrongfulness involved in obtaining the evidence and, if the wrongfulness results from a violation of any other provision of the Convention, the nature of that violation.
- The nature of the evidence and, if applicable, whether it was promptly withdrawn or modified. The use made of the evidence, in particular, whether it constitutes an integral or substantial part of the evidence on which the conviction was based, and the value of other evidence in the case.[49]

Other factors taken into account by the Court are the way guilt is assessed and whether the assessment is made by professional judges or assessors and, in other cases, by members of a jury. Other considerations include the importance of the public security interest in the investigation and the punishment of a particular offence. The Court also refers to other relevant procedural safeguards provided by national law and practice.[50] At the same time, the Court makes it clear that this is not a closed catalogue. In subsequent judgments, the Court refers to the same elements and examines their presence in the facts under consideration.

However, it is worth pointing out, following Wojciech Jasiński, that in the light of the *Ibrahim* judgment as a whole, "the fact that the applicant belongs to the category of vulnerable suspects is a factor which strongly weighs in favor of finding a violation of Article 6(1) ECHR in conjunction with Article 6(3)(c) ECHR, although it is not a factor which would always establish a violation of the ECHR. A very important issue is undoubtedly the circumstances in which the evidence was obtained. […] of utmost importance, however, and perhaps even decisive, is how the weight of the evidence obtained in the absence of counsel and the conduct of the evidentiary proceedings before the court are assessed against the background of the rest of the evidence, particularly in the context of the rights of the accused during the proceedings."[51] At the same time, it should be noted that, just as the Court defines as open a catalogue of circumstances that may affect the assessment of the proceedings as a whole in the light of Article 6(1), it must be assumed that the Court treats the category of vulnerable suspects as a kind of open category, without specifying the sources and factors which may determine the existence of a vulnerable situation.

The Court's reasoning in this judgment undoubtedly establishes that attention to the special circumstances of an accused person, which may affect the effectiveness of his or her participation in criminal proceedings, is inherent in the general concept of procedural fairness and should guide criminal justice authorities in ensuring that criminal proceedings meet the requirements of the Convention. The Court's guidelines

[49] ECtHR, judgment of 13 September 2016 in *Ibrahim and Others v United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 i 40351/09, para. 273.

[50] *Ibid.*

[51] W. Jasiński, *Dostęp osoby oskarżonej…*

set out above are not, however, an exhaustive description of the Court's approach to the standard of fairness of criminal proceedings for persons with special needs or who define themselves as such. They are merely an indication of the main thrust of the Court's consideration of cases involving those who can be called vulnerable suspects.

To illustrate the Court's approach in this respect in detail, it is worth discussing the judgment in the case *Hasáliková v Slovakia*, which the Court delivered in 2021.[52] The Court's decision was based on an application submitted by a woman who had been sentenced to fifteen years' imprisonment for murder. The psychiatric-psychological report, prepared as part of the proceedings, indicated that the applicant exhibited mild intellectual disabilities, with an IQ of 64 according to the Raven test and 69 according to the verbal section of the WAIS-R. It was additionally observed that she exhibited infantile characteristics and a tendency towards simplistic thinking. The expert also observed a notable degree of naivety, emotional immaturity, and susceptibility to suggestion. However, it was established that at the time of the events which formed the basis of the criminal proceedings, she was aware that her actions were dangerous to society and was able to foresee their consequences. However, the experts accepted that she had a reduced capacity to control her behaviour because of emotional stress, reduced mental capacity, and alcohol. The experts also noted that during the examination, the applicant initially denied the events and then admitted them.

In the domestic criminal proceedings, the court of first instance found the applicant guilty. The court noted that the applicant and the second defendant had repeatedly changed their version of events during the proceedings. The national court underlined that their testimony had been rigorously analyzed and combined with collected evidence. The Court found no reason for the second defendant to falsely incriminate the applicant. In the Court's view, the applicant's guilt was established mainly by the co-accused's testimony, but also by her repeated statements during the trial, the views of the investigation judge and the expert witness. The Court pointed out that her statements contained a very detailed description of events, which she would not have been able to give if she had not been at the scene, and which were largely consistent with the testimony of the other accused. Other evidence, such as recordings of telephone conversations and some witness statements, also proved the applicant's guilt. Furthermore, expert opinions did not rule out the possibility that the victim had been stabbed by two people. Relying on the opinion of an expert psychiatrist, the court found that the applicant's mild mental disability could not in itself lead to diminished legal responsibility. Subsequent attempts to challenge the judgment on the national level were unsuccessful.

In her application to the Court, the applicant alleges a violation of Article 6 § 1 and § 3 (a), (b) and (c) and Article 17 of the Convention. The applicant claims that the criminal proceedings against her had been unfair and had not been adapted to her mental state and state of health. First, she claims that she had not been able to fully understand the charges and the accompanying notification of her procedural

[52] ECtHR, judgment of 24 June 2021 in *Hasáliková v Slovakia*, application no. 39654/15.

rights. She further submits that she had not had sufficient time to choose a lawyer and prepare her defence. She points out that no reasonable steps had been taken to address her mental health until the trial, that is, she had been deprived of adequate legal assistance and any psychological support during the pre-trial activities conducted by the police. In addition, she states that her confession had been given untruthfully. She also points out that the confession she made on that occasion had been used as evidence against her, although she had later withdrawn it and there was ample evidence in her favour. The applicant indicates that the authorities should consider her as a particularly vulnerable person who requires special treatment, namely the assistance of a professional or family member to help her understand the charges and participate meaningfully in the proceedings. Without taking into account her mental state, her testimony and, in particular, her confession, made in such a traumatic situation, could not be accepted.

Following the proceedings and after analyzing the submissions of both the applicant and the Slovak Government, the Court finds that there had been no violation of Article 6 of the Convention in this case. This decision was reached by five votes to two. Such a decision was reached even though the Court accepts that, in considering the impact of procedural irregularities at the pre-trial stage on the overall fairness of the criminal proceedings, it had to consider, *inter alia*, whether the applicant was particularly vulnerable to a violation of her rights, for example, because of her age or mental capacity.

In light of its previous case law, the Court acknowledges that police questioning creates an inherently stressful situation for the suspect. It considers that, in the circumstances of this case, such a condition was all the more acute because the applicant suffered from a mild mental disability, as confirmed by the expert examination. However, the Court observes that the experts had determined that, although the applicant had a reduced mental capacity which, combined with emotional distress and the influence of alcohol, limited her ability to control her behaviour at the time of the events, she did not suffer from any mental illness or disorder and was able to appreciate the danger of her actions and to foresee their consequences. Furthermore, the Court considers that the applicant was an adult, literate, and had been assisted by a lawyer since the first interview, during which she confirmed that she fully understood the charges and did not require any further explanation. The Court acknowledges that the majority of the applicant's interview and examination records did not indicate that she had any difficulty understanding or expressing herself. This was the case at one hearing, but during that hearing, steps were taken to enable the applicant to understand the questions being asked. The wording of the questions was reformulated both based on the applicant's statement and the initiative of a psychological expert.

Furthermore, the Court observes that the court that conducted the interview did not identify any noteworthy aspects regarding the applicant's circumstances. The Court considers that if the applicant felt unprepared for the hearings or needed further clarification or assistance, it was her and her lawyer's responsibility to bring such concerns to the attention of the authorities. The Court notes that the applicant did

not raise any concerns regarding her ability to understand the meaning of the criminal proceedings or to testify about the events until the appeal stage. At that point, the applicant argued that the experts should have assisted her in the pre-trial hearings. In these circumstances, the Court does not consider that there were sufficient grounds to require the authorities to consider the applicant as a vulnerable person and to make appropriate procedural adjustments.

In addition to the facts of the case, the dissenting opinion of Judges K. Turković and S. Orland, the elected judges for Croatia and Malta, also prompts one to present and discuss this case in more detail. In the dissenting opinion, the judges point out that the Court's jurisprudence on the participation of a suspect or defendant with intellectual disabilities in criminal proceedings is underdeveloped. They state that "unfortunately, this case [*Hasalikova v Slovakia*] represents a missed opportunity to properly define the procedural safeguards required in such circumstances and to establish appropriate standards to ensure procedural justice for such suspects or defendants."[53] In their view, both at the pre-trial stage and at the trial stage, the failure to assess the applicant's vulnerability in terms of her ability to be questioned and to stand trial, once the national authorities had established that the applicant was a person with a mental disability, should have been seriously considered by the Court. In their view, this circumstance of the case should have led the Court to consider that the applicant was particularly vulnerable to threats to the fairness of the proceedings. They indicate that, in their view, there had been a violation of Article 6 because of the absence of adequate procedural safeguards to compensate for the applicant's lack of adequate mental capacity. Furthermore, they highlight that the absence of such safeguards had not been adequately considered by the national courts in determining the admissibility of the applicant's statements, including their probative value, and in determining her guilt. In presenting their arguments, the judges highlight that, in addition to the general circumstances of the case, the criminal proceedings involved serious charges with severe penalties. They, therefore, emphasize the importance of guaranteeing the right to a fair trial to the greatest possible extent, as previously established in the *Salduz v Turkey* case.

