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How neoclassical criminology, penal populism and COVID-19 helped to escalate the repressiveness of criminal law – the case of Poland?

Jak kryminologia neoklasyczna, populizm penalny i COVID-19 pomogły w zwiększeniu represji karnej w Polsce?

Abstract: Since almost the very beginning of the 21st century, the prevalent criminal policy in Poland has been punitive, seeking to solve almost all problems related to crime by means of one solution, i.e. more severe penalties. At the same time, for more than 20 years political power has been wielded by conservative parties. It will come as no surprise that neoclassical criminology, with its retributive approach to punishment and repeated invocation of a social sense of justice, appeals most to a conservative government. Neoclassical criminology is also a good starting point for creating a penal offer typical of penal populism. In this article we analyse the latest changes in law related to the amendment of the Penal Code in June 2019. Although the amendment did not enter into force, it triggered operations aimed at tightening criminal law, with some of the changes proposed in the amendment adopted with the introduction of anti-crisis acts related to the COVID-19 pandemic.

Keywords: neoclassical criminology, penal populism, repression, retributivism, penalty, pandemic, COVID-19

Abstrakt: W Polsce niemal od początku XXI w. realizowana jest punitywna polityka karna, która upatruje rozwiązania prawie wszystkich problemów związanych z przestępczością w jednej metodzie: zaostrzeniu kar. Jednocześnie, od ponad 20 lat rządzące w Polsce formacje polityczne są zorientowane mniej lub bardziej konserwatywnie. Nietrudno zauważyć, że najbardziej atrakcyjna będzie dla ich przedstawicieli kryminologia neoklasyczna, w tym jej retrybutywne podejście do karania oraz odwoływanie się do poczucia sprawiedliwości społecznej. Kryminologia neoklasyczna stanowi także

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dobry punkt wyjścia do tworzenia oferty penologicznej typowej dla populizmu penalnego. W artykule analizujemy ostatnie zmiany w prawie, związane z nowelizacją Kodeksu karnego w czerwcu 2019 roku. I choć nie weszła ona w życie, zapoczątkowała działania zmierzające do zaostrzenia prawa karnego. Część zmian proponowanych w noweli przyjęto bowiem przy okazji wprowadzania ustaw o charakterze antykryzysowym związanych z pandemią COVID-19.

Słowa kluczowe: kryminologia neoklasyczna, populizm penalny, represyjność, retrybutywizm, kara, pandemia, COVID-19

Introduction

Almost from the beginning of the 21st century, successive administrations in Poland have pursued punitive penal policies, seeking to solve virtually all problems related to crime by means of one method: tightening the penalties. For over two decades now, power has been in the hands of conservative parties of varying types, ideologically close to the trend of neoclassical criminology. So much so that consecutive changes of criminal provisions have been justified by quoting the exact same arguments used in seminal works of the concept. Even more curiously for the current day and age, some of the arguments used date back to an even more classical school of criminology. Conservative criminological trends sometimes become a useful tool for penal populism,[1] and Polish politicians have been using them for years in their pursuit of increasing penal repression. In our article we would like to concentrate on the most recent changes: an attempt to introduce a significant, retributive amendment the Penal Code in June 2019 (a failed attempt,

[1] Following the classic definition of Anthony Bottoms, we assume that populist punitiveness was created "to convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance" (see: Bottoms 1995). The literature indicates that by comparing the two terms: populist punitiveness and penal populism, it can be concluded that the latter is characterized by a more conscious desire to manipulate social attitudes (cf. Green 2009: 521). However, aside from the question of whether politicians were misled or whether they themselves mislead others, in our opinion, penal populism is expressed in the belief that the best (and, in fact, the only effective) means of triggering crime is severe punishment. Following David Garland (2001: 13), we also recognize that a characteristic feature of penal populism is the tendency to limit – in terms of shaping criminal policy – the role of experts and professionals whose authority, in conjunction with the results of scientific research, is replaced by the "authority of society", "the will / power of the people" (authority of the people) and references to "authority of common sense" or "getting back to basics" (cf. Witkowska-Rozpara 2011: 278). From Polish perspective it's also worth to quote the definition of punitivity created at the beginning of the 1970s by the distinguished Polish criminologist, Jerzy Jasiński (1973: 23): "under punitivity we shall understand the results of the tendency towards a broad use of instruments provided for by criminal law to limit the extent of phenomena re-garded as socially undesirable, and towards combating crime with measures that are more severe, more afflicting, and interfere more with civic liberties."

one hastens to add, as most of the proposed provisions did not come into force) and taking advantage of the COVID-19 pandemic as it gripped Poland to tighten criminal law through the "side door".

