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# In search of the future of penology: Can we escape the fatalistic vision of criminal law?

## Przyszłość penologii. Czy możliwa jest ucieczka od fatalizmu prawa karnego?

**Abstract:** Penology, like the criminal law to which it essentially refers, is seen as a science in crisis. This crisis is related to the unclear conceptual and problematic scope to which it is intended to refer. In this text, the author presents a proposal for the broadest deployment of penology and juxtaposes it with contrology, a science that also includes methods of influence and control over human behaviour other than criminal. The author notes that it is impossible to predict the development of penology without reference to three factors that determine the development of almost all modern fields of knowledge: technological progress, medicalisation and economisation. It seems a sad anachronism to think about punishment as the basic response to crime in future. Instead, we should be aiming to develop methods to help people avoid situations in which their behaviour must be corrected through suffering.

**Keywords:** penology, criminology, contrology, penal law, criminal law

**Abstrakt:** Penologia postrzegana jest, podobnie jak prawo karne, do którego się zasadniczo odnosi, jako nauka w kryzysie. Kryzys ten związany jest z niejasnym zakresem pojęciowo-problemowym, do którego ma się ona odnosić. Autor w niniejszym tekście prezentuje propozycję najszerszego rozumienia penologii i zestawia ją z kontrologią, nauką która obejmować ma również metody oddziaływania i kontroli ludzkich zachowań inne niż penalne. Autor zauważa, że predykcja rozwoju penologii nie jest możliwa bez odniesienia się do trzech czynników determinujących rozwój niemal wszystkich współczesnych dziedzin wiedzy. Chodzi o postęp technologiczny, medykalizację oraz ekonomizację. Wydaje się, że myślenie o karaniu i o karze jako podstawowej reakcji na przestępstwo w odniesieniu do przyszłości jest smutnym anachronizmem. Winniśmy zmierzać raczej do opracowania metod pomocy ludziom w unikaniu sytuacji, w których trzeba będzie korygować ich zachowania za pomocą cierpienia.

**Słowa kluczowe:** penolologia, kryminologia, kontrologia, prawo karne, polityka kryminalna

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## Introduction – basic research questions

The basic question I ask myself in this text is about the future of criminal law and penology. The specific questions I try to answer are as follows: (1) Which of the possible approaches to penology is the most appropriate? (2) Is the metaphor, often cited in the literature, of changes in criminal law – and consequently, in penology – being a pendulum (between retribution and resocialisation) accurate? and (3) If not, what factors give a chance to break with the pendular movement in the development of criminal law?

Attempts to describe criminal law cannot disregard the practice of its application. This is well known in the Anglosphere, in which the arguments are focussed on creating criminal law around specific cases (*R. v. Dudley and Stephens* 1884; *P. v. Kellog* 2004; Hoffmann, Stuntz 2021), on which theory is based and the institutions that constitute criminal responsibility are developed. It is no different in Europe, contrary to appearances, including in German law and doctrine, which is an inspiration for the Polish science of criminal law (Greco 2021). These are positive examples of the symbiosis of jurisprudence and doctrine influencing the development of criminal law. However, there is no shortage of negative illustrations of the influence of "practice" on criminal law and the shape of the system of criminal sanctions.

In Poland, changes in criminal law in the 21st century have predominantly not been inspired by subtle scientific analysis or the results of specific criminological studies, but rather the politically motivated consequences of dramatic events loudly reported in the media. One can mention, for example, the case of the so-called "monster from Siemiatycze" leading to changes in the regulation of security measures, the so-called "gambling scandal" resulting in changes in the criminal provisions of the "gambling act" and the Criminal Code (prohibition of entry to gambling casinos), the so-called "lex Trynkiewicz" (i.e. the introduction of a law on post-penal detention) and recent statements by politicians about the legitimacy of reinstating the death penalty resulting from the shocking murder case (Nie żyje 8-letni Kamil 2023). More examples can be found. Recently (as of the beginning of October 2023), an amendment came into force in Poland that radically tightened criminal sanctions – a comprehensive implementation of the populist announcements of the government (J.o.L. of 2022, item 2600).

