



ARCHIWUM KRYMINOLOGII

Archives of Criminology

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Criminal justice in an age of populism: Introduction to the special issue

Karanie w czasach populizmu. Wprowadzenie do Numeru Specjalnego

Abstract: The rise of populism, as a by-product of neoliberal policies in Western democratic societies, became a hallmark feature of the supposed end-of-history era and post-cold-war order. Surprisingly, that shift was also evidenced in post-communist “new” democracies in Central and Eastern Europe. The field of criminal justice became one of the core areas of populist discourse. Penal populism indeed became a way to address concerns and fears that emerged in other realms. A Free-Market economy, immigration, the decline of the welfare state opened up huge social divisions and in the form of previously undreamt of levels of wealth for some, nothing but uncertainty and insecurity amidst poverty and crime fears for many more. Mass immigration from poorer regions challenged our cultural identity for both individuals and the nation state itself, which notion had been put at risk. Local contingencies also play an important role in this, of course. In some societies, versions of Christian values have joined populist forces in targeting women’s rights or those of the LGBT community. Penal populism has reshaped how it was possible to think about criminal justice. This includes the abandonment of previous restraints on imprisonment in both old and new democracies. Nevertheless, the liberal democratic model of criminal justice may also have two unlikely saviours of its own. One of these may be the COVID virus itself. The successful antidote to this involves trust in scientific knowledge. The successful antidote to COVID involves trust in scientific knowledge and expertise; high levels of trust in a strong central government, greater trust in public broadcasting organisations, and much stronger, social cohesion rather than the divisions that populism thrives on. The second unlikely saviour may be Vladimir Putin. With his war against the Ukraine state and its people, we also see what might be next in the route that populism is following: a form of autocracy;

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denial of free speech and all liberal values, killings of political opponents and the total defenseless and helplessness of individuals in front of the state apparatus of power.

Keywords: populism, penal populism, immigration, criminal justice, COVID-19, Putin

Abstrakt: Pojawienie się populizmu jako efektu ubocznego neoliberalnych polityk w zachodnich demokracjach, stało się cechą charakterystyczną epoki „końca historii” post-zimnowojennego porządku świata. Co ciekawe, ta zmiana nie ominęła „nowych” demokracji krajów postkomunistycznych i Środkowo-Wschodniej Europy. Karanie i prawo karne stały się głównym polem populistycznych polityk, a populizm penalny koił lęki i niepokoje powstałe w innych sferach życia społecznego. Gospodarka wolnorynkowa, imigracja, zanik państwa opiekuńczego pogłębiły podziały i nierówności społeczne, które podkopały bezpieczeństwo ekonomiczne jednych i pogłębiły biedę i niepewność u innych. Masowa imigracja z biedniejszych krajów podważyła tożsamość kulturową naszych społeczeństw. W każdym kraju lokalne czynniki odgrywają dodatkową rolę, na przykład w niektórych społeczeństwach populisci odwołują się do ochrony wartości chrześcijańskich w celu ograniczenia praw kobiet lub osób LGBT. Populizm penalny przeformułował myślenie o karaniu i wymiarze sprawiedliwości karnej, w tym pojmowanie kary pozbawienia wolności. Jednakże w ostatnich latach w demokracjach liberalnych pojawiły się jaskółki zmian. Z jednej strony pojawił się koronawirus. Skuteczne antidotum na Covid-19 opiera się na zaufaniu do wiedzy naukowej, wysokim stopniu zaufania do władzy publicznej, do mediów głównego nurtu oraz większej integracji społecznej niż oferuje to populizm. Drugim mniej oczywistym antidotum może okazać się Władimir Putin oraz wojna na Ukrainie. Pozwalają one dostrzec zachodnim społeczeństwom, do czego populizm może prowadzić: autokracji, odebraniu nam wolności słowa i zanegowaniu wszystkich liberalnych wartości, mordowaniu politycznych przeciwników oraz zupełnej bezradności obywatela wobec władzy.