First things first, however, let us begin by looking at the premises of the classical and neoclassical schools in criminology. By far the oldest trends, they were in existence even before criminology as a field was born. The founders were philosophers: Cesare Beccaria, Jeremy Bentham, Immanuel Kant and Paul Johann Anselm Ritter von Feuerbach, who worked at the turn of the 18th and 19th century (with the exception of Cesare Beccaria, who lived in the 18th century). The most important topics, and a source of inspiration for contemporary advocates of the neoclassical paradigm, are: just and effective punishment, indeterminate concept of man, and prevention of crime, realised mainly through control of society's members. To reiterate: punishment, indeterminism and control. Control is illustrated by the concept of the *Panopticon*, an ideal prison, according to Jeremy Bentham, whose architectural design allowed a security guard sitting in a tower to observe each prisoner at all times, while the prisoners detained in individual cells were unable to contact each other. The sense of being watched was supposed to result in discipline and uncertainty (Foucault 2009: 195–206). The indeterminate approach proclaims that every offender is a rational and sound citizen, whose decision to commit crime was a result of his free will, hence they bear full responsibility for their actions (Błachut, Gaberle, Krajewski 1999: 42). From the perspective of this article the question of punishment is of primary importance. Cesare Beccaria (2014) claimed that a rationally thinking person would not break the law, provided it was the same for everyone and the punishment would be in proportion to the crime.

At the end of the 19th century the classical direction had been almost completely superseded by the paradigm of positivist criminology, which proposed a determinist concept of man growing out of conviction that "crime is viewed as behaviour which is caused by biological, psychological or social factors. Crime does not, therefore, result from rational decisions made by offenders" (Jones 2006: 118). Since various circumstances could influence human behaviour, crime prevention was beginning to revolve around the idea of correcting the offender, i.e. their social rehabilitation. The positivist direction dominated criminology until the 1960s, when criminologists identifying as classicists were stigmatised as conservative, reactionary and vindictive. The trend only collapsed in the mid-1970s, when the global economy was in crisis and conservative parties came to power in both the United States and the UK. Right-wing scientists associated with the parties argued that prosperity did not contribute to a drop in crime (in the USA of the 1960s, crime grew despite stable economic growth), which needed to be combatted not by improving people's living conditions but by means of a rational crime policy (Jones 2006: 262–263). Neoclassical criminology was born, drawing on the 18th century classical paradigm. It existed in opposition to the positivist direction that relied on the need to understand the etiology of criminal behaviour and rehabili-

tation of the offender. It was fundamentally opposed to the idea of deterministic concept of man together with the idea of rehabilitation. Instead, it brought back the classical notion of an offender as intelligent, rational and entirely responsible for their own decisions. The punishment needed to be a just and proportional payback for the committed act (Burke 2005: 29).

It is important to make it clear that among the three paradigms in criminology, the positivist direction remains politically neutral. Also postmodernist/poststructuralist criminology (also named constitutive criminology), inspired inter alia by Nietzsche and Foucault, it is (or at least tries to be) counter-ideological and anti-political. Neoclassical criminology has clear political associations: it is firmly right-wing and particularly appreciated in the circles of conservative politicians and criminologists. Likewise the (neo)marxist wing of critical criminology can be unequivocally linked to left-wing ideologies.

1. Neoclassicism and penal populism

The ideological "offer" of neoclassical criminology plays the "eye for an eye" card, associated with fair retribution for the wrong that has been done, while abandoning the concept of rehabilitating the perpetrator and understanding their behaviour results from different variables, some of which are beyond the perpetrator's control. As such, it has an unquestionable pull, using clear (and thus easy to convey) concepts which are already firmly established in the broader culture. The conviction that punishment is in part a form of retaliation (for the wrong, damage or harm done) and that an individual should be held responsible for their deeds is hardly controversial, particularly if both are presented in the appropriate context, which is the protection of vital interests and social values. Simplified like that, the view is attractive for another reason – it seemingly resolves ethical or axiological dilemmas. The more "evil" the behaviour of the perpetrator is, the more retaliatory the punishment should be, particularly if the crime was against the values that are deemed worthy of the highest respect. Since the perpetrator is a thinking, rational individual and fully responsible for their decisions, then it would be difficult to question the necessity of punishing them accordingly. The message here is clear and provides solid enough foundations to build a specific, though not necessarily complicated (which is important further down the line) philosophy of punishment. What is more, if it falls on fertile ground, it will bear fruit in the form of particular political capital.

Retributive neoclassical criminology is, as has been indicated, a right-wing alternative with a distinctly conservative outlook. Hence, the trend may be particularly attractive to certain political factions with specific views (political, ethical and moral) with regard to selected phenomena and social values. Drawing on

neoclassical criminology when it comes to combatting crime and dealing with offenders is not only ideologically justified, it is also politically astute – it fits in well with the conservative mindset and its values, such as the rule of law, justice, and personal responsibility, held in high esteem by supporters and with the potential to capture the imagination of many people. In addition, the rhetoric of neoclassical criminology relevant to combatting crime and dealing with offenders allows the use of politically clever slogans, indicating concern for the citizen (which implies every citizen), ensuring safety (of all), appealing to the sense of social justice and the needs of vulnerable groups (children or crime victims). Such an approach, in turn, makes it possible to narrow the divide between the politician and the voter, placing the former among "his people", speaking not on behalf of the elite (people who in fact wield the power), but rather on behalf of the average citizen. Such distancing from the elites is in fact an element of a peculiar politics of simplicity which characterises populist movements (Taggart 2007: 124) – whether you understand populism narrowly – as was the case when the ideology was being forged with slogans like "power to the people" as the driving force, levelled against corporations and corrupted political parties, or more broadly – perceiving it as an ideology that emerged as a result of the interaction of two elements: traditional electoral politics and charismatic leadership (Mény, Surel 2007: 29). Speaking on behalf of the sovereign people and representing their needs is part of the populist language of public debate. The sovereignty of the "people-nation" is also to be reflected in politics (Taggart 2007: 124–125).