In almost every contemporary piece of legislation we can find similar examples. They add up to a grim picture of criminal law changed by the influence of penal populism. The above-mentioned Polish cases differ fundamentally from the positively used cases taken from Anglo-Saxon and German law. Indeed, they have not become a contribution to critical reflection on the law, nor an inspiration for the creation of comprehensive theories (Widłak 2016). On the contrary: they have become an impetus for direct action and have punctuated changes in the law, often without the slightest concern for systemic coherence. The Polish examples are only an illustration of a broader phenomenon (Pratt, Miao 2019).

## 1. Context of penological research – the meaning of penal populism

When we talk about modern penology, it is therefore impossible to dissociate it from the phenomenon of penal populism. There is no room here for a broader discussion of penal populism itself, so it is necessary to refer to other publications on this point (Zalewski 2009; Widacki 2017). Instead, an earlier definition should be recalled. In my opinion, penal populism is a set of social beliefs, as well as political and legislative actions undertaken with programmatic limitation of the role of experts, co-shaped by the media, characterized by a strict attitude to crime, a lack of sympathy for its perpetrators and the instrumental use of crime victims (Zalewski 2009: 31).

For the present argument, it is important to state that penal populism as a complex sociopolitical/legal phenomenon forms an important framework for contemporary penological considerations. It is impossible to talk about punishment whilst overlooking this key phenomenon. An interesting paradox is drawn here. It is postulated to scientifically and rationally consider a method of lawmaking and application that is saturated with irrationality and current political practice. To put it somewhat metaphorically: Does the old saying that "all is fair in love and war" also work in the face of fighting crime? Do prohibitions and harsh sanctions bring the desired results?

Practice, so far, proves the opposite. By way of example, two huge political and criminal experiments – alcohol prohibition and drug prohibition in the 20th and 21st centuries – proved that regulating human behaviour with criminal sanctions can not only fail to combat certain undesirable (in the opinion of those in power) phenomena, but can even result in their multiplication, introducing a number of further negative side effects (Rosmarin, Eastwood 2012; Stuart, Buchanan, Ayres 2016), including the institutional collapse of entire countries and profound economic crisis. The best example is Mexico, which is considered a state in decline, partly as a result of the lost "war on drugs" (Grinberg 2019).

## 2. Definition and scope of basic concepts

Before proceeding further it is necessary to establish the meaning of the fundamental concept we are using. The concept of penology is sometimes understood inconsistently. From the beginning, authors differed in the scope that the term was to encompass. For Franz von Liszt, penology was the study of the concept of punishment, the reasons for its application and the differences between punishment and safeguards; for Quintiliano Saldana, likewise, penology was to be the science of punishment. However, Bartłomiej Wróblewski saw penology as a broad