Słowa kluczowe: populizm, populizm penalny, imigracja, karanie, COVID-19, Putin

“What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the endpoint of mankind’s ideological evaluation and the universalization of Western liberal democracy as the final form of human government.” So wrote the American political scientist Francis Fukuyama (1989: 4), with the fall of the Berlin wall imminent. Here, it seemed, was the final act in the drawn out legacy of the victory of the Allies over the Axis powers in 1945. Their demagogic, murderous leaders, it appeared, had been consigned to the dustbin of history, with a liberal, democratic order firmly in place, initially in the West, but after the fall of the Berlin wall, in Central and Eastern Europe as well. And beyond this region: around this time, the infamous dictatorships in Brazil (1985), and Chile (1990) also collapsed beneath the weight of the incompetence of their leaders and the repression of their peoples.

In contrast to totalitarianism, the democratic order of the West promised free and fair elections, a free press, an independent judiciary and civil service. And above all, perhaps, it governs through the rule of law. In democratic society, the criminal justice system could not be used to make individuals simply “disappear”, or to subject them to torture, or die in concentration camps or labour camps, as

a consequence of the excesses of the state's power to punish and control. Instead, there was a strong emphasis on protecting the rights of individuals from state excesses, a further response to the way in which criminal law had been used in Nazi Germany to legitimize the prosecution of its enemies. In effect, there was a reassertion of the values of classical criminology (as these influenced the 1948 UN Declaration of Human Rights). Accordingly, there should be no punishment unless a crime had been committed; and it should then be finite, fixed and certain. On this basis, the US sexual psychopath laws were declared unconstitutional in 1956 and status offences largely abolished. More generally, indeterminate sentences were almost completely phased out in these societies by the 1970s (Bottoms 1977), given that their justification was for crimes that *might be* committed in the future, rather than a retributory response to crimes already committed. Many of the reforms of this era were the product of expert knowledge and influence brought to bear on policy development. As regards the US for example, a Harvard law professor became the executive Director of the 1966 President's Crime Commission and "the Model Penal Code [1962] effort of the American Law Institute brought the best and brightest in academic law into the process of substantive criminal law reform" (Zimring 1996: 253).

Yet Fukuyama's projections for a happy future, amidst the sweeping triumph of the democratic order, have been disturbed and set back in both old and new democracies: all around Europe – and beyond – we find the rise of populist political parties challenging and undermining the fundamental principles of the democratic order: from Swedish Democrats in the North to the Italian Five Star Movement in the South; from the Conservative government in the UK led by Boris Johnson in the West to Fidesz, led by Viktor Orban in Hungary in the East. We can then add others to this mix, such as the Republican Party in the US, with possibilities of a further Trump administration from 2024, and the presidency of Jair Bolsonaro in Brazil.

That said, it is important to understand what it is that we mean by this term "populism", as Russell Hogg discusses in his contribution, *Rethinking populism and its threats and possibilities*: rather than simply denouncing it as a kind of aberration, we need to see how it emerges in its current form. While populism itself is not necessarily aligned to the political right, the contemporary resurgence of populism has become an overwhelming characteristic of right-wing politics with very few exceptions to this (such as Syriza in Greece and Podemos in Spain). What seems to have been of central importance in this resurgence is the democratic order's embrace of the neo-liberal mode of governance. The importance this gave to the free market, as the determinant of economic policy, the reduction of welfare in favour of lower rates of direct taxation, opening up huge social divisions in the form of previously undreamt of levels of wealth for some, nothing but uncertainty and insecurity amidst poverty and crime fears for many more; and the free movement of labour, under EU rules especially, usually from East to West and South to North (which coincided with a growing number of refugees, asylum

seekers or undocumented immigrants from wars in the Balkans, then the Middle East, then the Horn of Africa, as well as those trying to escape the consequences of climate change). In these ways, it seemed that both the economic well-being and cultural identity for both individuals and the nation state itself had been put at risk. Hence, the way that has helped to direct the contemporary course of most populist politics, with the criminal justice process being reshaped by it, is to try to address such concerns, notably in the form of *penal populism*.