The neoclassical approach to the problem of crime and the solutions proposed in this trend are attractive to populists also because they, in a sense, fit into the dichotomous way of presenting problems, so characteristic of the commented formation (Taggart 2007: 124–125). At the same time, the populist public discourse tends to reduce any problematic issue to a basic "for" or "against" dichotomy (Taggart 2007: 125). This dichotomy is also visible to a certain extent in the approach towards the perpetrator of the crime, who, having violated rights or values cherished by all, is put in opposition to the honest people and therefore deserves (in everyone's opinion) to be punished.

Even so, it is possible to go a step further in interpreting the problem of crime through a neoclassical lens. Using the retributive ideas of neoclassical criminology, particularly the concept of punishment as just retaliation, one can build a philosophy of punishment based solely on punitive assumptions, characteristic of penal populism. This is, without doubt, the path that the Polish legislator has been following in recent years. In the justification to the 2019 amendment of the Penal Code, which was extremely punitive on many levels, there is the statement that:

> the current legal status does not match the demands resulting from the protective function of criminal law and hence does not provide sufficient tools to reduce crime and protect important social values. In particular, the sanctions envisaged so far for the most serious crimes, directed against

> legal interests of high value in the hierarchy of legal interests, do not fully reflect the degree of social harm of these crimes, leading to too lenient treatment of their perpetrators and thus violating the social sense of justice. (Explanatory memorandum to Act of 13 June 2019)

Penal populism as one of the varieties of populism is a phenomenon that receives a lot of attention in literature. Having at this point rejected the stance presented by Michael Tonry, who considers penal populism merely as a subject of academic analyses and deliberations,[2] it has to be admitted that the presence of penal populists in the area of criminal policy has gradually ceased to be a surprising occurrence, especially given that the issues of combatting and preventing crime have become electoral campaign fixtures (Wróbel 2008: 13; Pratt, Miao 2018: 12). Likewise, it has been pointed out that perhaps the right moment has come to redefine the role of penal populism in the context of the development of broadly understood populist policies, where punitiveness itself and its application for criminal policy purposes have become insufficient as a tool for managing society (Pratt, Miao 2018: 3). At the same time the idea comes with the caveat that the changes described will happen along different lines, depending on how "settled" democracy is in a given society. Irrespective of how rapidly this redefinition of the role of penal populism is already happening in the modern world, it is worth pointing out that the idea in question emphasises a new recognition of punishment, where the existing standards and rules of adjudicating become blurred, out of consideration for (rather vaguely defined) security or the (equally unspecified) sense of well-being. Those general interests remaining so ambiguous is a cause for concern and might suggest that the rights and freedoms of individuals are under serious threat (Pratt, Miao 2018: 28). In any case, it would seem that this approach is in keeping with the rhetoric of neoclassical criminology in that it highlights the need to protect society against the (dangerous and menacing) criminal. That protection comes at a price is par for the course, although this fact is rarely mentioned in neoclassical criminology.

From the perspective of a political faction using penal populism, designing the doctrine of criminal policy around the ideological offer of neoclassical criminology seems to be a legitimate strategy with at least four reasons in its favour. First of all, as has been already pointed out, a neoclassical approach to the fight against crime, the perpetrator and the punishment enables political weaponisation of the values extolled by conservative voters.[3] Neoclassical rhetoric enforces slogans and solutions for the greater common benefit, pits the perpetrator against

[2] "If penal populism […] or populist punitiveness […] exists at all, it is mostly as reifications in academics' minds of other academics' ideas" (Tonry 2007: 1).

[3] It is particularly important in Poland, where conservative parties have been in power almost continuously since the fall of communism. Even the short rule (in 2001–2005) of a notionally left-wing party, i.e. the Democratic Left Alliance, was characterised by constant compromises with the Catholic Church and moral conservatism.