synthesis of "punishment in the most general sense" and Philipp Allfeld even considered penology to be the science of fighting crime: *Verbrechenbekämpfungslehre* (Wróblewski 1926). Clearly, some people have framed the scope of the study of penology narrowly (punishments), and others broadly (all measures to combat crime). Penology is understood in different ways today as well (Utrat-Milecki 2022). Jarosław Utrat-Milecki presents an indirect position by linking the subject of penology with sanctions (not only penalties), but adjudicated only on the basis of criminal law. He points out that "penology deals primarily with the issue of criminal punishment and other crime prevention measures [adjudicated] on the basis of criminal law from the theoretical and practical side" (Utrat-Milecki 2022). I believe that it is necessary to opt for the broadest view. It seems that in modern times penology cannot be limited to the study of reaction measures described by legislators as "punishments" (Snacken, Van Zyl Smit 2017). Currently, criminal law involves a wide range of reaction measures. In addition to penalties, there are both post- and predelictual detention, compensatory measures and punitive measures. Legislators also establish administrative, civil and other sanctions. In all these cases, it is up to the legislature to decide what type of sanction to apply in a given case, in view of the negative social phenomenon in question (Bogusz, Zalewski 2021). It is not uncommon for fiscal considerations to decide, but more than the variously named fines come into play. Legislators decide in a non-penal mode to apply even isolation sanctions in the form of detention ordered by civil courts for those who pose a certain high degree of threat to the legal order (J.o.L, of 2022, item 1689). This is done in order to bypass constitutional, legal and international restrictions on criminal penalties, including the prohibition of double punishment (*ne bis in idem*) (Zalewski 2018b). I believe that the task of penology should be the study of areas bordering on criminal law, despite the fact that they formally fall outside the scope strictly defined by this branch of law. The broadest concept, which includes penology, would be c o n t r o l o g y, which is a broad concept encompassing the study and evaluation of the effectiveness of all methods of preventing and combating crime, starting with traditional punishment and ending with methods of restorative justice (Zalewski 2021).

To summarise this part of the argument: the consideration of the future of criminal law and penology should take into account not only penal populism, but also the above-mentioned phenomenon of "blurring the boundaries" and the mutual penetration of negative state reactions, in the face of acts prohibited by law. I use the term "acts prohibited by law" and not "crime" because of the actions of legislators in this field. It can happen that an act which was a crime is reclassified as an administrative tort, or vice versa; therefore, using the term "crime" to describe a specific sanctioned behaviour may be inadequate for a comprehensive examination of a particular case.

## 3. Overcoming fatalism – breaking the pendulum

For many authors analysing contemporary criminal punishment systems, the state of affairs in many countries appears pessimistic. There is no shortage of fatalistic visions of the future. Most appealing to the imagination is the comparison of penal and criminal policy in the 20th and 21st centuries to the movement of a pendulum (Stunz 2011). The fatalistic vision of penology as a reflection on criminal punishment is, as I assume for the purposes of this paper, a picture of this science intellectually closed and moving conceptually on a tight axis between harsh and lenient punishment, with no real impact on crime.

Of course, the mechanical, pendular movement of penal policy from one extreme to another (rehabilitation–retribution, mild–severe) – although a simplification – is not the only problem facing the modern justice system, even in countries with established democracies. In the USA, the problems noted in the study are the breakdown of the primacy of the rule of law, the dominance of discretion in adjudication and the ever-present racial discrimination (Stunz 2011). In Poland, we can add undermining the values of the constitutional tripartite division of power, attempts by those in power to influence adjudication, direct threats to judicial independence, courts overloaded with cases through inefficient administration and underfunding, restrictions on judicial discretion in adjudication through changes in the statutory basis for adjudication, including the directives for judicial assessment of punishment (Zalewski 2023b), etc.

However, the metaphor of the pendulum is common in popular, political and academic discussions of criminal justice and serves many useful purposes. Current events, changes in the law, changes in criminal policy, analyses of individual court decisions or selected crime statistics can be viewed against its background. The metaphor of the pendulum has some explicative value, but being a simplification, it does not reflect the complexity of the issues. Philip Goodman, Joshua Page and Michelle Phelps are right in advocating a more complex approach (Goodman, Page, Phelps 2017). These authors propose an "agonistic approach", that is, based on a vision of penal policy as permanent competition. In their view, the current criminal policy is the product of a constant dispute between proponents of implementing different ideas about the shape of criminal sanctions. The starting point of the agonistic approach is the seemingly accurate observation that in the modern era no single approach has been absolutely dominant in a given country. Even in the USA at the height of just deserts and mass incarceration policies at the turn of the 20th century, there was no shortage of examples of rehabilitation and therapeutic programmes (Cullen 2013; Lösel 2020). The authors accept the following axiom: the development of criminal law "is the product of a struggle between actors of different types and magnitudes of power" (Goodman, Page, Phelps 2017: 8).