At the same time, they point out that the lack of such safeguards had not been duly taken into account by the national courts in determining the admissibility of the applicant's statements, including, in particular, their probative value, and in determining her guilt. In presenting their arguments, the judges point out, in addition to the general circumstances of the case, that the criminal proceedings involved serious charges with severe penalties, so the right to a fair trial should be guaranteed to the greatest possible extent, as already held in *Salduz v Turkey*.

The judges express disagreement with the Court's conclusion that there were insufficient grounds for requiring the authorities to consider the applicant as a vulnerable person and to make reasonable adjustments. The dissenting opinion

[53] Dissenting opinion to the judgement of 24 June 2021 in case *Hasáliková v Slovakia,* application no. 39654/15.

highlights that in the case of *O'Donnell v United Kingdom*,[54] cited by the majority, there was not one but two assessments of the defendant's capacity to give evidence, subject to certain safeguards. Furthermore, in this case the judge allowed the jury to consider evidence about the applicant's mental capacity and its potential impact on his ability to give evidence on his behalf.[55] These considerations were also reflected in the judge's instructions to the jury. This was not the case in the present case. The dissenting judges point out that in the Slovak case, the applicant had not undergone an assessment to determine her eligibility for additional protection, nor had she been granted such protection based on her disability.

The case cited and the doubts that have been raised about it concern both the definition of the scope of the concept of vulnerability and the determination of the circumstances that give rise to the need to treat a given person as someone with special needs or the obligation to consider whether a person should be included in this group and, consequently, to adapt his or her procedural situation accordingly. Roxanna Dehaghani argues that the Court's ruling "betrays a lack of understanding of vulnerability and how it manifests itself, how it is defined, how it is identified (and the challenges it poses) and the consequences of its absence."[56]

It is worth noting that the case of *Mikołajczyk v Poland*,[57] which is currently pending before the Court, may provide an opportunity to re-examine the standard of procedural fairness in cases involving defendants with special needs.[58] The applicant – a man diagnosed as mildly disabled – was sentenced to twenty-five years' imprisonment by a Polish criminal court for the murder of two women. Appellate courts and the Supreme Court (twice) have upheld the District Court's sentence without addressing the defence's objections.

In the course of the criminal proceedings, a team of experts (composed of psychologists and psychiatrists) prepared a report on the applicant's mental state. It states that the applicant had a very limited vocabulary, answered questions mainly in single words, and needed to be asked short and direct questions to understand. The experts assess his IQ at 62 but conclude that he was sane at the time of the offence. To the extent that he claimed not to remember the details of the murders, the experts state that this was an excuse that constituted a line of defence, as he had

---

[54] ECtHR, judgment of 7 April 2015 in *O'Donnell v the United Kingdom*, application no. 16667/10.

[55] Dissenting opinion to the judgment of 24 June 2021 in case *Hasáliková v Slovakia,* application no. 39654/15, para. 26.

[56] R. Dehaghani, *Not vulnerable enough? A missed opportunity to bolster the vulnerable accused's position in Hasáliková v. Slovakia*, https://strasbourgobservers.com/2021/11/23/not-vulnerable-enough-a-missed-opportunity-to-bolster-the-vulnerable-accuseds-position-in-hasalikova-v-slovakia [accessed: 2024.08.8].

[57] Case of *Mikołajczyk v Poland*, application no. 13951/17, communicated to the Government of the Republic of Poland on 15 May 2023.

[58] The standard established in the *Hasalikova v Slovakia* ruling is further developed in the *Kreplik v the Czech Republic* ruling (application no. 23963/21, judgment of 12 June 2025), thus contributing to the advancement of the standards related to the effective participation of intellectually disabled persons in criminal proceedings.

given detailed statements about the exact course of events to the police and the prosecutor a few days before the examination. The experts also state that, because of his intellectual disability, the applicant needed the assistance of a defenc lawyer to participate effectively in the proceedings.

The applicant, during an informal conversation shortly after his arrest, confessed to the police officers that he had committed the murder. Nevertheless, he was subsequently questioned as a witness and only then as a suspect. It was only at the stage of questioning as a suspect that he was informed of his procedural rights, including the right to refuse to answer. The first contact between the accused and defence counsel took place three months after the arrest (although formally the appointment of the defence counsel took place five days after the arrest). It was only after a conversation with his defence counsel that the accused withdrew his earlier statements.

While the Supreme Court upheld the judgments of the lower courts, it points out in its decision that "It should be emphasized that in a situation where the basis for establishing the suspect's guilt is self-incrimination in pre-trial proceedings which was not subsequently upheld in the pre-trial recognition proceedings before the court, a special, heightened standard of assessment of such evidence must be maintained, especially when the crime charged is murder and there is no other evidence directly pointing to the suspect's guilt, and in addition the suspect shows signs of mental impairment (however slight) and no professional defence counsel was involved in the pre-trial proceedings. Although the applicable Code of Criminal Procedure does not exclude the possibility of making findings of fact based on self-incriminating statements made under the conditions described above, doubts may then arise as to compliance with the standards arising from the principle of *nemo se ipsum accusare tenetur*, which should be examined in detail by the court. A general questioning of the possibility of making such findings remains in the realm of – perhaps worthy of consideration – *de lege ferenda* proposals."[59] It can therefore be concluded that the judges have recognised an issue that may be the subject of future legislative amendments aimed at making the situation of persons with special needs more secure.

In his application to the Court, the applicant alleges, *inter alia*, a violation of Article 6 § 1 and § 3(c) of the Convention on the ground that the proceedings against him were unreliable because they were based solely on statements made by the applicant without the presence of a lawyer. He further submits that his limited intellectual capacity prevented him from fully understanding the consequences of the implied waiver of counsel. By its questions to the Polish Government, the Court seeks to ascertain whether the criminal proceedings against the applicant were fair overall, as required by Article 6 § 1 of the Convention. In particular, the Court seeks to ascertain whether there was a violation of Article 6 § 1 and § 3(c) of the Convention because the applicant, although a person with a mental disability, did not have the assistance of a lawyer during his pre-trial interrogation by the police and before the prosecutor.

[59] Order of the Supreme Court of 23 June 2016, ref. II KK 39/16.

The next aspect to be examined by the Court is whether the applicant waived his right to counsel and, if so, whether this waiver met the Court's standard of a "knowing and intelligent waiver"[60] in light of his limited intellectual capacity.

The questions addressed to the Polish Government suggest that the present case may be another opportunity to analyze the standards that should accompany people with intellectual disabilities and other persons with special needs during criminal proceedings. The Court's decision may thus resolve the doubts that arose in the Slovak case described above. It can also be expected to provide an answer to the question of the extent to which the special needs of participants in criminal proceedings, and particularly of the accused, should influence both how the implementation of specific procedural guarantees, such as access to a lawyer or the right to information, is assessed in practice and how the fairness of criminal proceedings is assessed overall. Furthermore, it can contribute to the ongoing discussion of the concept of vulnerability as developed by the Court.

3. Conclusions

This article presents the Court's approach to the assessment of the fairness of proceedings conducted against persons with special needs, with the use of the example of cases involving minors and persons with disabilities. The cases selected for examination are those in which the lack of access to legal aid in the initial stages of proceedings, or the ineffectiveness of such access, is identified as a concern.

The judgments and cases discussed above demonstrate that the standard in this respect in the ECtHR's jurisprudence is still evolving in response to new conditions for conducting criminal proceedings. The cases presented above demonstrate that protection against the risk of being harmed by unfair proceedings is an integral part of the right to a fair trial. Furthermore, the cases brought before the European Court of Human Rights demonstrate that the national provisions currently in force in Council of Europe countries lack sufficient precision and definition in this respect. Additionally, there is a discrepancy between the heightened awareness observed in the public debate regarding the treatment of persons with disabilities or children and the attentiveness of criminal justice authorities to these circumstances.

However, it is important to note that the fairness of procedures for individuals with special needs is not solely determined by legal norms and their precision. Rather, it is primarily influenced by practice, which is also shaped by the sensitivity and preparedness of those within the justice system who interact with individuals with special needs. It is not only the role of the justice system to demonstrate sensitivity and attentiveness. Rather, it is the duty of the individuals who make up the system

[60] ECtHR (Grand Chamber), judgment of 12 May 2017 in *Simeonovi v Bulgaria*, application no. 21980/04, para. 115; ECtHR, judgment of 5 September 2017 in *Türk v Turkey*, application no. 22744/07, para. 48–53; ECtHR, judgment of 24 September 2009 in *Pishchalnikov v Russia*, application no. 7025/04, para. 77.

to embody these qualities. To cultivate sensitivity and attentiveness, it is essential to gain a comprehensive understanding of special needs, the methods for identifying them, and the safeguards that can be put in place to prevent additional distress for individuals appearing before the justice system.