the "law-abiding" citizens who value safety, the rule of law and justice – the latter value being understood as the social sense of justice. Moreover, as indicated, neoclassical principles easily translate into the populist vernacular. Secondly, the populist disdain for elites and the establishment, can be converted via penal populism into a fight with "out of touch" authorities (scientists, experts, the judicial "caste", etc.), instead justifying legal and criminal solutions with the needs and demands of "ordinary" people. Thirdly, the neoclassical tenet of punishment as just retaliation may be the starting point for enforcing punitive solutions, notably when they appeal to the firm favourite of penal populists, i.e. the basic social sense of justice. This otherwise extremely useful concept is a gateway to so-called "emotional law-making" (i.e. legal solutions adopted *ad hoc*, most often in response to a one-off event covered extensively by the media) since it also enables the policy of severe punishment – not only effective but also socially desirable. Finally, the retributivism of neoclassical criminology and the rule of a "heavy hand" that it engenders with regard to perpetrators are in a sense a natural combination for those populists who truly and consistently believe in the effectiveness of criminal repression. This belief cannot be ruled out, although the literature on the subject questions the validity of referring to so-called penal fanatics who are convinced of the validity of their identity as penal populists (Dudek 2016: 65–68). Neoclassical criminology allows for the creation of solutions in the field of criminal policy that fit into the trend of penal populism, but it also attracts those who, either out of a sense of mission or believing repression to be "the best of the worst" (Dudek 2016: 65–68) solutions, represent a retributive approach to combatting and preventing crime.

2. Neoclassical criminology & penal populism in Poland – the origin and development

Compared to other countries, the development of neoclassical thought, as well as penal populism, on Polish soil occurred relatively late. Once reborn in the Anglosphere, the neoclassical school grew larger and entered continental Europe in the 1990s, where it emerged in the rhetoric of right-wing parties and even their extreme factions. At the turn of the 20th and 21st century it practically lay at the foundations of new political movements demanding the fight against crime be reinforced, such as Pim Fortuyn List in the Netherlands, Jörg Haider's Freiheitliche Partei Österreichs in Austria or Ronald Schill's Partei Rechtsstaatlicher in Germany.

In the early 2000s, neoclassicism finally reached Poland. Just as *Crime and Human Nature*, a book by James Q. Wilson and Richard J. Herrnestein, published for the first time in 1985 (Wilson, Herrnstein 1998) became the scientific basis for the development of neoclassicism in the Anglo-Saxon countries, so did Janusz

Kochanowski's (2000) *Redukcja odpowiedzialności karnej* in Poland. The author[4] expresses serious objections to the Penal Code in force at the time (Penal Code 1997), directing his criticism at the relaxing of criminal penalties in the Penal Code of 1969 (Penal Code 1969). On the one hand, the author concedes that the previous version of the code was extremely punitive; on the other hand, he argues that the collapse of communism had completely changed the point of reference and attempting to reduce the punitivity of criminal law in the new political circumstances has an entirely new meaning. In his words "while trying to undermine the system of criminal law of real socialism served to protect the law and civil liberties, undermining it now leads to entirely different results, namely it robs citizens of their right to legal protection of freedom and safety" (Kochanowski 2000: 51). The author even goes on to ridicule the intentions of the reformers to adjust Polish criminal provisions to European standards, calling them "a misguided point of reference" (Kochanowski 2000: 51). He lambasted the idea of individual prevention and rehabilitation of offenders, which dominated in the Penal Code of 1997, took a dim view of liberalisation of responsibility, criticising the relaxation of criminal liability for numerous offenders and finally, he also questioned the validity of the changes introduced, in the light of the growing crime rate in Poland, instead endorsing severe and inevitable punishments (Kochanowski 2000: 50–62). Indeed, at the time of publication, crime was on the rise in Poland (and would only start declining after 2003 (Buczkowski et al. 2015: 19)), and the fear of crime among Poles was high (Ostaszewski 2014: 225).

Unsurprisingly, the arguments fell on fertile ground. They are repeated by scientists, also those of the younger generation. One of the supporters of retributive approach to punishment, Michał Królikowski (2004: 10) lamented that "unfortunately, many European countries – including Poland – remain under the influence of the ideology of rehabilitation and improvement of the offender or that of deterring would-be offenders from committing crimes." The rhetoric struck a chord and was employed for political purposes during the Polish parliamentary and presidential elections in 2005. The electoral slogans: "Citizens have the right to feel safe", "More rights for victims, not perpetrators", or "Safe streets – inevitable and just punishments – efficient police" (Bulenda 2005: 46) dominated public debate. The last two points were catchphrases of the newly formed right-wing party – Law and Justice. The name itself was a reference to the American right-wing ideology of Law and Order, while the legislative proposals put forward during the election campaign were the embodiment of neoclassical criminology in action. It was emphasised that the punishment will be:

> just, i.e. proportional to the scale of guilt of the offender. The current code allows for adjudicating punishments so lenient that they insult a person's basic sense of justice; severe, so that it deters anyone from committing a

[4] Janusz Kochanowski was a Polish lawyer who in the years 2006–2010 held the office of the Ombudsman.

