POLSKA AKADEMIA NAUK • INSTYTUT NAUK PRAWNYCH

ZAKŁAD KRYMINOLOGII

ARCHIWUM KRYMINOLOGII

Archives of Criminology

PL ISSN 0066-6890

DOI 10.7420/AK2023.20

2023 • 45(2) • 7–14

Joanna Beata Banach-Gutierrez, Tom Daems, Anthea Hucklesby ■ Jarosław Utrat-Milecki

Changing penologies and European crime policy. Theory and practice in the global context. Introduction

Zmieniające się penologie i europejska polityka karna. Teoria i praktyka w kontekście globalnym. Wprowadzenie

Abstract: This Special Issue deals with the significant questions about changing penologies and European crime policy. The discussed topics cover the general picture, trends and aim of today's European penology. The focus is paid on the effectiveness of crime policy, its role in contemporary penology and fundamental values which are closely linked with human rights orientated approach. The issue of punishment and prison standards are also presented in the context of International and European standards. Furthermore, Scandinavian approach to crime policy is widely illustrated, especially based on the Finnish and Norwegian studies.

Keywords: contemporary penology, European crime policy, punishment, international prison standards, Scandinavian crime policies

Abstrakt: W tym numerze specjalnym poruszane są istotne kwestie dotyczące zmieniających się penologii i europejskiej polityki karnej. Tematyka obejmuje ogólny obraz, kierunki i cele współczesnej penologii europejskiej. Nacisk położony jest na skuteczność polityki karnej, jej rolę we współczesnej

Dr hab. Joanna Beata Banach-Gutierrez, prof. UWM, University of Warmia and Mazury in Olsztyn, Poland, joanna.banach-gutierrez@uwm.edu.pl, ORCID: 0000-0002-9705-7665
Prof. Tom Daems, KU Leuven, Leuven Institute of Criminology (LINC), Belgium, tom.daems@kuleuven.be, ORCID: 0000-0002-7927-843X
Prof. Anthea Hucklesby, University of Birmingham, United Kingdom, A.Hucklesby@bham.ac.uk, ORCID: 0000-0001-6366-0442
Dr hab. Jarosław Utrat-Milecki, prof. UW, University of Warsaw, European Centre forPenological Studies, Poland, j.utrat-milecki@uw.edu.pl, ORCID: 0000-0002-2868-426X

penologii oraz podstawowe wartości, które są ściśle powiązane z podejściem zorientowanym na prawa człowieka. Zagadnienie kar i standardów więziennych ukazane jest także w kontekście standardów międzynarodowych i europejskich. Ponadto, szeroko zilustrowane jest skandynawskie podejście do polityki karnej, zwłaszcza w oparciu o badania fińskie i norweskie.

Słowa kluczowe: współczesna penologia, europejska polityka karna, kara, międzynarodowe standardy więzienne, skandynawskie polityki karne

This Special Issue of Archives of Criminology was inspired by the discussions and presentations during the international conference hosted by the University of Warsaw (21–22 October 2022). The topics it presents deal with the questions about changing penologies and European crime policy. They appear to be of significance, considering the current tendencies observed at the global, European and national levels.

The general framework of contemporary penological debate and its importance is discussed by Tom Daems. We can quote his conclusions from the first article in this Special Issue:

> A penology for today's Europe should have at least two objectives. On the one hand, there is a need to document and describe, to understand and to analyse what is happening (or not happening) with punishment in Europe, with comparative attention for how European developments relate to developments elsewhere in the world. But on the other hand, such a penology should also make its hands dirty; it should engage and intervene in the key debates of today's Europe. After all, … our European institutions are under attack and face important challenges. A penology for today's Europe therefore seems – more than ever – necessary.

Furthermore, the need for a platform to exchange multidisciplinary ideas and research related to crime policy has been clearly highlighted in contemporary 21st-century penology (see e.g. Daems, van Zyl Smit, Snacken 2013). Indeed, the conference which was organised under the auspices of the University Rector on 21–22 October 2022, on the occasions of the 15th anniversary of the European Centre for Penological Studies and the 50th anniversary of the Institute of Social Prevention and Resocialisation of the University of Warsaw, became one such platform for exchanging views. Likewise, the European Centre for Penological Studies at the University of Warsaw was established in 2007–2008 to stimulate interdisciplinary discussions on penological issues and research on the effectiveness of principled policy embodied in the values articulated in European law.

When talking about a penology for Europe, questions naturally arise about the effectiveness of crime policy, fundamental values and the role of crime policy in the legitimation of political order. One may also add that the European dimension of punishment clearly relates to key ideas such as principled human-rights-orientated crime policies and the need to develop an area of justice, security and freedom.