As highlighted in the introduction, the lack of clarity of the concept of vulnerability in the context of criminal procedure and the jurisprudence of the European Court of Human Rights may be viewed as an advantage, as it permits some flexibility at the stage of assessing human rights violations. Nevertheless, an analysis of the cases discussed reveals that an undefined concept may present challenges when its interpretation imposes specific positive obligations on states and criminal justice authorities. It would, therefore, be desirable for the Court to provide further clarification, both in terms of the factors on which the Strasbourg concept of vulnerability is based and in terms of the consequences that this concept has in criminal proceedings. Such clarification would have positive implications both for states, as it would facilitate the implementation of pertinent regulations, and for the parties involved in the proceedings, who would be in a better position to exercise their rights.[61]

Finally, it is also important to acknowledge that complaints from vulnerable suspects and defendants, and subsequent judgments, contribute to the broader discussion of the general standards of fairness in the criminal justice system. This is exemplified by the extensive discussion that followed the *Salduz v Turkey* judgment, which illuminated the challenges that individuals involved in criminal proceedings may encounter. This caveat serves to establish the broader context of the analyses presented in this article.

Literature

Adamska-Gallant A., *Vulnerable Witnesses in Practice of International Courts – Definition and Trauma as the Key Risk Factor*, "Peace Human Rights Governance" 2024, vol. 8, no. 1, pp. 53–74.

Arnardóttir O.M., *Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?*, "Oslo Law Review" 2017, vol. 4, issue 3, pp. 150–171.

Celiksoy E., *Ibrahim and Others v. UK: Watering down the Salduz principles?*, "New Journal of European Criminal Law" 2019, vol. 9, no. 2, pp. 229–246.

Dehaghani R., *Not vulnerable enough? A missed opportunity to bolster the vulnerable accused's position in Hasáliková v. Slovakia*, https://strasbourgobservers.com/2021/11/23/not-vulnerable-enough-a-missed-opportunity-to-bolster-the-vulnerable-accuseds-position-in-hasalikova-v-slovakia [accessed: 2024.08.8].

Domańska M., *People with Disabilities as a Vulnerable Group. The Concept of Protection of the Rights of Vulnerable Groups*, "Białostockie Studia Prawnicze" 2018, vol. 23, no. 4, pp. 25–34.

Fineman M.A., *The vulnerable subject: Anchoring equality in the human condition*, "Yale Journal of Law & Feminism" 2008, vol. 20, no. 1, pp. 1–23.

[61] M. Domańska, *People with Disabilities*…, p. 33.

Gerry F., Cooper P., *Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility*, "Journal of Judicial Administration" 2017, vol. 26, no. 4, pp. 265–275.

Girdwoyń K., *Right to appropriate representation of defendants with intellectual disabilities in criminal proceedings*, "Ius Novum" 2020, vol. 14, no. 3, pp. 67–86.

Goss R., *The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze*, "Human Rights Law Review" 2023, vol. 23, no. 4, pp. 1–23.

Grans L., *The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights*, "Women & Criminal Justice" 2023 [published online], pp. 1–16.

Jasiński W., *Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego: standard strasburski*, "Europejski Przegląd Sądowy" 2019, no. 1, pp. 24–30.

Mergaerts L., *European guarantees for vulnerable suspects and defendants: Good intentions but limited impact in national procedures*, 2020.

Nowakowska J., *Wczesna identyfikacja osób wymagających szczególnego traktowania, będących uczestnikami postępowania karnego* [in:] *Osoby z niepełnosprawnością intelektualną. Z uwzględnieniem wyników badań przeprowadzonych przez pracowników Biura Rzecznika Praw Obywatelskich*, eds. E. Dawidziuk, M. Mazur, Warszawa 2017, pp. 149–167.

Peroni L., Timmer A., *Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law*, "International Journal of Constitutional Law" 2013, vol. 11, no. 4, pp. 1056–1085.

Sakowicz A., *Suspect's access to a lawyer at an early stage of criminal proceedings in view the case-law of the European Court of Human Rights*, "Revista Brasileira de Direito Processual Penal" 2021, vol. 7, no. 3, pp. 1979–2014.

Sakowicz A., *Zakaz dowodowego wykorzystania wyjaśnień podejrzanego występującego bez obrońcy bądź pod nieobecność obrońcy*, "Europejski Przegląd Sądowy" 2019, no. 1, pp. 47–53.

Truscan I., *Considerations of vulnerability: From principles to action in the case law of the European Court of Human Rights*, "Retfærd (Nordic Journal for Law and Justice)" 2013, vol. 36, no. 3/142, pp. 64–83.

Turner B.S., *Vulnerability and Human Rights*, University Park 2006.

Vaughan M., Milne R., Cherryman J., Dalton G., *Managing investigative interviews with vulnerable suspects in the UK: Do specialist interview managers (IM's) understand vulnerability? Psychology*, "Crime & Law" 2024, pp. 1–20.

Wąsek-Wiaderek M., *Model zakazów dowodowych z perspektywy Konwencji i orzecznictwa ETPCz* [in:] *Nowe spojrzenie na model zakazów dowodowych w procesie karnym*, eds. J. Skorupka, A. Drozd, Warszawa 2015, pp. 20–41.

Summary

Katarzyna Wiśniewska

"Fair" and "Inclusive": The Standard of Criminal Proceedings Involving Suspects and Defendants with Special Needs

It is increasingly clear to those working in the criminal justice system, as well as to those responsible for formulating policy, that there is a need to provide additional support to individuals involved in the criminal justice process. This is because, as a result of their particular characteristics or the circumstances of their case, particular individuals may require special assistance in order to be able to exercise their procedural rights fully and to participate effectively in the proceedings. The aim of this article is to identify the standards of treatment for suspects and accused persons who have been identified by European and international bodies or self-defined as having special needs. Through the analysis of specific cases, the text attempts to answer the question of whether the current jurisprudence of the European Court of Human Rights is an appropriate guideline for national authorities, including lawmakers and law enforcement personnel, on how to ensure the rights of persons with special needs and on whether they require additional attention from those conducting the proceedings.

Keywords: fairness, vulnerability, defendant, criminal justice, needs.

Streszczenie

Katarzyna Wiśniewska

„Rzetelny", ale i „wrażliwy", czyli o standardzie postępowania karnego z udziałem podejrzanych i oskarżonych wymagających szczególnego wsparcia

Zwiększenie świadomości profesjonalistów zaangażowanych w wymiar sprawiedliwości w sprawach karnych, jak również decydentów i projektodawców, prowadzi do dostrzeżenia potrzeb uczestników procesu karnego, którzy ze względu na różne cechy lub okoliczności faktyczne mogą potrzebować szczególnego wsparcia, aby w pełni zrealizować swoje prawa procesowe i efektywnie uczestniczyć w prowadzonym postępowaniu. Celem artykułu jest wskazanie standardów dotyczących traktowania osób podejrzanych i oskarżonych, które przez organy europejskie i międzynarodowe są identyfikowane jako osoby o szczególnych potrzebach lub które się tak samodefiniują. Tekst, poprzez analizę konkretnych spraw, będzie zmierzał do odpowiedzi na pytanie, czy obecnie orzecznictwo Europejskiego Trybunału Praw Człowieka może stanowić właściwy drogowskaz dla krajowych organów – zarówno stanowiących, jak i stosujących prawo – w zakresie ochrony praw osób o szczególnych potrzebach oraz czy osoby te wymagają dodatkowej uwagi ze strony organów prowadzących postępowanie.

Słowa kluczowe: sprawiedliwość, wrażliwość, oskarżony, wymiar sprawiedliwości w sprawach karnych, potrzeby.

Glosy

Przejęcie kontroli nad spółką a szkoda majątkowa w rozumieniu art. 296 k.k.

Wyrok Sądu Najwyższego z dnia 19 stycznia 2023 r., II KK 492/22[1]

1. „Utrata kontroli" przez wspólnika nad majątkiem posiadanym przez spółkę, czy – szerzej – nad spółką jako osobą prawną, nie powinna być sama w sobie utożsamiana z wystąpieniem szkody w rozumieniu art. 296 § 1 i 3 kodeksu karnego[2].
2. Niewątpliwe trafna jest konstatacja Sądu Najwyższego, że samo w sobie zmniejszenie udziału wspólnika w kapitale zakładowym spółki nie powoduje pozbawienia go posiadanych przez niego udziałów, a co za tym idzie – wystąpienia szkody równej wartości całego majątku spółki.
3. Glosowany wyrok Sądu Najwyższego wydaje się stać na przeszkodzie rozszerzającej interpretacji szkody majątkowej z art. 296 k.k., a co za tym idzie, minimalizuje ryzyko sabotowania uchwał o podwyższeniu kapitału zakładowego przez wspólników mniejszościowych, poprzez składanie zawiadomień o podejrzeniu popełnienia przestępstwa z art. 296 § 1 k.k.