> crime. Scientific research proves that harsh punishments deter would-be offenders from committing crimes. Meanwhile, the current code in fact bans courts from resorting to applying the deterrence principle when they decide on the sentence; [we'll] successfully keep the worst offenders – those who pose a particular threat to citizens – locked up in prisons. The Code of 1997 does not provide for severe treatment of certain types of prisoners, despite what common sense and results of criminological research dictate. (Bulenda 2005: 47)

Law and Justice, mentioned above, came to power in 2005 and wielded it for two years, undertaking many initiatives in order to officially strengthen criminal law and change certain practices, which undeniably led to tougher treatment of suspects and convicts (e.g. an increased number of requests for temporary arrest made by prosecutors) (Klaus et al. 2008: 381–387).

One of the "flagship" slogans popularised by Law and Justice in the discussed period was a crackdown on hooliganism, facilitated by new normative solutions introduced to the Penal Code (Act of 16 November 2006). As a result of their adoption, the concept of a misdemeanour of a hooligan character was reintroduced into the Polish legal system, the rules of imposing penalties and penal measures for perpetrators of such acts were tightened, and a special procedure of criminal proceedings was initiated (the so-called accelerated procedure). The justification for this clearly punitive course of action was interesting indeed. As the authors of the draft emphasised (in the original wording of the explanatory memorandum), "the increase in the number of crimes referred to as 'common', most often directed against basic human interests and against public order, led to a decline in citizens' sense of security and resulted in a public response demanding that the perpetrators of such crimes be punished severely and promptly" (Explanatory Memorandum 2005: 39; cf. Witkowska-Rozpara 2011: 294–295). Furthermore – it was concluded – it is the misdemeanours of a hooligan character, "[...] as the most acute examples of social nuisance and resonating the most with the public that should be met with tougher legal and criminal repression" (Explanatory Memorandum 2005: 39). The arguments used by the authors of the draft attracted criticism from the academic community, including members of the Criminal Law Codification Commission during that time, who published a review demonstrating that the reasons cited in the explanatory memorandum were not supported by facts, while the proposed solutions were at odds with the principle of proportionality adopted in Art. 31 para. 3 of the Polish Constitution (Opinion of the Criminal Law 2006: 294–296). The opinion of the Codification Commission did not stop the work on the act, but it "inspired" the authors to slightly modify both the act and the explanatory memorandum. Interestingly, the "revamped" memorandum argues that: "there is no evidence to prove that increased criminal repression does not or cannot have positive impact on the results of fight against crime in general, and hooliganism in particular" (Explanatory memorandum to Act of 16 November

2006; cf. Witkowska-Rozpara 2011: 296–297). With regard to assessing the scale of the phenomenon, it was asserted that based on

> the observation of everyday reality and the knowledge gained from mass media, it can be argued that not only is the phenomenon of hooliganism far from being a thing of the past – it is in fact burgeoning. Therefore, the reintroduction into the Penal Code of provisions aimed at combating this phenomenon by intensifying penal repression for hooligan-related offence must be considered justified. (Explanatory memorandum to Act of 16 November 2006; cf. Witkowska-Rozpara 2011: 296–297)

One would be hard-pressed to find a more apt illustration of the rapid ascent of penal populism after its arrival in Poland than the excerpts quoted above. It is worth noting, however, that the subsequent government, under the banner of Civic Platform, a quite conservative party in its own right, did not shy away from toughening penal law, either. It was during the period of this formation's political dominion that one of the most famous amendments to the Penal Code took place, aimed at combating sex crimes, particularly paedophilia. The act was passed in the autumn of 2009 (Act of 5 November 2009) somewhat in response to the case of a sexual offender dubbed the Polish "Fritzl of Siematycze",[5] whose story caused a media frenzy at the time. The introduced solutions received plenty of media coverage despite being completely incongruous with the analysis of the actual status of sex crimes in Poland and possibly disregarding the *ultima ratio* principle of criminal law. The catchy slogans of "zero tolerance" and "heavy hand" policies towards perpetrators of sex crimes were fervently endorsed by those in power and reinforced by one of the key solutions adopted in the discussed amendment (so-called chemical castration, which many people confused with surgical castration) echoed wildly in the public debate of the time and turned out to be a smart move politically (cf. Witkowska-Rozpara 2011: 296–297). The extent to which the solutions introduced in 2009 had any chance of contributing to the reduction of sex crimes and strengthening the protection of survivors of such acts was a completely secondary issue.

When Law and Justice regained power in 2015, it picked up its criminal policy from a decade before. Once again penal populism was used to justify further changes in criminal law, which was becoming increasingly retributive in Poland. Politicians engaged in scaremongering and provoked one case of moral hysteria after another, now legitimate tools of political marketing (Szafrańska 2015). Recent years have shown, however, a marked change – it turns out that introducing legislative changes motivated by populism is not always so easy. Worse still, it necessitates secrecy when slipping them through the "side door", so to speak, without attracting publicity. Events that happened in Poland in 2020 (although

[5] Krzysztof B., a 45-year-old resident of a small town near Siemiatycze, was accused of repeatedly raping his own daughter and abusing members of his own family for many years (cf. Witkowska-Rozpara 2011: 305–306).

their origin dates back to 2019) are extremely interesting, as they raise the question of whether the penal populists are losing control, or, on the contrary – they have already so much control that they introduce changes regardless of how and who will evaluate them, because they no longer care about the result of the evaluation or how the public will react to it, if at all. Provided that the introduced reforms are indeed part of a deliberate expansion of control over society, then it is debatable what intentions underpin the changes – is it a political game and, if yes, to what extent, or is it perhaps a genuine belief in the causative power of penal repression. This two-track and ostensibly complex activity of Polish populists is illustrated in the examples described below.