Undoubtedly, the question of values which should offer guidelines for, and set limits to, crime policy emerges in different contexts. The multidimensional aspects of European crime policy standards are analysed by Joanna B. Banach Gutierrez in this issue. In her article, she examines different elements of punishment and crime policy based on EU legislation and the jurisprudence of European courts. She concludes that the effectiveness of punishment should refer to detailed research and should respect the principled human rights approach. The role of modern penology is to reconcile these aspects of punishment in crime policy.

Furthermore, Elżbieta Hryniewicz-Lach uses the example of confiscation to illustrate the importance of clearly defining the limits of crime policy and penology. She demonstrates that certain reactions to harmful behaviours which are not defined as criminal should not be justified as a form of punishment, despite their potential role in crime prevention (confiscation in case of non-conviction). She argues that if these interventions are deemed necessary, they should be justified and rationalised on grounds beyond modern penology. From this perspective, it is especially important to avoid generalisations and to examine interventions which may not be labelled as punishment, but which impact human rights. The limits of criminal law (Husak 2009) and the inflation of criminal law, both in terms of excessive criminalisation and the use of penal law in other branches of social policy (Simon 2007), are a problem for criminology and penology and the interpretation of European law, as Hryniewicz-Lach demonstrates in her contribution.

It is important to understand the historical roots of the development of European standards in crime policy – including the rule of *nullum crimen sine lege poenali anteriori* (no crime without law), which is fundamental to criminal law. This important question is discussed in this issue from a Scandinavian perspective. In his contribution, Raimo Lahti argues that the contemporary Scandinavian approach (especially Finnish) to crime policy is one of the best examples of the "enlightened" tradition of effective and human crime policies, rooted in the Enlightenment – especially in the work of Cesare Beccaria and Jeremy Bentham. Similar themes are explored by Berit Johnsen and colleagues in relation to the new Norwegian security prisons. They examine the interrelationship and potential clashes between rational (in the sense of effective) and humanitarian penitentiary policy. They also suggest that the modern questions and solutions are rooted in earlier discussions between the protagonists of the Panopticon (presented in the work of Jeremy Bentham) and the Philanthropinists (e.g. Elisabeth Fry) in 19th-century England. They demonstrate how questions about balancing efficiency and control with humanitarian prison conditions posed at the end of the 18th-century by Enlightenment reformers are still current, despite the practical challenges evolving because of the ongoing development of societies and technologies.

The question of prison standards is discussed by Dirk van Zyl Smit. He traces the development of contemporary international standards derived from penological reform movements which in turn were inspired by ideas of rational thought and the Enlightenment. The roots of international penitentiary policy and standards lie

in "policy transfer" activities, including visits by practitioners to other countries in search of best practices (starting from the famous report of John Howard on European prisons in 1777), and in international meetings of researchers and prison staff, which started in the mid-19th century (with the first penitentiary conference taking place in Frankfurt am Main in 1846). His focus is on modern mechanisms to promote and reform international prison rules which must apply irrespective of prisoners' sex, race, ethnicity, indigeneity, nationality, sexuality, religion, disability etc. (Mandela Rules 2015). He notes the interrelations between the standards agreed by organisations at different levels and identifies how this influences the process by which international standards are agreed. This is illustrated with the example of how the United Nations' prison standards of 1955 and their later revision (2015 Mandela Rules) inspired the development of and amendments to regional standards, such as the European prison rules (1987/2006). Any revisions or reforms to prison standards, including more detailed recommendations concerning specific groups or policy areas (health, work, disciplinary penalties, monitoring, vulnerable prisoners etc.), should at least maintain current standards. Van Zyl Smit also discusses how international soft law may be effective at influencing practice, and he helps to define minimum standards of human rights based on the provisions of binding treaties. His points are important when considering the need for penology to address the contemporary challenges facing European penal institutions, whilst under attack from political and ideological ideas opposed to Enlightened heritage.

One example of a penal policy which appears to be incompatible with these minimum standards is the confinement of life-sentenced prisoners (lifers) in special security units in Poland, which is examined by Maria Niełaczna. In her contribution, she cogently argues that security concerns cannot justify harsh regimes or non-conformity to the Mandela and European prison rules. However, she argues that improving conditions in these units may be more complicated and difficult than elsewhere because crime policies in Poland (and many other Central European countries) appear harsher than those of Western Europe.

The problem of the relative severity of crime policy in Central Europe is also explored by Krzysztof Krajewski in his article on penal exceptionalism in Central Europe. He demonstrates how the historical heritage of these countries prepared a fertile ground for the development of neo-liberal vulgata and conservative political ideas influencing crime policy. He splits Europe into two regions: east of the river Elbe (a river which delineates eastern and western Germany) and countries which were part of the Ottoman Empire, and the countries of Western Europe. He argues that the eastern region developed much more slowly than Western Europe, including its penal policy, humanitarian reforms and modern criminal law. Punishment reforms did not spread throughout Europe until the end of the 18th and the beginning of the 19th centuries. He also examines the influence of Russian rule, arguing that simplified ideas of Marxism and the political theory of (proletarian) dictatorship strengthened the authoritarian patriarchal attitude of societies, resulting in the development of harsher criminal justice policies.