Kaja Zaleska-Korziuk
Uniwersytet Gdański, Polska
kaja.zaleska@prawo.ug.edu.pl
ORCID: 0000-0003-4389-7308

https://doi.org/10.26881/gsp.2025.4.14

Glosa

1. Uwagi wstępne

Przedmiotem glosy jest analiza wyroku Sądu Najwyższego (dalej: SN) z dnia 19 stycznia 2023 r. (II KK 492/22) w zakresie, w jakim SN rozważał możliwość zakwalifikowania utraty kontroli nad majątkiem spółki na skutek zmiany w składzie wspólników spółki, a także uprzywilejowanie głosów nowych wspólników, jako szkody w rozumieniu

[1] Legalis nr 2914557.
[2] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (tekst jedn.: Dz. U. z 2025 r., poz. 383 ze zm.; dalej: k.k.).

art. 296 § 1 k.k. W rezultacie glosowany wyrok Sądu Najwyższego zdaje się odmawiać możliwości klasyfikacji „utraty kontroli przez wspólnika nad majątkiem spółki" o określonej wartości jako szkody w rozumieniu art. 296 § 1 i 3 k.k.

Z uwagi na przedmiot zainteresowania niniejszej analizy rozważania w zakresie oceny prawnej dokonanej przez SN zostały ograniczone do problematyki znamion przestępstwa z art. 296 § 1 i 3 k.k., z pominięciem innych wątków glosowanego wyroku, a zwłaszcza problematyki obrony obligatoryjnej (skazani cierpieli odpowiednio na znaczny niedosłuch albo głuchotę).

2. Okoliczności faktyczne glosowanego wyroku

Glosowany wyrok Sądu Najwyższego zapadł na skutek kasacji obrońców skazanych, którzy zostali uznani za winnych tego, że na przestrzeni 2 lat nadużyli udzielonych im uprawnień i nie dopełnili ciążących na nich obowiązków w ten sposób, że będąc zobowiązanymi do zajmowania się sprawami majątkowymi oskarżyciela posiłkowego (osoby prawnej) odpowiednio jako prezes zarządu lub sekretarz zarządu, działając wspólnie i w porozumieniu, wyrządzili tejże osobie prawnej szkodę majątkową w wielkich rozmiarach (7 733 862,25 zł), działając tym samym na szkodę tejże osoby prawnej. Działanie skazanych polegało przy tym na dokonaniu zmian w aktach założycielskich jednoosobowych spółek zależnych oskarżyciela posiłkowego, tj. spółkach Z. sp. z o.o. i E. sp. z o.o. Zmiany obu umów spółek dotyczyły podwyższenia kapitału zakładowego, odpowiednio: w Z. sp. z o.o. z kwoty 1 102 200 zł do kwoty 1 635 600 zł przez utworzenie 889 nowych udziałów o wartości nominalnej 600 zł każdy, a w E. sp. z o.o. z kwoty 1 229 500 zł do kwoty 1 866 000 zł przez utworzenie 1273 nowych udziałów o wartości nominalnej 500 zł każdy. Udziały w podwyższonym kapitale zakładowym zostały objęte „krzyżowo" przez obie spółki zależne, tj. nowo utworzone udziały w Z. sp. z o.o. zostały objęte przez E. sp. z o.o., a nowo utworzone udziały w E. sp. z o.o. przez Z sp. z o.o. Co istotne, nowo utworzone udziały w obu spółkach zostały uprzywilejowane co do prawa głosu (3 głosy na 1 udział). Na skutek dokonanych podwyższeń kapitałów zakładowych spółek zależnych oraz objęcia udziałów w podwyższonym kapitale zakładowym przez nowych wspólników oskarżyciel posiłkowy podnosił, że „utracił kontrolę" nad „swoim" majątkiem w obydwu spółkach o ogólnej wartości aktywów netto 7 285 582,25 zł, nie uzyskując nic w zamian, a spółki nie zostały zasilone kapitałowo.

Wyrok Sądu Okręgowego w Warszawie został zaskarżony zarówno przez obrońców, jak i oskarżyciela posiłkowego. Niemniej jednak, Sąd Apelacyjny (dalej: SA) w Warszawie nie dopatrzył się żadnych wadliwości w wyroku sądu I instancji, utrzymując zaskarżony wyrok w całości[3]. W odniesieniu do art. 296 § 1 i 3 k.k. Sąd Apelacyjny zważył, że Sąd Okręgowy dokonał prawidłowej kwalifikacji prawnej przypisanego obu oskarżonym czynu i dokonanych ustaleń faktycznych. Co istotne, SA wyraźnie wskazał, że obaj oskarżeni swoim zachowaniem wyczerpali wszystkie znamiona występku

[3] Wyrok SA w Warszawie z dnia 26 stycznia 2022 r., II AKa 430/19, Legalis nr 2675810.

określonego w art. 296 § 1 i 3 k.k., a wywody apelacji kwestionujące wypełnienie znamion zawartych w art. 296 k.k. miały wyłącznie polemiczny charakter.

Wyrok Sądu Apelacyjnego w Warszawie został zaskarżony kasacjami przez obrońców skazanych, co spowodowało wydanie glosowanego wyroku przez Sąd Najwyższy. Na skutek wywiedzionych kasacji SN uchylił zaskarżony wyrok i przekazał sprawę do ponownego rozpoznania w postępowaniu odwoławczym przez SA w Warszawie.

3. Ocena prawna dokonana przez Sąd Najwyższy

Odnosząc się do art. 296 k.k., Sąd Najwyższy stwierdził, że „utraty kontroli nad majątkiem ogólnej wartości aktywów netto 7.285.582,25 zł" nie należy utożsamiać wprost z wysokością szkody właśnie w tej kwocie. Ponadto objęcie nowo utworzonych udziałów przez osoby trzecie nie pozbawiło oskarżyciela posiłkowego *per se* dotychczasowych udziałów. Jednocześnie Sąd Najwyższy zauważył, że dokonane zmiany w strukturze właścicielskiej spółek zależnych mogły mieć wpływ na wartość udziałów przysługujących oskarżycielowi posiłkowemu. Dalej SN wskazał, że dla wyceny wartości spółki istotna jest nie tylko wartość kapitału zakładowego, ale „również zobowiązania, marka firmy i inne przesłanki". W ocenie Sądu Najwyższego kwestia ta w sposób oczywisty wynika z rozumienia szkody w myśl art. 296 k.k., która – zgodnie z utrwalonym poglądem w orzecznictwie – obejmuje zarówno rzeczywisty uszczerbek w majątku (*damnum emergens*), jak i utracone zyski (*lucrum cessans*).

Sąd Najwyższy zwrócił również uwagę, że w żaden sposób nie zostało ustalone w sprawie, aby oskarżeni działali w celu późniejszego, całkowitego zawładnięcia mieniem spółek zależnych, z jednoczesnym pozbawieniem dotychczasowego udziałowca wszelkich praw do ich majątku.

Na koniec rozważań w zakresie naruszenia art. 296 § 1 i 3 k.k. Sąd Najwyższy podkreślił, że utrata większości głosów na zgromadzeniu wspólników nie implikuje utraty całości „swojego" majątku przez dotychczasowego wspólnika spółki – tzn. rozwodnienie udziału wspólnika w spółce nie powoduje pozbawienia go jego udziałów ani prawa do zaskarżania uchwał zgromadzenia wspólników.

4. Analiza oceny prawnej Sądu Najwyższego

Pomimo zwięzłości rozważań Sądu Najwyższego w zakresie znamion przestępstwa z art. 296 k.k. uwagi poczynione przez SN są wielowątkowe. Kluczowym aspektem dla rozpoczęcia analizy tego stanowiska wydaje się jednak możliwość kwalifikacji zmiany wartości majątku spółki na skutek zmian struktury właścicielskiej jako szkody w rozumieniu art. 296 k.k. To właśnie bowiem w kontekście wyceny wartości spółek zależnych SN powołał się na szeroko akceptowany pogląd, że szkoda w rozumieniu art. 296 k.k.

obejmuje zarówno rzeczywisty uszczerbek w majątku (*damnum emergens*), jak i utracone zyski (*lucrum cessans*).

Jak wskazuje się w piśmiennictwie, termin „szkoda majątkowa" na gruncie art. 296 k.k. ma znaczenie cywilnoprawne[4]. W ujęciu cywilistycznym szkoda stanowi różnicę między stanem majątkowym poszkodowanego, który powstał po nastąpieniu zdarzenia powodującego uszczerbek, a stanem, jaki by w jego majątku istniał, gdyby to zdarzenie nie nastąpiło[5]. Odrębną kwestią pozostają postacie szkody, za które uważa się straty (*damnum emergens*) oraz utracone korzyści (*lucrum cessans*), a których kryterium rozgraniczenia jest czas wystąpienia danej postaci szkody – strata będzie mieć miejsce do chwili zakończenia oddziaływania czynnika szkodzącego, zaś utracone korzyści to potencjalne zyski, które poszkodowany mógłby osiągnąć, gdyby czynnik szkodzący nie wystąpił[6]. Na gruncie prawa cywilnego nie budzi przy tym wątpliwości, że szkoda (zarówno w postaci szkody rzeczywistej, jak i utraconych korzyści) może polegać na zmniejszeniu aktywów lub powiększeniu pasywów poszkodowanego (tzw. różnicowe albo dyferencyjne ujęcie szkody)[7].