Local contingencies also play an important role in this, of course. In some societies, versions of Christian values have joined populist forces in targeting women's rights or those of the LGBT community (Hochschild 2019). As regards Poland, for example, it is argued by Olga Sitarz in the volume (*Protection of Christian values – penal populism or a rational decision on criminalization*), that it is important to understand the place of the Catholic church in the populist dynamics in this country; and Dagmara Wozniakowska-Fajst and Katarzyna Witkowska-Rozpara illustrate its roots in neo-classical criminology, to which have been added new regulations against COVID-19. More generally, those who now find themselves left behind, working in sunset industries such as coal mining, or whose expectations have been reduced by the prospects of reduced employment opportunities, or otherwise see themselves threatened by the emancipation of previously suppressed groups (ethnic minorities, women, the LGBT community) have a decreasing commitment to a democratic order that offers so little to them. For them, their everyday anxieties, failed aspirations and broken dreams seem oblivious to the Establishment elites who hold political power and who seem to prosper at their expense. Accordingly, a promise running through all manifestations of populism is a return to order instead of chaos and uncertainty, as Katalin Gonczol shows in her analysis here, 'Let there be order!': *Rising criminal populism in Hungary*.

But in populist discourse, bringing back order necessitates that a "strong man" saviour takes the helm of the ship of state (with very few exceptions, such as Marine LePen in France, such leaders are, indeed, all men), projecting, in their carefully crafted manliness, the strength of character that is needed to take on and vanquish Establishment elites (or "the deep state", to use a Trumpian phrase) and supra-national organizations. This is the way, they say, to restore national identity and sovereignty. Their promises of a return to the order and certainty that this will then bring are frequently accompanied with great displays of pageantry: they surround themselves with national flags, order military parades, celebrate their victories (2022 has thus been set down for a "Festival of Brexit" in the UK), use phrases such as "world beating" or "world leading". Whether this is to do with, as in Johnson's Britain, administering the COVID-19 vaccine or hosting Ukrainian refugees, the reality is almost exactly the opposite. Pageantry is important not only in promoting a resurgent nation state but also in identifying the presence of the strong man leader / saviour with this possibility.

In so doing, this has meant, to varying degrees, breaking free from the norms, conventions, values and rules that had previously ordered democratic society. Po-

pulist leaders are thus likely to proclaim themselves as “anti-politics” politicians, the more they can distance themselves from the political Establishment, the more this establishes their credentials with their supporters and, in this respect, a lack of political experience, or even a lack of any form of public service is seen as one of their strengths, evidence of their commitment to “drain the swamp” of governments from corruption and inefficiency. They are also anti-expert, government bureaucracies are simply representatives of the deep state and, anyway, the strong man saviour always knows best. Similarly, they are anti-science, believing in their own “natural ability” rather than specialist knowledge. And they distrust the media (but not social media), largely because it exposes their lies and outlandish claims to public scrutiny. In populist discourse, journalists are merely purveyors of “fake news.”

At the same time, there was a strong sense of victimhood running through populist discourse: most obviously in relation to crime victims; or potential crime victims which the liberal Establishment appeared to have done nothing to address. But then, as the world seemed to be ever more uncertain and insecure (the 2008 global, fiscal crisis coincided with rising immigration), those who threatened the well-being of ordinary citizens diversified and increased. It began to include those who seem unacceptably different in some way or other: sex offenders, for example, as with the UK article here by Ian Mahoney et al., *Populist and vindictive constructions of sexual offending, pluralities of violence, and the implications for criminal and social justice*; or ex-prisoners in Romania, as Gabriel Oancea and Silvia Neculcea demonstrate in *Compensatory remedy against criminal populism*; or young offenders in Chile as Daniela Rodriguez Gutierrez writes in *Elite punitive populism and youth justice reform in Chile: Legitimizing a new political order*. Or such enemies might simply be immigrants (their regular or irregular status does not seem to matter to those who feel aggrieved and left behind by government policies and for whom immigration has become an unwanted and undesirable burden); and those members of the Establishment who stand in the way of the strong man’s programme to restore national greatness in some way or other, judges, journalists and civil servants all become “enemies of the people”; and in Central and Eastern European societies especially, these enemies include EU elites who, as the story goes, have stripped away the sense of certainty and security that was known in these societies before the fall of the Berlin wall and the dangerous embrace of Western values and freedoms (Vermeersch 2019).