3. "Solving problems" through criminal repression

Criminal cases (often isolated ones) which resonate strongly with society are very helpful for retributivists. By referring to these, it is easy to convince citizens of the need to toughen punishments and introduce new reforms to criminal law. Sometimes draft amendments are prepared in advance and politicians just bide their time in anticipation of a criminal incident worthy of media attention that will help them publicise the project. In May 2019 that moment came in the form of a documentary film about paedophilia in the Polish Catholic Church, produced by opposition journalists, Tomasz and Marek Sekielski (2019). Even though the subject matter was not exactly unheard of, the film did strike a chord with many people. Once again the subject of paedophilia became headline news, while outraged Poles voiced their resentment of the Church and demanded tougher punishments for paedophiles. And while the public outcry directed at the Catholic Church was not necessarily in the interest of the ruling party, who collaborate closely with the institution, the demands for tougher penalties for paedophilia were what the reformers of the Penal Code had been waiting for. Thus, under the guise of fighting paedophilia and (yet another time in the history of this Code) toughening the penalties for such offences, the Polish Sejm and Senate adopted the act (Act of 13 June 2019) on 13 June 2019 (hereinafter referred to as the "June amendment"), which provided for the introduction of over 120 amendments to the Penal Code. The introduced changes were radical and in the spirit of retributivism. They concerned three areas: firstly, changes in the severity of criminal sanctions and the structure of specific types of offences; secondly, the extension of the institution of extraordinary aggravation of punishment; and thirdly, the introduction of changes in general directives on sanctions to favour the choice of more severe criminal repressions. In addition, the June amendment also assumed stricter penalties for other crimes (mainly of sexual nature and stalking) and the restoration of the crime dating back to the communist era known as aggravated theft.

3.1. Increasing of criminal responsibility

The solutions adopted in the amendment to the Penal Code assumed in many places increasing criminal liability. In Poland there are the following sanctions: fine, restriction of liberty (mainly in the form of community service) and three types of custodial sentence: between one month to 15 years of imprisonment, 25 years imprisonment and life imprisonment (Articles 32 and 33 of the Penal Code). The proposed changes were serious: the basic sentence of imprisonment was to range between a month and as much as 30 years. At the same time, the draft proposed eliminating the penalty of 25 years imprisonment. The explanatory memorandum for the discussed changes indicated that "the statutory selection of sanctions should take account of the gravity of the crime in question" (Explanatory memorandum to Act of 13 June 2019: 2), while the legislator, pre-empting any future accusations of retributivism, explained that the "[d]rafted change will not result in an automatic increase in repressiveness with regard to the penalty system, as it can be reasonably expected that when the amendment comes into force the resulting penalties will more lenient for the perpetrator than what they could be if based on the current legal status" (Explanatory memorandum to Act of 13 June 2019: 3). According to the current penal code, it is sometimes possible to use alternatives to fines, restriction of liberty or imprisonment, with the judge deciding independently on the amount of the fine and the duration of the restriction of liberty (all within the framework specified by the Penal Code). In the meantime, the draft outlined plans to impose a framework on judges of how severe the adjudicated fine or the restriction of liberty should be, making them both dependent on the length of custodial sentence provided for by the Penal Code.[6]

Other normative solutions also interested the authors of the June amendment. As it has been previously mentioned, it was suggested that the conditions for the application of Art. 37a of the Penal Code on judiciary sentencing should be redefined and the policy of punishment with regard to perpetrators of crimes charged as a continuing offence (Art. 57b of the Penal Code) should be tightened. In order to be able to discuss the first proposal, it needs to first be placed in a specific context.

3.2. Limiting the scope of judicial discretion

As a matter of fact, between 1997 (when the Penal Code came into force) and 2015, Poland was unable to achieve the model of penal policy that was outlined by the authors of this legal act. The plans to adjudicate fines more frequently had fallen through and Poland was characterised by a very high rate of imprisonment,

[6] For instance, if the act was punishable by a custodial sentence not exceeding one year, the judge would have to order instead no fewer than 50 daily fine rates or a restriction of liberty of minimum 2 months. If the act was punishable by a custodial sentence not exceeding 3 years, then the minimum fine would be 300 daily rates and a minimum restriction of liberty of 6 months.

despite a decline in the crime rate. Moreover, Polish courts imposed suspended custodial sentences far too often, with about 20–30% of such cases ending with the convict serving a custodial sentence anyway. Hence, in 2015, a major amendment to the criminal law was approved in Poland, which was aimed at, among other things, limiting the imposition of suspended sentences and increasing the share of non-custodial penalties in the total number of penalties adjudicated in Poland (cf. Witkowska-Rozpara 2020: 84–108).