Odrębnym zagadnieniem jest szkoda ewentualna, która nie jest objęta obowiązkiem odszkodowawczym na gruncie prawa cywilnego i która w polskiej literaturze prawniczej określana jest „utratą szansy lub nadziei"[8]. W rezultacie kluczowe jest odróżnienie utraconych korzyści od szkody ewentualnej poprzez ocenę prawdopodobieństwa osiągnięcia danej korzyści. O ile dla zakwalifikowania danej korzyści jako utraconych korzyści konieczne jest wykazanie przez poszkodowanego graniczącego z pewnością stopnia prawdopodobieństwa uzyskania tychże korzyści[9], o tyle za szkodę ewentualną uznaje się te korzyści, których prawdopodobieństwo osiągnięcia było niższe niż „graniczące z pewnością"[10].

Mając powyższe na uwadze, nie sposób nie zauważyć błędu Sądu Najwyższego, który – odnosząc się do elementów wpływających na wycenę wartości spółki (czy też spółki jako przedsiębiorstwa w znaczeniu podmiotowym) – utożsamia te elementy

---

[4] J. Lachowski, T. Oczkowski, *Sporne problemy wykładni przepisów o przestępstwie nadużycia zaufania (uwagi de lege lata i de lege ferenda)*, „Przegląd Sądowy" 2002, nr 5, s. 62.

[5] Wyrok SN z dnia 3 lutego 1971 r., III CRN 450/70, OSNCP 1971, nr 11, poz. 205.

[6] M. Borysiak, *Art. 361 k.c.* [w:] *Kodeks cywilny. Komentarz*, red. K. Osajda, Warszawa 2024, Legalis.

[7] A. Koch, *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym*, Warszawa 1975, s. 57; A. Szpunar, *Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie*, Bydgoszcz 1998, s. 32–33; M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2011, s. 180; A. Olejniczak, *Art. 361 k.c.* [w:] *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna. Tom III*, cz. 1, red. A. Kidyba, Warszawa 2014, s. 105, nb 12.

[8] M. Kaliński, *Art. 361 k.c.* [w:] *Prawo zobowiązań – część ogólna*, red. A. Olejniczak, seria: System Prawa Prywatnego, t. 6, wyd. 4, Warszawa 2023, nb 346–353.

[9] Wyroki SN z dnia: 21 czerwca 2002 r., IV CKN 382/00, MoP 2003, nr 1, s. 33; 3 października 1979 r., II CR 304/79, OSNCP 1980, nr 9, poz. 164; 28 stycznia 1999 r., III CKN 133/98, Legalis; 28 kwietnia 2004 r., III CK 495/02, Legalis; 22 kwietnia 2015 r., III CSK 256/14, Legalis.

[10] Z. Banaszczyk, *Art. 361 k.c.* [w:] *Kodeks cywilny. Tom I. Komentarz do art. 1–449[10]*, red. K. Pietrzykowski, Warszawa 2015, s. 1162, nb 49; A. Olejniczak, *Art. 361 k.c.* [w:] *Kodeks cywilny. Komentarz. Zobowiązania…*, s. 106, nb 13; K. Zagrobelny, *Art. 361 k.c.* [w:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2016, s. 653, nb 42.

z postaciami szkody majątkowej poniesionej przez wspólnika. W tym zakresie wydaje się raczej, że ewentualna szkoda majątkowa wspólnika wynikająca z „utraty kontroli" nad spółką może przybrać w określonych okolicznościach zarówno postać szkody (np. utrata wartości pakietu udziałów), jak i utraconych korzyści (np. proporcjonalne zmniejszenie udziału w zysku spółki za dany rok obrotowy, w sytuacji, gdy spółka osiąga zyski, czy zmniejszony udział w majątku likwidacyjnym spółki z o.o. w likwidacji). W tym kontekście niewątpliwie trafna jest konstatacja SN, że samo w sobie zmniejszenie udziału wspólnika w kapitale zakładowym spółki nie powoduje pozbawienia go posiadanych przez niego udziałów, a co za tym idzie – wystąpienia szkody równej wartości całego majątku spółki. Istotna jest tu również uwaga Sądu Najwyższego co do konieczności ustalenia przez sąd *meriti* celu działań podejmowanych przez skazanych. Nie budzi bowiem wątpliwości, że o ile na chwilę podwyższenia kapitału zakładowego nie dochodzi zasadniczo do wystąpienia szkody równej wartości całego majątku spółki, o tyle do wyrządzenia takiej szkody może dojść w przypadku podjęcia uchwał prowadzących do zmniejszenia aktywów spółki, a nawet wyzbycia się majątku spółki zależnej w całości (np. poprzez wyrażenie zgody przez zgromadzenie wspólników na zbycie przez spółkę składników jej majątku, uniemożliwiające dalsze prowadzenie jakiejkolwiek działalności przez spółkę). W takim jednak wypadku charakter zdarzenia szkodzącego należałoby przypisywać uchwale zgromadzenia wspólników w przedmiocie wyrażenia zgody na zbycie danych składników spółki, umożliwiające podjęcie dalszych czynności przez zarząd spółki zależnej. Co ciekawe, jak wynika z uzasadnienia Sądu Najwyższego i Sądu Apelacyjnego w Warszawie, z materiału dowodowego sprawy nie wynikało, jakoby podwyższenie kapitału zakładowego spółek zależnych, a także objęcie nowo utworzonych udziałów przez nowych wspólników (tj. zdarzenie szkodzące w ujęciu cywilnoprawnym) wywołało jakiekolwiek skutki w majątku oskarżyciela posiłkowego, chociażby poprzez zmianę wyceny wartości spółek zależnych. O ile jednak podjęcie uchwały o podwyższeniu kapitału zakładowego zasadniczo powinno pozostać naturalne z perspektywy bilansowej dla spółki, ponieważ podwyższenie kapitału zakładowego (odnotowanego po stronie pasywów w bilansie spółki) wymaga wniesienia wkładów na pokrycie udziałów w podwyższonym kapitale zakładowym, a w przypadku obejmowania udziałów po cenie wyższej od wartości nominalnej – wniesienia *agio*, które zasila kapitał zapasowy spółki, o tyle – jak słusznie zauważył Sąd Najwyższy – może mieć to wpływ na wartość udziałów przypadających danemu wspólnikowi. Nie powinno bowiem budzić wątpliwości, że „rozwodnienie" udziału wspólnika w kapitale zakładowym spółki zasadniczo będzie skutkować zmniejszeniem wartości posiadanych przez niego udziałów. W rezultacie możliwe jest zakwalifikowanie jako szkody majątkowej różnicy pomiędzy wartością udziałów danego wspólnika przed podwyższeniem kapitału zakładowego i po tym podwyższeniu.

Na marginesie należy zauważyć, że nie do końca zrozumiałe pozostaje, z jakich powodów w wyniku przeprowadzonego podwyższenia kapitału zakładowego „spółki nie zostały zasilone kapitałowo". Złożenie przez członków zarządu oświadczenia o wniesieniu w całości wkładów na pokrycie udziałów w podwyższonym kapitale zakładowym jest bowiem warunkiem zarejestrowania podwyższenia kapitału zakładowego przez

sąd rejestrowy (art. 262 § 2 pkt 3 kodeksu spółek handlowych[11]), a złożenie nieprawdziwego oświadczenia w tym zakresie skutkuje odpowiedzialnością odszkodowawczą (art. 291 k.s.h.) lub odpowiedzialnością karną (art. 587 k.s.h.).

W końcu, jak słusznie zauważa Sąd Najwyższy, „rozwodnienie" udziału wspólnika w kapitale zakładowym spółki kapitałowej nie pozbawia go możliwości kwestionowania uchwał zgromadzenia wspólników w drodze powództwa o uchylenie uchwały (art. 249 k.s.h.) albo stwierdzenia nieważności uchwały (art. 252 k.s.h.). Powództwo o uchylenie uchwały umożliwia przy tym kwestionowanie uchwały z uwagi na jej cel, którym jest pokrzywdzenie wspólnika (łącznie z przesłanką sprzeczności z umową spółki albo dobrymi obyczajami). Jednocześnie, o ile uchylenie uchwały przez sąd wywiera skutki *ex nunc* i zasadniczo nie wstrzymuje postępowania rejestrowego, o tyle sąd ma możliwość zawieszenia postępowania rejestrowego do czasu rozpoznania powództwa o uchylenie uchwały – co jest istotne zwłaszcza z perspektywy uchwał, których wpis do Krajowego Rejestru Sądowego ma charakter konstytutywny (np. uchwała o podwyższeniu kapitału zakładowego).

5. Podsumowanie

Na koniec przeprowadzonej analizy wyroku Sądu Najwyższego uzasadnione wydaje się wskazanie na ewentualne praktyczne implikacje możliwości kwalifikowania utraty kontroli wspólnika nad spółką jako szkody z art. 296 k.k.