Krajewski presents the complexity and ambiguities of these historical arguments, discusses important differences within the region and analyses other contemporary factors that could have contributed to the important and lasting differences in the levels of repression and the sophistication of the crime policy in the two regions. He explores the impact of more contemporary events, including the influence that the conservative turn and new punitiveness in Western Europe have had on the new democracies of Central Europe. The value of Krajewski's article is that it demonstrates the interrelationship between general social reform and political ideas on the one hand, and penological concepts and practices on the other. Unfortunately, most historical and cultural specific developments in Central Europe seem to contradict Western European standards, which is particularly salient when they are compared with Scandinavian developments, as discussed by Raimo Lahti and Berit Johnsen et al.

Moreover, the complexity of punishment, as discussed by Daems, reminds us that the role of punishment in criminal justice policy should not be reduced to its instrumental function, i.e. as a means of preventing crime. This perspective is explored in the context of the punitive tendencies of Polish criminal policy in the paper by Jarosław Utrat-Milecki, in which he presents the outline of recent reforms of the Polish penal code, arguing that the changes cannot be explained solely by the results of criminological research or by penal populism. He uses the theoretical framework of "philosophy of punishment" as a tool to analyse changes in crime policy and to evaluate the causes of penal developments which were not predicted 30 or 40 years ago. He argues that this perspective helps in formulating critical arguments about controversial crime policies and criminal law reforms. Crime policy, he states, should be based on evidence and rooted in a principled approach anchored in human rights standards, which may set minimum standards for crime policy but is not enough to explain the way we punish. From this perspective, he analyses the official functions of new forms of punishment and principles of sentencing, especially the changes in the severity of punishment *in abstracto*, which cannot be explained by any criminological arguments or changes in the levels or patterns of crime. He also examines changes in the execution of penalties, especially the principles applied when granting parole.

Both Audrey Teugels and Jarosław Utrat-Milecki approach the question of pain in the sense of Nils Christie's "Limits to Pain" (Christie 1982) in order to understand different aspects of punishment. Teugels' focus is on parole – and specifically recall to prison because of non-compliance. Her article identifies the pains of recall and demonstrates the negative effects and outcomes of recalling prisoners, in terms of reducing the likelihood of successful rehabilitation and reintegration. Questions about the harshness and rationality of punishment (particularly imprisonment) are also addressed by Kathrin Stiebellehner, who provides insights into the history and the use of short-term prison sentences in Austria. Utilising the work of von Liszt and others, she argues that short prison sentences cannot serve the main purposes of prison (i.e. resocialisation and incapacitation) and have negative side

effects, including high rates of recidivism, ineffective crime prevention and a high financial burden. These arguments have been, and still are, used throughout Europe to promote alternatives to prison: community sanctions and measures, including Poland's "mixed penalty" discussed by Utrat-Milecki. However, they are not always successful; for example, Austria does not use community sentences.

In turn, the use of new types of criminal sanctions is explored by Anthea Hucklesby and Paulina Sidor-Borek in their comparative study on the use of electronic monitoring (EM) in criminal justice policy in England and Wales versus Poland. They demonstrate that whilst the Polish approach to EM has evolved away from that of England and Wales to share many of the features of the approaches taken in Western Europe, it is sufficiently distinctive to suggest that a third model or approach exists. Their paper also examines enduring questions about whether the approach to EM by England and Wales or Poland has more effectively managed prison populations. It suggests that EM's impact on prison populations has been marginal at best. Arguably, however, the Polish approach more clearly limits the potential for net-widening because all penalties are described as "deprivation of liberty", i.e. imprisonment. In Poland, deprivation of liberty for up to 18 months may be executed outside of prison under EM. Decisions are taken by the penitentiary court or, since 2023, a penitentiary commission for minor cases attracting sentences of imprisonment of up to four months. Deprivation of liberty can be implemented using different tools, including open, semi-open or closed prisons, and the difference between open prisons and house arrest under EM supervision is much less than between open and closed prisons, especially units for dangerous prisoners. This graduated approach to the implementation of deprivation of liberty in Poland may be one reason why Poland has been an enthusiastic user of EM. This is an important argument when considering the fundamental human right of freedom of movement. Anthea Hucklesby and Paulina Sidor-Borek point to differences in Polish and British approaches, especially concerning the understanding of the "restrictions" and "freedoms" provided by their respective systems. This is part of the discussion on the pains of punishment, also referred to by Teugels and Utrat-Milecki.