The consequence of such attacks on the democratic order has been that the criminal justice system has also been moving beyond the boundaries previously set for it in democratic society: adherence to the principles of the rule of law have become too narrow and restricting if enemies are to be defeated and if the conspiratorial threats of the deep state are to be curtailed. There are many illustrations of the way in which this *penal populism*, particularly strong in the Anglo-American world and feeding on “expressions of anger, disenchantment and disillusionment with the criminal justice establishment” (Pratt 2007: 12) because of its failure

to protect ordinary people from victimization. At the same time, this form of populism, with its use of social media platforms, as discussed by both Michalina Szafrńska in Poland (*[Penal] populism and experts in the age of digital crown wisdom*) and by Leandro Ayres Franca and Carlos Ferreira de Abreu in relation to Brazil (*Algorithm-driven populism: An introduction*) has further undermined the ability of criminal justice elites to maintain their previous monopoly of knowledge and information on such matters.

Instead, penal populism has reshaped how it was possible to think about criminal justice. This includes the abandonment of previous restraints on imprisonment in both old and new democracies. Rather than being seen as a source of shame in democratic society, the New Zealand Justice Minister, for example, described rises in imprisonment in his country as an indication of the success of government policy (see Pratt 2007). In addition, however, concerns about crime risks, as well as crime that has been committed, have both swollen prison populations (because it has become more difficult to get bail or parole when the risk of future crime is taken into account) at one end of the criminal justice spectrum, has been accompanied at the other by a range of penal controls (as in the British anti-social behaviour legislation, for example) that restrict the presence or movement of the homeless and others who spend much of their time in public spaces, seemingly threatening the well-being of those who have to pass by them on a regular basis. While homelessness, begging etc. are not, by their nature, crimes, civil law injunctions, backed up by criminal law penalties (including prison) can be imposed on those behaving in such ways (Pratt 2020). Similarly, sexual risk orders can be imposed in England and Wales on those thought at risk of committing sex crimes, prohibiting them, for example, from going near school playgrounds and so on.

Many of these initiatives have been put in place by means of retrospective or hybrid legislation, again, previously thought to have no legitimate place in democratic society. American jurist, Lon Fuller (1964), described retrospective legislation as a “monstrosity”, objectionable both in terms of its morality and efficacy. And for Professor Anthony Duff (2010: 93), hybrid legislation is “a subversion of criminal law ... using a non-criminal procedure and supposedly non-penal restrictions to deal with conduct that, if it does constitute a public wrong, should instead be dealt with through the criminal law; and a perversion of criminal law, in that they impose criminal conviction and punishment on those who break the supposedly non-criminal orders that are imposed.” And, Sir Leon Radzinowicz (1991: 430), with great foresight, warned of the displacement of the “socio-liberal” model of criminal justice by an “authoritarian” model encouraging imprecise definitions for many crimes, the absence of strictly enforced rules of evidence inspired by the presumption of innocence, with the enforcement of criminal justice likely to be exercised not only by the courts but through administrative and police agencies.