Przede wszystkim, o ile możliwe jest, że na skutek zmian struktury własnościowej spółki dojdzie do „utraty kontroli" przez wspólnika nad majątkiem posiadanym przez spółkę czy – szerzej – nad spółką jako osobą prawną, o tyle sytuacja ta nie powinna być sama w sobie utożsamiana z wystąpieniem szkody, w jakiejkolwiek postaci, po stronie wspólnika. Cywilistyczne rozumienie szkody, zaaprobowane na gruncie art. 296 k.k., nie pozwala bowiem na ustalenie, że na skutek samej zmiany struktury wewnętrznej spółki dojdzie do zmniejszenia jej aktywów czy zwiększenia pasywów. Jednocześnie należy pamiętać, że wykazanie szkody w postaci utraconych korzyści wymaga wykazania graniczącego z pewnością stopnia prawdopodobieństwa uzyskania tychże korzyści. W praktyce więc możliwe będzie zakwalifikowanie jako szkody majątkowej wspólnika różnicy wartości udziałów danego wspólnika przed podwyższeniem kapitału zakładowego spółki zależnej i po jego podwyższeniu. Ponadto glosowany wyrok Sądu Najwyższego wyraźnie odróżnia sytuację, w której dochodzi do „rozwodnienia" udziału wspólnika w kapitale zakładowym spółki, od sytuacji, w której wspólnik zostaje pozbawiony (w całości lub w części) posiadanych przez siebie udziałów. W praktyce tego rodzaju przypadek może mieć miejsce właściwie wyłącznie w sytuacji dobrowolnego umorzenia całości lub części udziałów wspólnika, bez wypłaty wynagrodzenia z art. 199 § 2 k.s.h. (minimalne wynagrodzenie jest równe wartości przypadających na

[11] Ustawa z dnia 15 września 2000 r. – Kodeks spółek handlowych (tekst jedn.: Dz. U. z 2024 r., poz. 18 ze zm.; dalej: k.s.h.).

udział aktywów netto, wykazanych w sprawozdaniu finansowym za ostatni rok obrotowy, pomniejszonych o kwotę przeznaczoną do podziału między wspólników).

Jednocześnie nie sposób nie zauważyć, że cechą charakterystyczną spółek kapitałowych jest zasada „rządów większości", przejawiająca się w możliwości podejmowania uchwał bezwzględną lub kwalifikowaną większością głosów. Glosowany wyrok Sądu Najwyższego wydaje się stać na przeszkodzie rozszerzającej interpretacji szkody majątkowej z art. 296 k.k., a co za tym idzie, minimalizuje ryzyko sabotowania uchwał o podwyższeniu kapitału zakładowego przez wspólników mniejszościowych, poprzez składanie zawiadomień o podejrzeniu popełnienia przestępstwa z art. 296 § 1 k.k.

Literatura

Gniewek E., Machnikowski P. (red.), *Kodeks cywilny. Komentarz*, Warszawa 2016.

Kaliński M., *Szkoda na mieniu i jej naprawienie*, Warszawa 2011.

Kidyba A. (red.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna. Tom III*, cz. 1, Warszawa 2014.

Koch A., *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym*, Warszawa 1975.

Oczkowski T., Lachowski J., *Sporne problemy wykładni przepisów o przestępstwie nadużycia zaufania (uwagi de lege lata i de lege ferenda)*, „Przegląd Sądowy" 2002, nr 5, s. 62–77.

Olejniczak A. (red.), *Prawo zobowiązań – część ogólna*, seria: System Prawa Prywatnego, t. 6, wyd. 4, Warszawa 2023.

Osajda K. (red.), *Kodeks cywilny. Komentarz*, Warszawa 2024, Legalis.

Pietrzykowski K. (red.), *Kodeks cywilny. Tom I. Komentarz do art. 1–449[10]*, Warszawa 2015.

Szpunar A., *Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie*, Bydgoszcz 1998.

Streszczenie

Kaja Zaleska-Korziuk

Przejęcie kontroli nad spółką a szkoda majątkowa w rozumieniu art. 296 k.k.

Analiza wyroku Sądu Najwyższego wskazuje na praktyczne implikacje związane z kwalifikowaniem utraty kontroli wspólnika nad spółką jako szkody w rozumieniu art. 296 k.k. Zmiana struktury własnościowej może prowadzić do utraty kontroli, jednak niekoniecznie oznacza to wystąpienie szkody dla wspólnika, ponieważ cywilistyczne rozumienie szkody nie pozwala na stwierdzenie, że sama zmiana wpływa na aktywa lub pasywa spółki. W praktyce możliwe jest uznanie różnicy wartości udziałów wspólnika przed podwyższeniem kapitału zakładowego i po dokonaniu tego podwyższenia za szkodę majątkową. Sąd Najwyższy odróżnia sytuację, w której dochodzi do „rozwodnienia" udziału wspólnika, od przypadków, gdy wspólnik traci swoje udziały, co zazwyczaj ma miejsce przy dobrowolnym umorzeniu udziałów bez wynagrodzenia. Wyrok ogranicza możliwość rozszerzającej interpretacji szkody majątkowej, co zmniejsza ryzyko sabotowania uchwał o podwyższeniu kapitału przez wspólników mniejszościowych.

Słowa kluczowe: szkoda, przejęcie kontroli nad spółką, umorzenie udziałów.

Summary

Kaja Zaleska-Korziuk

Acquisition of Control Over a Company and Property Damage within the Meaning of Article 296 of the Criminal Code

An analysis of the Supreme Court's judgment indicates the practical implications of defining the loss of a shareholder's control over a company as damage within the meaning of Article 296 of the Criminal Code. A change in the ownership structure may lead to a loss of control, but this does not necessarily imply that damage has been inflicted on the shareholder, since the civil law understanding of damage does not permit the conclusion that such a change itself affects the assets or liabilities of the company. In practice, it is possible to consider the difference in the value of a shareholder's shares before and after a share capital increase as damage to property. The Supreme Court distinguishes between a situation in which there is a "dilution" of a shareholder's holding and cases in which a shareholder loses his or her shares, which is usually the case with a voluntary redemption of shares without compensation. The ruling limits the possibility of an expansive interpretation of damage to property, which reduces the risk of minority shareholders sabotaging capital increase resolutions.

Keywords: damage, taking control of a company, share redemption.

Prowadzenie pojazdu w stanie nietrzeźwości na prywatnej posesji a popełnienie przestępstwa z art. 178a k.k.

Wyrok Sądu Najwyższego z dnia 6 lutego 2025 r., I KK 496/24[1]

1. Prowadzenie pojazdu w ruchu lądowym jest konieczne dla przypisania przestępstwa z art. 178a kodeksu karnego[2]. Dla ustalenia, że sprawca uczestniczył w ruchu lądowym, wystarczające jest prowadzenie pojazdu w obszarze dostępnym dla osób trzecich i w tym celu przez nie wykorzystywanym.

2. Usiłowaniem popełnienia przestępstwa z art. 178a k.k. jest podjęcie próby przemieszczenia z prywatnej posesji na obszar, w którym odbywa się ruch lądowy, do którego jednak nie doszło z przyczyn od sprawcy niezależnych.

Paulina Górna-Lewińska
Górna Topolewicz Tax&Legal Kancelaria Adwokatów i Radców Prawnych sp. p., Polska
p.gorna@gtlegal.pl
ORCID: 0000-0002-4995-6930

https://doi.org/10.26881/gsp.2025.4.15

Glosa

Przestępstwa przeciwko bezpieczeństwu w komunikacji – w tym przestępstwo z art. 178a k.k. – stanowią przedmiot znacznej części postępowań karnych prowadzonych aktualnie przez sądy w Polsce. Oprócz edukacji obywatelskiej jedną z metod mających przyczynić się do ograniczenia przestępczości drogowej jest stałe zaostrzanie przepisów karnych[3]. Prowadzone przez Prokuraturę Krajową statystyki potwierdzają, co prawda, spadek liczby aktów oskarżenia kierowanych do sądów, np. w związku z przestępstwem z art. 178a k.k.[4], niemniej jednak przestępstwa te nadal pozostają

[1] LEX nr 3825136.

[2] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (tekst jedn.: Dz. U. z 2025 r., poz. 383 ze zm.; dalej: k.k.).

[3] K. Wala, P. Poniatowski, M. Kulik, M. Mozgawa, *Rozdział XXI k.k. – Przestępstwa przeciwko bezpieczeństwu w komunikacji* [w:] *Aktualne problemy i perspektywy prawa karnego*, red. M. Mozgawa, P. Poniatowski, K. Wala, Warszawa 2022, s. 311–312.

[4] Pełny zapis przebiegu posiedzenia Komisji Administracji i Spraw Wewnętrznych z dnia 5 grudnia 2024 r. (nr 37), s. 5.

istotnym problemem społecznym – tylko w 2024 r. do sądów trafiło blisko 8144 aktów oskarżenia w sprawach dotyczących prowadzenia pojazdu mechanicznego w stanie nietrzeźwości. Przestępstwa te stanowią także źródło poważnych problemów prawnych[5].