Accomplishing the latter goal was to be facilitated by a new Art. 37a in the Penal Code, which allowed a judge to replace a custodial penalty with a non-custodial one, under the following conditions: the offence in question was punishable only by deprivation of liberty and the maximum possible sentence provided for was 8 years.[7] In such circumstances, if they considered it justified, the judge could decide against a custodial sentence and impose on the perpetrator a fine or restriction of liberty, in line with general principles. The judge was therefore free to make decisions on punishments and influence their format. Admittedly, the analysed solution was an interesting one, giving the judge more leeway to decide on the level of sentencing. At the same time, the shape of the provision adopted in 2015 shifted the burden of responsibility for its application onto the judge, assuming that it was the authority deciding on the case that could best recognise (or not) relevant case- and perpetrator-specific arguments for the possible application of Art. 37a of the Penal Code.[8]

The "convertible sanction" introduced in February 2015 was accompanied by a significant tightening of the provisions for applying the conditional suspension of penalty, which took place under the same act. These changes received extensive coverage in the literature, therefore they will not be the subject of an in-depth analysis in this article (see, inter alia: Witkowska-Rozpara 2015; Adamski et al. 2016) Nonetheless, referencing them is justified as they had a significant impact on the modification of penalties adjudicated after 2015. It seems that the limitation of the judge's freedom to adjudicate proposed by the authors of the June amendment (and, consequently, further tightening of penalties) can hardly be considered rational and justified. This trend was first manifested with the introduction of the aforementioned Art. 37a of the Penal Code which, having taken into account

[7] See Art. 37a of the Penal Code, as proposed initially – based on Act of 20 February 2015 on amending the Penal Code and certain other acts (J.o.L. of 2015, item 396).

[8] The decisions of courts from the first years of the application of Art. 37a of the Penal Code show that the adjudicating authorities referred to very different circumstances to justify (or the other way round – rule out) the application of Art. 37a. Often, the factors supporting the decision of the court in favour of the so-called convertible sanction were presented very generally (e.g. a positive criminal prognosis). However, there were also situations in which the courts analysed the arguments allowing for the application of Art. 37a very carefully (e.g. by examining the issue of the victim's contribution or the specific motivation of the perpetrator). Meanwhile, the most common reason indicated by the courts as responsible for the impossibility to apply Art. 37a of the Penal Code was the perpetrator's previous convictions (cf.: Witkowska-Rozpara 2019: 23–39).

the revisions by the authors of the June amendment,[9] would remove from the Penal Code the general provision allowing for the imposition of non-custodial penalties against perpetrators of petty offences, instead introducing difficult and procedurally complex penalties (Barczak-Oplustil et al. 2020: 19–20). As indicated in the literature, the adoption of the regulation in the form proposed by the authors of the June amendment would require the judge to use a complicated mechanism of imposing a penalty based on contradictory premises, which could lead to reluctance to apply Art. 37a of the Penal Code (Barczak-Oplustil et al. 2020: 20). Furthermore, it would carry the risk of yet another shift in the system of adjudicating penalties – towards an increase in the share of absolute custodial sentences or with a conditionally suspended penalty (Barczak-Oplustil et al. 2020: 20), which, in essence, was the course of action that the amendment of the Penal Code in 2015 was trying to do away with.

3.3. Changing the conditions of a continuing offence

An even more disturbing change proposed by the authors of the June amendment involves adding a specific directive to the current Penal Code regarding the penalty for perpetrators of crimes charged as a continuing offence[10] (draft Article 57b).[11] The amendment assumed an obligatory tightening of the sentence if the court

[9] According to the draft, Article 37a of the Penal Code as amended by the June amendment would allow a judge to impose a fine or a penalty of restriction of liberty in the case of crimes initially punishable by a custodial sentence of up to 8 years. However, such a change would only be possible under certain conditions: firstly, the court would have to come to the conclusion that the custodial sentence that could be imposed on the perpetrator would not exceed one year; secondly, the sentences imposed instead of imprisonment could not be lower than the minimum thresholds indicated by the legislator (with regard to a fine – a minimum of 100 daily rates, in the case of a restriction of liberty – a minimum of 3 months); and thirdly, conversion to a non-custodial sentence would be possible provided that the court simultaneously ordered a penalty measure, a compensatory measure or forfeiture. It is worth noting that in accordance with the formula adopted in the June amendment, the possibility of changing the sentence would not be possible with regard to certain types of perpetrators (persons who committed a crime acting in an organised group or a criminal association and persons who committed a terrorist offence).

[10] A continuing offence is a construct that allows for the recognition of many behaviours of the perpetrator as one act. In order for this to be possible, the following conditions must be met: firstly, the perpetrator must commit several offences in a short period of time, and secondly, all of these offences must be premeditated. An additional premise concerns behaviours constituting an attack on a personal interest, e.g. life or health. In such circumstances the identity of the aggrieved party is an additional criterion allowing for the recognition of a continuing act (cf. Kulik 2021).