Nonetheless, under the influence of populism, such initiatives no longer seem to trouble politicians and judges (see Pratt 2020). When he was British Prime Minister, Tony Blair acknowledged that his government’s anti-social behaviour

legislation disturbed “the normal legal process [but] if the practical effect of the law is that people live in fear because the offender is unafraid of the legal process then, in the name of civil liberties, we are allowing the vulnerable, the decent, the people who show respect and expect it back, to have their essential liberties trampled on.” As this example illustrates, populism has been able to reshape the framework of criminal justice in supposedly liberal democratic societies. In essence, rather than protecting individual rights from excessive use of the state’s power to punish, its purpose has been redefined to be one of protecting the public from those individuals who put them at risk by excessive use of the state’s power to punish as necessary.

So, does this then mean that this new phase of criminal justice, suited to the demands and expectations of populism, and leaving the previous model of justice with its emphasis on individual rights and clear limits and restrictions on state power only as some kind of historical monument, is irreversible? This does not seem to be the case. As Luke Oldfield et al argue here (*Adventures in populist discourse: Could a solution to penal populism in New Zealand be hiding in plain sight?*), what is needed are a set of arguments against the direction of populism that can also speak directly to public concerns without falling back on reasserting that criminal justice policy should be the exclusive property of elitist experts.

At the same time, though, the liberal democratic model of criminal justice may also have two unlikely saviours of its own. As John Pratt and Daisy Lutyens show here (*The pandemic as an antidote to populism: Punishment, immobilization and COVID-19*), one of these may be the virus itself. Notwithstanding the new regulations on personal freedoms it necessitated from governments, it is evident that the successful antidote to COVID involves trust in scientific knowledge and expertise (such as the development of vaccines and predictive models that show its rise and fall); high levels of trust in a strong central government acting in conjunction with its own bureaucratic in relation to distributing the vaccine and providing accurate public information; and greater trust in public broadcasting organizations to gain more knowledge of the virus rather than searching for this amidst all the conspiracy theories available on the internet; and much stronger social cohesion rather than the divisions that populism thrives on, amidst innumerable reports of volunteers helping citizens unable to do their own shopping, doctors and nurses coming out of retirement to assist and so on. All such matters are not only antidotes to COVID but also antidotes to populism. Indeed, it might be that the pandemic has had the effect of decoupling risk from crime and placing it in the public health arena, making populist appeals to law and order much less effective than has previously been the case. In this respect, Donald Trump has been COVID’s “biggest loser”, in the political sense, notwithstanding his attempt to present himself as the law and order candidate in the US presidential election in 2020, with the pandemic enlarging his faults “so they became too frightening to miss, regularly contradicting and undermining” the response of his own government (Freedland 2020). Meanwhile, elections and opinion polls during the time of the

pandemic illustrate, for the most part, a strong shift away from populism. This is not a hard and fast rule, of course. There have been some significant exceptions to it, notably the 2022 general election in Hungary, which saw President Orbán returned to power. Nonetheless, the more general pattern appears to be one of scepticism and distrust of populist saviours, who variously try to deny the reality of the virus, or, discrediting their own scientific experts, put forward their own “snake oil” cures (“have you tried injecting yourself with disinfectant?”, as Donald Trump once famously asked); but growing trust in those politicians who conform to democratic values and expectations and tell their public the truth about the virus, whether this takes the form of good or bad news.

Meanwhile, the second unlikely saviour may be Vladimir Putin. With his war against the Ukraine state and its people, we also see what might be next in the route that populism is following: a form of autocracy; rigorous state control of the media; denial of free speech; “disappearances”; the dreaded knock on the door by visitors from the state security services; and the overt politicization of criminal justice to silence critics and opponents. The strength of feeling across much of the world against what Putin has done in Ukraine may have the consequences of restoring faith in democracy, the rule of law, international cooperation and supra-national organizations, such as NATO, the EU and the International Criminal Court in providing unity, cohesion and the protection of human rights, along with a much greater willingness to accept Ukrainian refugees, even amongst those societies that had been most resolutely opposed to opening their borders for fear of weakening national purity. All this, no doubt, is exactly the opposite of what Putin expected to achieve; it is also the starkest reminder of the value of democratic order and the inherent menace of populism to it.

Declaration of Conflict Interests

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The authors received no specific funding for this work.

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