Wyrok Sądu Najwyższego (dalej: SN) z dnia 6 lutego 2025 r. (I KK 496/24) porusza jeden z najczęściej występujących dylematów w postępowaniach o czyn z art. 178a k.k., tj. kwestię interpretacji pojęcia „ruch lądowy". Jeżeli bowiem przestępstwo z art. 178a k.k. popełnia ten, kto, znajdując się w stanie nietrzeźwości lub pod wpływem środka odurzającego, prowadzi pojazd mechaniczny w ruchu lądowym, trzeba odpowiedzieć na pytanie, jak pojęcie ruchu lądowego należy interpretować. W dalszej kolejności rozważenia wymaga także kwestia prawnokarnej oceny zachowania sprawcy, który podjął nieudolną próbę przemieszczenia z prywatnej posesji na obszar, w którym odbywa się ruch lądowy.

Sąd Rejonowy w Zielonej Górze wyrokiem z dnia 15 listopada 2022 r. (II K 311/21) uznał oskarżonego winnego tego, iż znajdując się w stanie nietrzeźwości, prowadził on pojazd mechaniczny, a tym samym w ocenie sądu I instancji dopuścił się przestępstwa z art. 178a k.k. Sąd I instancji ustalił przy tym, że ruch pojazdu odbywał się wyłącznie na prywatnej posesji. Oskarżony, co prawda, usiłował opuścić podwórko, jednak ostatecznie pozostał na terenie posesji po tym, jak kierowany przez niego pojazd uderzył w ogrodzenie. Oskarżonemu wymierzono karę 8 miesięcy pozbawienia wolności, której wykonanie zostało przez Sąd zawieszone na okres próby wynoszący 3 lata. Ponadto Sąd orzekł od oskarżonego na rzecz Funduszu Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej świadczenie pieniężne w wysokości 5000 zł i zakaz prowadzenia wszelkich pojazdów mechanicznych w ruchu lądowym na okres 3 lat.

Orzeczenie sądu I instancji zostało utrzymane w mocy wyrokiem Sądu Okręgowego (dalej: SO) w Zielonej Górze z dnia 26 lutego 2024 r. (VII Ka 91/23). W uzasadnieniu wyroku sąd II instancji uznał, że fakt prowadzenia przez oskarżonego pojazdu na prywatnej posesji pozostaje bez znaczenia dla oceny prawnej czynu popełnionego przez oskarżonego. Kasację od orzeczenia sądu II instancji wywiódł Rzecznik Praw Obywatelskich, wskazując, iż oskarżony, prowadząc pojazd na prywatnym podwórku, nie uczestniczył w ruchu lądowym, a tym samym nie może ponosić odpowiedzialności karnej, o której mowa w przepisie art. 178 a k.k.

Sąd Najwyższy uznał, że wyrok SO w Zielonej Górze został wydany z rażącym uchybieniem przepisów prawa procesowego. Sąd odwoławczy nie dokonał bowiem analizy sprawy pod kątem wystąpienia wszystkich znamion przestępstwa z art. 178a k.k., w szczególności zaś nie rozważył, czy miejsce, w którym oskarżony prowadził pojazd mechaniczny, spełniało przesłanki uznania go za „ruch lądowy" w rozumieniu tego przepisu. Pojęcie ruchu lądowego nie ma w polskim prawie definicji legalnej, należy jednak przyjąć, że ruch lądowy odbywać się będzie każdorazowo w miejscu dostępnym dla innych osób i w tym celu przez nich wykorzystywanym – niezależnie od tego, czy miejsce to będzie miało status drogi publicznej w rozumieniu ustawy z dnia

[5] *Ibidem*.

21 marca 1985 r. o drogach publicznych[6]. Sąd orzekający powinien zatem, dokonując oceny znamion strony przedmiotowej czynu z art. 178a k.k., każdorazowo ustalić, czy na gruncie konkretnej sprawy prowadzenie pojazdu przez sprawcę rzeczywiście odbywało się w ruchu lądowym.

Sąd Najwyższy wielokrotnie wypowiadał się na temat prawidłowej wykładni pojęcia ruchu lądowego. Jednym z pierwszych judykatów w tej materii była uchwała Sądu Najwyższego z dnia 14 września 1972 r. (VI KZP 33/72), w której SN wyraził pogląd, że przestępstwo drogowe może być popełnione wyłącznie na drogach publicznych, dojazdach do tych dróg, jak i w innych miejscach o statusie zrównanym z drogami publicznymi[7]. Swoista korekta tego stanowiska nastąpiła w 1975 r., kiedy to Sąd Najwyższy przyjął, iż przestępstwo drogowe może zostać popełnione także w miejscach niemających charakteru dróg publicznych, jeżeli rzeczywiście odbywa się w nich ruch pojazdów[8].

Powyższy pogląd ewaluował następnie na przestrzeni lat. W orzeczeniu z dnia 2 marca 2012 r. (V KK 358/11) Sąd Najwyższy stwierdził, iż „Dekodując pojęcie ruchu lądowego użyte w dyspozycji art. 178a § 1 k.k., należy odwołać się do art. 1 ust. 1 i 2 ustawy z dnia 20 czerwca 1997 r. – Prawo o ruchu drogowym, Dz. U. z 2005 r. Nr 108, poz. 908 ze zm., która reguluje zasady ruchu na drogach publicznych, w strefach zamieszkania oraz w strefach ruchu. Nadto przepisy tej ustawy stosuje się do ruchu odbywającego się poza wskazanymi miejscami w zakresie koniecznym dla uniknięcia zagrożenia bezpieczeństwa osób oraz wynikającym ze znaków i sygnałów drogowych. Wszystkie wskazane w ustawie obszary, w których może odbywać się ruch lądowy, mają charakterystyczne cechy wspólne, a mianowicie muszą być ogólnodostępne i wykorzystywane przez nieograniczoną liczbę osób”[9]. Sąd Najwyższy rozszerzył zatem obszary, na których możliwy jest „ruch lądowy”. Jednocześnie w sposób jednoznaczny wykluczył z powyższego zbioru miejsca, w których do ruchu dopuszcza się jedynie wąskie, ograniczone grono osób, tj. m.in. grunty rolne, posesje prywatne, podwórka. Podobne stanowisko SN prezentował w późniejszym czasie wielokrotnie, chociażby w postanowieniu z dnia 28 marca 2017 r. (III KK 472/16, LEX nr 2271447) czy w wyrokach z dnia: 29 stycznia 2016 r. (IV KK 324/15, LEX nr 1977832) i 15 grudnia 2011 r. (II KK 184/11, LEX nr 2271447)[10].

Ogół powyższych okoliczności implikuje wniosek o tym, że dla przypisania odpowiedzialności z art. 178a k.k. nie wystarczy sam fakt ustalenia, iż sprawca prowadził pojazd w stanie nietrzeźwości. Konieczne jest także ustalenie miejsca, w którym pojazd ten był prowadzony. Nie w każdych warunkach bowiem prowadzenie pojazdu

---

[6] Ustawa z dnia 21 marca 1985 r. o drogach publicznych (tekst jedn.: Dz. U. z 2025 r., poz. 889 ze zm.).

[7] Uchwała SN z dnia 14 września1972 r., VI KZP 33/72, OSNKW 1972, nr 12, poz. 187.

[8] Uchwała SN z dnia 28 lutego 1975 r., V KZP 2/74, OSNKW 1975, nr 3–4, poz. 33.

[9] Wyrok SN z dnia 2 marca 2012 r., V KK 358/11, OSNKW 2012, nr 6, poz. 66.

[10] J. Musak, *Miejsce popełnienia przestępstwa w ruchu lądowym*, LEX/el. 2020, https://sip-1lex-1pl-16bq3ldkq000b.hansolo.bg.ug.edu.pl/#/publication/419797297/musak-jolanta-miejsce-popelnienia-przestepstwa-w-ruchu-ladowym?cm=URELATIONS [dostęp: 30.03.2025].

w stanie nietrzeźwości stanowić będzie czyn karalny[11]. Sąd orzekający w ramach dokonywanych ustaleń faktycznych winien zatem określić charakter drogi (miejsca), na której miało dojść od popełnienia przestępstwa, następnie zaś, ilekroć będzie to miejsce inne niż droga publiczna, Sąd zobligowany jest ocenić dostępność tego miejsca dla osób trzecich oraz rzeczywiste możliwości poruszania się na tym obszarze pojazdów. Przenosząc powyższe na grunt niniejszej sprawy, należy uznać, że w sytuacji, gdy zdarzenie miało miejsce na terenie prywatnej posesji, konieczne jest zweryfikowanie, czy dopuszczony był tam ruch pojazdów, czy ten ruch pojazdów faktycznie występował oraz z jaką częstotliwością. Dopiero wtedy można uznać, że Sąd dokonał kompleksowych i wnikliwych ustaleń faktycznych, pozwalających na ocenę wystąpienia znamion czynu zabronionego.