In my opinion, even the broad vision of Goodman, Page and Phelps – though tempting – is incomplete, as it focusses mainly on sociopolitical struggles.

It seems that today's criminal law should take into account three further factors that affect, or will soon affect, the development of the sanctions that the state offers to combat negative social phenomena.

## 4. Factors determining the development and accuracy of predictions

First, consider *technological advances*, especially the development of artificial intelligence. Since modern technologies have such a large impact in so many areas, and will result – as some scholars prophesy (Babinet 2019) – in the end of the nation-state, traditionally understood sovereignty and perhaps *ius puniendi* as the exclusive prerogative of the ruler, the criminal justice system and punishment as such are also likely to be redefined, since they are closely linked to a certain perception of the state.

The justice system can and should be reinvented (Zalewski 2023a). However, shouldn't this mean a qualitative change, not just a quantitative one? Some authors assume that the technological revolution will basically be limited to an expanded catalogue of punishments, that new means of penal response will be introduced and applied to subjects, basically humans, but perhaps also androids(?) raised in the world of the Internet. Thus, new sanctions are postulated: deprivation of Internet access, banishment from social networks, digital exile and social media pillorying. For Kamil Mamak, the criminal response and punishment must continue to be a nuisance, and nuisance is invariably inherent in the essence of punishment (Mamak 2021). This *de lege lata* obvious view is not necessarily accurate *de lege ferenda*, namely in the technological world of the future. Accepting the obvious that in modern times, and universally, the essence of punishment is suffering, it is no longer necessarily the case that punishment is an indispensable response to crime, and certainly punishment is not the best or only remedy for illegal behaviour. The future will bring a change in the ways we influence people, including as early as the embryonic stage (Fukuyama 2004). We may be able to effectively change human behaviour pharmacologically by affecting neuronal structures (Beaver, Walsh 2011; Zalewski 2018b). I will return to this statement below.

China appears to be a leader in technological changes to the judiciary. The PRC has introduced and is implementing a plan to build a "smart court" (*Zhi Hui Fa Yuan*). As a result of the adopted assumptions for the plan, there is a gradual modernisation of the entire judicial system in the country through the use of various technological innovations. The smart court requires that court services be accessible and conducted online. Initially, many of the changes were aimed at serving litigants and their lawyers and ensuring the availability of information about verdicts. By 2015, three important developments had been introduced: China Judicial Process Information Online, China Judgments Online and China Judgments Enforcement

Information Online. Programmes using artificial intelligence technology are helping to maintain the uniformity of jurisprudence. An example used in Beijing County is the "Wise Judge" (*Rui Fa Guan*). No less important is the information system on pending enforcement (execution) proceedings, which has merged with the Chinese Social Credit Score System gaining efficiency. Data on "discredited" individuals (including names and corresponding identification numbers) can be used, for example, to preclude such individuals from certain activities, including buying property or traveling by air (Shi, Sourdin, Li 2021).

The introduction of modern technology into the criminal justice system in the UK is interesting. The Judicial Review and Courts Act, passed in 2022, referred to a number of research findings. The most important development in the area currently under discussion turned out to be the new procedure for automatic online conviction and standard statutory punishment (Automatic Online Conviction and Punishment for Certain Summary Offenses, AOCPCSO). In a nutshell: for certain non-custodial offences that are tried by summary trial, the new procedure will allow cases to be handled completely online and without a judge, but using artificial intelligence. The simplest acts are to be eligible for the procedure, and the Government's intention is to initially apply the provision to, for example, traveling on a train or tram without a ticket or fishing without a licence. Defendants must agree to this procedure and choose an automatic online conviction and the punishment specified for their offence (JRaCA 2022).