The theoretical limit of the study of punishment, and consequently of penology, is raised in this volume by Wojciech Zalewski, who postulates closer links between penology and the study of the methods of social control (which he labels "contrology"). His arguments are similar to those provided by William Tallack (and many other positivist penologists), who argued for closer cooperation between penology and other social policies in his famous book "Penological and Preventive Principles, with Special Reference to Europe and America and to Crime, Pauperism, and Their Prevention; Prisons and Their Substitutes; Habitual Offenders; Conditional liberation; Sentences; Capital Punishment; Intemperance; Prostitution; Neglected Youth; Education; Police" (second enlarged edition, London, Wertheimer, Lea and Co, 1896).

To conclude, if contemporary penology is developing as an important subdiscipline of criminology, as Daems suggests, it raises the question of whether all means of preventing social harms should be part of penological studies. We can ask whether

contrology, proposed by Zalewski, is directing us back to the important debates about the limits of criminology which took place in the 1970s and 1980s (radical, critical criminology) rather than to the "old positivists". The fact that there are different kinds of policies which may influence crime policy does not provide obvious answers about the way in which these issues are analysed, researched and taught. It is important to think about crime as the real social harm, and to remember that not all social harms are, or ought to be, criminalised. In this respect, there is a place for penology as a field of research and teaching, which should at least answer the question of to what extent the threat of criminal punishment can be justified by the prevention of certain harmful behaviours. However, Zalewski seems to go even further, as his proposed contrology blurs the boundaries between different forms of social control.

Without doubt, the changes of crime policy in Europe are complex and divergent. However, ongoing reforms are closely interrelated with some changes in "penal philosophy". "The philosophy of punishment" as a research problem is related both to the diversity of crime policies within and across different jurisdictions and to the kinds of crime (offences) which are dealt with. One of the questions that emerges from the Special Issue is whether there is one European crime policy or different crime policies and different philosophies of punishment or contrology, depending on jurisdiction, types of criminality and reactions to offences. Some questions concerning punishment may be new, but others are enduring (like the discussion about short-term detention, house arrest with the use of electronic monitoring, prison humanitarian reforms, solitary confinement in some supermax prisons or counterterrorism special measures).

As Daems states at the beginning of this volume, changes in the reaction to crime are not necessarily related to progress in research or the understanding of human rights standards. There remains a need to develop consistent minimum values and methods to prevent harms which are defined as crime through limiting the reach of criminalisation and rational reactions to harmful behaviour. Here again we can notice the importance of both the discussion about the limits of criminal law (criminalisation) and the limits of using punishment within the framework of criminal law, especially prison, in response to crime. These are two important questions which penology should help provide answers to, although it is acknowledged that they will always be influenced to different degrees by the political processes and institutionalised practices in a given jurisdiction. However, those processes and practices should be part of the research and debate within penology; indeed, penologists cannot avoid getting their hands dirty.

Guest Editors:
Joanna Beata Banach-Gutierrez
Tom Daems
Anthea Hucklesby
Jarosław Utrat-Milecki

References

Banach-Gutierrez J. and Harding Ch. (eds.) (2018). *EU Criminal Policy. Values, Principles and Methods*. London, New York: Routledge.

Daems T., van Zyl Smit D., and Snacken S. (eds.) (2013). *European Penology*. Oxford: Hart Publishing.

Heiner R. (2020). *Criminology in Brief*. Abingdon: Routledge.

Husak D. (2008). *Overcriminalization. The Limits of the Criminal Law*. Oxford, New York: Oxford University Press.

Joyce P. (2018). *Criminology and Criminal Justice*. Milton: Routledge.

Klip A. (2016). *European Criminal Law: An Integrative Approach*. Cambridge: Intersentia.

Lahti R. (2021). *Towards an Efficient, Just and Human Criminal Justice: Nordic Essays on Criminal Law, Criminology and Criminal Policy 1972–2020*. Helsinki: Finnish Lawyers' Association.

Lauterwein C.C. (2009). *The Limits of Criminal Law. A Comparative Analysis of Approaches to Legal Theorizing*. Burlington: Ashgate.

Melossi D. (2008). *Controlling Crime, Controlling Society. Thinking about Crime in Europe and America*. Cambridge: Polity.

Simester A.P. and Von Hirsch A. (2011). *Crimes, Harms, and Wrongs. On the Principles of Criminalisation*. Oxford: Hart Publishing.

Simon J. (2007). *Governing through Crime. How the War on Crime Transformed American Democracy and Created Culture of Fear*. Oxford, New York: Oxford University Press.

Snacken S. and Dumortier E. (eds.) (2012). *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy*. Abingdon: Routledge.