Zatem pogląd wyrażony przez Sąd Najwyższy w glosowanym judykacie zasługuje na aprobatę. Wydaje się jednak, że stanowisko Sądu winno zostać wzbogacone także o rozważania w zakresie form stadialnych przestępstwa z art. 178a k.k. Faktem jest bowiem, iż o ile na gruncie omawianego stanu faktycznego oskarżony prowadził pojazd na prywatnej posesji, o tyle jednak zgromadzony w sprawie materiał dowodowy potwierdza, że usiłował on wyjechać na drogę publiczną – co nie nastąpiło wyłącznie z uwagi na zderzenie pojazdu prowadzonego przez oskarżonego z ogrodzeniem. Wydaje się, że niesłusznie powyższa kwestia pozostała poza rozważaniami Sądu Najwyższego.

W tym miejscu należy zasygnalizować, iż co prawda skarżący nie objął powyższej kwestii sformułowanymi zarzutami, niemniej jednak, stosownie do przepisu art. 455 kodeksu postępowania karnego[12], Sąd miał możliwość samodzielnego dokonania zmiany kwalifikacji prawnej czynu. Zmiana ta nie wymagała bowiem modyfikacji ustaleń faktycznych dokonanych przez sądy orzekające w sprawie.

Zgodnie z przepisem art. 536 k.p.k.: „Sąd Najwyższy rozpoznaje kasację w granicach zaskarżenia i podniesionych zarzutów, a w zakresie szerszym – tylko w wypadkach określonych w art. 435, 439 i 455". Stosownie zaś do przepisu art. 455 k.p.k., „Nie zmieniając ustaleń faktycznych, sąd odwoławczy poprawia błędną kwalifikację prawną niezależnie od granic zaskarżenia i podniesionych zarzutów. Poprawienie kwalifikacji prawnej na niekorzyść oskarżonego może nastąpić tylko wtedy, gdy wniesiono środek odwoławczy na jego niekorzyść".

Co się zaś tyczy oceny prawnokarnej zachowania oskarżonego, nie budzi wątpliwości, że winno ono zostać przez Sąd zakwalifikowane jako usiłowanie. Czyn z artykułu 178a k.k. stanowi przestępstwo formalne[13]. Jako początkowy moment usiłowania poczytuje się w takim wypadku rozpoczęcie ostatniej czynności koniecznej dla dokonania przestępstwa[14]. Na gruncie omawianego postępowania było to niewątpliwie

---

[11] J. Lachowski, *Art. 178a* [w:] *Kodeks karny. Komentarz*, red. V. Konarska-Wrzosek, wyd. 4, Warszawa 2023, s. 976.

[12] Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (tekst jedn.: Dz. U. z 2025 r., poz. 46 ze zm.; dalej: k.p.k.).

[13] J. Lachowski, *Art. 178a* [w:] *Kodeks karny. Komentarz*, red. V. Konarska-Wrzosek…, s. 976.

[14] B.J. Stefańska, *6.4. Usiłowanie udolne przestępstw formalnych* [w:] *eadem*, *Usiłowanie w polskim i hiszpańskim prawie karnym*, Warszawa 2021, s. 204.

uruchomienie przez oskarżonego silnika oraz wprawienie go w ruch z zamiarem wyjazdu na drogę publiczną. Powyższe stanowisko znajduje swoje potwierdzenie w literaturze: „Za możliwe trzeba […] uznać karalne usiłowanie z powołanego przepisu w sytuacjach, w których sprawca próbował przemieścić się pojazdem mechanicznym wprowadzonym w ruch w przestrzeń, w której odbywa się ruch lądowy, wodny lub powietrzny, ale ostatecznie, z przyczyn od siebie niezależnych, zamierzenia swojego nie zrealizował"[15].

Na gruncie niniejszego postępowania sam skarżący wskazał: „Kierujący samochodem marki B. usiłował wprawdzie wyjechać z tego podwórka na drogę publiczną, ostatecznie jednak do tego nie doszło, gdyż w czasie jazdy nie zapanował nad pojazdem i uderzył w ogrodzenie sąsiadującej posesji. Wezwano Policję, zaś P.K. zaprzestał dalszej jazdy, a tym samym nie wyjechał samochodem osobowym marki B. o nr rej. […] poza teren podwórka. Wynika to już z notatki urzędowej sporządzonej przez funkcjonariuszy Policji K.M. i Ł.B. przybyłych na miejsce zdarzenia w dniu 13 lutego 2021 r., którzy podali, cyt. »kierujący pojazdem usiłował wyjechać z posesji mieszczącej się przy ul. D. […] w Z., uderzył w ogrodzenie, oraz w budynek«"[16]. Wyżej opisane zachowanie oskarżonego należy zatem zakwalifikować jako usiłowanie popełnienia przestępstwa z art. 178a k.k. i w tym zakresie glosowane orzeczenie jawi się jako niepełne.

Wydaje się, że bogate orzecznictwo Sądu Najwyższego dotyczące czynu z art. 178a k.k., a także liczne opracowania i monografie poświęcone tej tematyce pozwolą wyeliminować albo przynajmniej zminimalizować problemy na etapie stosowania wyżej wskazanego przepisu przez sądy. Glosowane orzeczenie jest jednak potwierdzeniem, iż dla sądów powszechnych ocena znamion omawianego przestępstwa dalej bywa pewnym wyzwaniem w sytuacjach nieoczywistych, co nierzadko skutkuje koniecznością dokonania ponownej oceny zagadnienia przez Sąd Najwyższy.

Literatura

Lachowski J., *Art. 178a* [w:] *Kodeks karny. Komentarz*, red. V. Konarska-Wrzosek, wyd. 4, Warszawa 2023, s. 976.

Mozgawa M., Poniatowski P., Wala K., Kulik M., *Rozdział XXI k.k. – Przestępstwa przeciwko bezpieczeństwu w komunikacji* [w:] *Aktualne problemy i perspektywy prawa karnego*, red. M. Mozgawa, P. Poniatowski, K. Wala, Warszawa 2022, s. 311–312.

Musak J., *Miejsce popełnienia przestępstwa w ruchu lądowym*, LEX/el. 2020, https://sip-1lex-1pl-16bq3ldkq000b.hansolo.bg.ug.edu.pl/#/publication/419797297/musak-jolanta-miejsce-popelnienia-przestepstwa-w-ruchu-ladowym?cm=URELATIONS [dostęp: 30.03.2025].

Stefańska B.J., *6.4. Usiłowanie udolne przestępstw formalnych* [w:] *eadem*, *Usiłowanie w polskim i hiszpańskim prawie karnym*, Warszawa 2021, s. 204–206.

[15] P. Zakrzewski, *Art. 178a* [w:] *Kodeks karny. Komentarz*, red. J. Majewski, Warszawa 2024, https://sip-1lex-1pl-16bq3ldkq000b.hansolo.bg.ug.edu.pl/#/commentary/587966379/763819/majewski-jaroslaw-red-kodeks-karny-komentarz?cm=URELATIONS [dostęp: 30.03.2025].

[16] Wyrok SN z dnia 6 lutego 2025 r., I KK 496/24, LEX nr 3825136.

Zakrzewski P., *Art. 178a* [w:] *Kodeks karny. Komentarz*, red. J. Majewski, Warszawa 2024, https://sip-1lex-1pl-16bq3ldkq000b.hansolo.bg.ug.edu.pl/#/commentary/587966379/763819/majewski-jaroslaw-red-kodeks-karny-komentarz?cm=URELATIONS [dostęp: 30.03.2025].

Streszczenie

Paulina Górna-Lewińska

Prowadzenie pojazdu w stanie nietrzeźwości na prywatnej posesji a popełnienie przestępstwa z art. 178a k.k.

Glosowane orzeczenie dotyczy problemu interpretacji pojęcia „ruch lądowy" w kontekście przestępstwa z art. 178a kodeksu karnego. Autorka dokonuje przeglądu dotychczasowego orzecznictwa Sądu Najwyższego, poszukując wytycznych dla sądów orzekających w podobnych sprawach. W opracowaniu poruszony został także problem oceny prawnokarnej zachowania, polegającego na usiłowaniu wprowadzenia pojazdu w ruch lądowy poprzez jego prowadzenie na prywatnej posesji z zamiarem przemieszczenia w przestrzeń, na której odbywa się ruch lądowy.

Słowa kluczowe: droga publiczna, prowadzenie pojazdu w stanie nietrzeźwości, ruch lądowy, usiłowanie przestępstwa.

Summary

Paulina Górna-Lewińska

Driving a Vehicle While Intoxicated on Private Property and Committing an Offence under Article 178a of the Criminal Code

The judgment commented on concerns the issue of interpreting the concept of "road traffic" in the context of an offence under Article 178a of the Criminal Code. The author reviews the existing case law of the Supreme Court, seeking guidelines for courts adjudicating in similar cases. The article also addresses the issue of the criminal law assessment of conduct involving an attempt to enter road traffic by driving a vehicle on private property with the intention of moving into an area where there is such road traffic.

Keywords: public road, driving a vehicle while intoxicated, road traffic, attempted offence.