US courts most often use artificial intelligence systems to assess the likelihood of recidivism or absconding by those awaiting trial or by criminals in bail procedures, and to evaluate the possibility of parole. A study of 1.36 million pretrial detention cases found that a computer can predict whether a suspect will flee or reoffend better than a human judge (Kleinberg et al. 2018). Often, other programmes are used for similar purposes, totalling about 200; one well-known and frequently used programme is COMPAS (Brennan, Dieterich 2009).

Regardless of the highlighted advantages, the use of algorithms even as an enabling technology has, for the time being, raised numerous questions. In the USA, COMPAS has been accused of bias, and the way it predicts behaviour as the basis for applying probation measures is subject to errors due to racial bias (Angwin et al. 2016). In recent years, the doubts have multiplied. In 2020 Santa Cruz became one of the first cities in the United States to ban predictive policing based on artificial intelligence (Silverman 2023). It is assumed that AI will reach the human level around 2040 (Bock, Linner, Ikeda 2011).

This raises an important question: do we need AI courts? On the one hand, criminal punishment, understood as an ailment for a culpable act, makes sense for people, but not for things. On the other hand, it also seems that punishment makes the most sense when it is adjudicated by a human, not artificial intelligence. At this stage, it is imperative to preserve a certain degree of "human" autonomy of courts in decision-making. It seems necessary to base adjudication on the personal experience and human empathy of judges in reaching a verdict (Ofterdinger 2020).

Perhaps these considerations will prove pointless in view of the development of biochemical and neurological technologies for influencing and evaluating human behaviour. I now turn to the second factor, which I call the "medicalisation of punishment". Thomas Douglas and David Birks, in the introduction to an important book on the subject (Douglas, Birks 2018), pointed out that at the interface between neuroscience and criminal law there are lively debates about the extent to which neuroscientific discoveries can undermine the attribution of criminal responsibility, and whether and how neuroscientific evidence, such as brain CT scans, should be used in criminal trials. It is already possible in criminal cases to order the administration of brain-acting drugs as part of recidivism prevention programmes. A number of criminal justice systems provide for the administration of drugs that dampen sexual desire (Forsberg 2018), and methadone treatment is administered to offenders addicted to opioids, etc.

It is too early to draw firm conclusions about whether and when neuroscientific and broader medical findings will affect adjudication. However, it seems inevitable. A study by Annalise Perricone, Arielle Baskin-Sommers and Woo-kyoung Ahn (Perricone, Baskin-Sommers, Ahn 2022) of Yale University attempted to clarify how the impact of neuroscientific evidence on sentencing interacts with beliefs about the goals of the criminal justice system. The 784 participants of their study recommended sentences for defendants before and after reviewing neuroscientific evidence about the offender's condition. Those who accepted retribution as the main goal of imprisonment recommended significantly more lenient sentences. On the other hand, when the stated goal of imprisonment was protection of society or rehabilitation, the participants suggested longer sentences.

The discussion of the principle of not deteriorating the situation of an inmate in penitentiary isolation is interesting in this context. Since we have more and more effective possibilities to influence an offender's nervous system, endocrine system etc., the postulate of the so-called "right to hope" should be redefined (Dore-Horgan 2023). The convict should serve their sentence in conditions that will prevent physical and mental degradation – or even improve their state – so as to enable them to function independently when free. Of course, one must not lose sight of the potential and actual risks, including the unexplored side effects of the pharmaceuticals used (Zalewski 2014). It is worth noting that Scandinavian countries have long taken into account the health of prisoners, especially mental health, in the context of early release. This also applies to those sentenced to life imprisonment, who must commit to treatment conditions and other related treatment and support before release (Lahti 2021).

The last factor I would like to draw attention to in this text is the issue of the "economisation of criminal justice". By this term I mean the problem of the costs of the criminal justice system, which are increasingly taken into account. Of course, the financial aspect of the functioning of the judiciary has been under consideration for a long time. For instance, the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1975 recommended the encouragement

of cost-benefit thinking in criminal policy (Lahti 2017). In recent years, however, it has become increasingly important.

This measure is particularly characteristic of an era in which crime policy is measured more by the scale of budget expenditures than by the social effectiveness of the programmes being implemented, which is often not financially measurable. A good example is the UK's Payment by Results policy, which is a manifestation of cost containment. The Transforming Rehabilitation agenda involves funding only those services that produce measurable results. It has been pointed out that this approach implies the commercialisation of criminal justice policies and the reduction of funding for programmes that do not necessarily contribute to the rehabilitation of the wards. There has been a reluctance on the part of policymakers to use risk assessment and evidence-based policing more broadly, due to this type of backlash, in the form of reduced funding for meaningful programmes (Ugwudike, Raynor, Anniston 2018).

The cost of maintaining the justice system has been rising immeasurably in recent decades. The leader of the Western world remains the United States, spending nearly USD 300 billion a year to police and incarcerate 2.2 million people. If one includes the so-called social costs of imprisonment, including lost wages, adverse health effects and damage to the families of inmates, the cost rises significantly – this has been estimated at as much as triple the direct costs, or USD 1.2 trillion (O'Neill Hayes 2020). Crime has not decreased; on the contrary, in some areas it has even increased.

Poland also incurs significant costs in the area of justice. Poland's inmate population is among the largest in the European Union. The Ministry of Justice does not provide official figures on the cost of living per person, but estimates range from PLN 3150 (EUR 732) to as much as PLN 4930 (EUR 1146) per month. The total cost of living is about PLN 300 billion a year (ca. EUR 70 billion) (Wysocki, 2022). It should come as no surprise that the Ministry of Justice is trying to develop alternatives to imprisonment, including electronic monitoring, which is nearly six times cheaper (Cost Comparison, 2023). However, it is not an ideal solution.

## Summary

We have a chance to develop criminal law in a way that departs from the fatalistic, simplistic and intellectually poor vision of a pendulum moving from harsh to mild punishment, from retributivism to rehabilitation and back again. Instead of being harsh we should respond intelligently (smart on crime), and move from "tough on crime" towards "smart on crime".

The agonistic vision of the development of criminal law seems more accurate than the linear (pendular) vision, although it also seems necessary to take account of extra-legal factors such as technological development and the medicalisation

and economisation of criminal law. Perhaps we are at the threshold of a change that will force us to radically redefine our approach to crime, and thus to radically redefine penology.

Penology as a separate science cannot abstract from the study of sanctions of a repressive nature other than criminal law. It seems necessary to consider the need to broaden the field of research, and therefore the accuracy of the term used. I propose to use the term "contrology", since nowadays more than punishment (*poena*) is involved in the response to criminal acts.

It is unclear what the future holds for the latest technological developments. Artificial intelligence seemed to be the hope for crime control, but recent studies point to growing threats. The suspension of the use of some AI programmes in the USA due to faulty algorithms is very telling. The ongoing medicalisation of the criminal justice system is similarly cautionary. "The right to hope" cannot mean an obligation to take certain medications, especially those with unproven effects and many adverse side effects. And finally, the need to count every penny should prompt prudence in action. One cannot limit oneself to counting only the financial costs, but the social and emotional costs of actions are especially important.

In the long run, it seems that thinking about punishment as the primary response to crime in future is a sad anachronism, resulting from a lack of ability and/or imagination to go beyond today's patterns and the current reality. Rather, it seems that the world should aim to develop methods to help people avoid situations in which their behaviour must be corrected through suffering. Recovery from a conflict, which in most cases is a crime, cannot take place without the victim of the criminal act or without their participation.

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**Legal acts**

Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 7 lipca 2022 r. w sprawie ogłoszenia jednolitego tekstu ustawy o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób. Dz.U. z 2022 r., poz. 1689 [Announcement of the Speaker of the Sejm of the Republic of Poland of July 7, 2022 on the announcement of the unified text of the law on treatment of persons with mental disorders posing a threat to the life, health or sexual freedom of others. Journal of Laws of 2022, item 1689].

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