[11] The drafted Art. 57b would oblige the court to impose a much stricter punishment on a perpetrator acting under the conditions of the so-called continuing offence (see footnote above). In such a situation, the court would have to impose a fine exceeding the statutory minimum, and could impose a fine up to twice the amount provided for in the legislation.

established that the perpetrator had fulfilled the features of a prohibited act under the conditions of a continuing act, compelling the judge to impose a penalty above the lower limit of the statutory penalty – and enabling the degree of severity to be increased to a very high level, i.e. double the upper limit of the statutory penalty (Łabuda 2021). The literature on the subject indicates that although the proposal to increase the penalty for a continuing offence is not new in Polish criminal law, this was the first time it was formulated as an obligation (rather than the court's discretion), and the changes to the limits of penalties set by the legislator were "very significant". As emphasized by Igor Zgoliński (2020), with regard to the modification of the upper limit of the statutory penalty, it should be stated that "this limit is disproportionate, too excessive and does not apply to any other category of perpetrators", even to perpetrators committing multiple offences or offences defined in Art. 65 § 1 of the Penal Code, which allows raising the upper limit of the penalty by only half (Zgoliński 2020). The adoption of the amendment would therefore have lead to an extraordinary tightening of penalties imposed on perpetrators charged with a continuing crime and created a peculiar paradox whereby – from the perpetrator's point of view – commiting a series of crimes (Article 91 § 1 of the Penal Code)[12] holds more "appeal", as it limits the aggravation of penalty only up to the statutory upper limit, increased by half (Łabuda 2021). Such a ridiculous state of affairs is somewhat reminiscent of the solutions used in the times of the Polish People's Republic, where, as a result of the normative solutions in force, from the perpetrator's perspective "it was only logical to steal more" (Marek 1988) if it meant suffering milder consequences. In the case of the discussed change, "the one who steals other people's movables under the conditions of a series of crimes is better off than the one who steals the same things under the conditions of a continuing act" (Łabuda 2021).

3.4. Conditional release from prison

The June amendment also attempted to change the current rules for the application of conditional early release from prison. In Poland, the court may release a convicted person if they meet certain conditions, namely when their attitude, personal qualities and conditions, the circumstances of the offence, and their behaviour after committing the offence and during serving the sentence encourage confidence that the convicted person will obey the imposed punitive measure or detention order after release and will comply with the law, in particular, they will not commit an

[12] If the perpetrator commits two or more crimes in a short period of time and he does so before the first judgment (even if open to appeal) in any of the cases, and at the same time the perpetrator uses the same repeated circumstances or opportunity to commit these crimes – then it is assumed that they operate under the conditions of a series of crimes. Such a statement engenders important consequences for the perpetrator – they then receive one penalty, with the possibility of exceeding the upper limit by half. In this way, it is a construct that enables an extraordinary tightening of the penalty (cf.: Kozłowska-Kalisz 2021).

offence again (Art. 77 § 1 of the Penal Code). Conditional early release is one of the probation tools that emerged during the great reforms of criminal law in the second half of the 19th century, based on the premises of the positivist trend in criminology (Marek 2010: 929). The possibility of its application was already provided for in the early 20th century by the partitioning states in the form of the Penal Code of the German Reich and the Russian Penal Code. Conditional early release also appeared in the first Polish Penal Code of 1932, whose authors claimed that this institution "is one of the components of an purposeful penitentiary system" (Lelental 2010: 1065, 1069). Similarly, the provision survived the communist era. For over a century it seemed to be an indisputable principle of Polish criminal law, until it was questioned (at least partially) by the legislator in the form of the June amendment, on the basis of which it was possible to impose a sentence of life imprisonment without the convict being able to apply for a conditional early release. Such a solution would apply to a person sentenced to the highest penalty in Poland, who has previously been sentenced for another crime to life imprisonment or deprivation of liberty for a period of not less than 20 years, as well as in a situation where the nature and circumstances of the act and the personal qualities of the perpetrator make it probable that their freedom would pose a permanent danger to the life, health, freedom or sexual freedom of other people. The explanatory memorandum to the amendment stated that "it is difficult to assume that the perpetrator [having found themselves in the circumstances described above] could take advantage of such an asset" (Explanatory memorandum to Act of 13 June 2019: 19), arguing also that the impossibility of early dismissal would be determined by "negative social and criminal prognosis, i.e. the functioning of a convict in conditions of freedom, not a penitentiary prognosis, i.e. relating to the further functioning of the convict in a prison" (Explanatory memorandum to Act of 13 June 2019: 19). The above statement is not technically inaccurate, were it not for the fact that, in principle, the social and criminal forecast would have to be made by a judge as early as the point of passing the sentence. Meanwhile, even an individual sentenced to life imprisonment may be a different person after several decades of serving their sentence (cf. Rzepliński, Ejchart-Dubois, Niełaczna 2017). In the memorandum the legislator admits openly that "in such cases, the segregating aspect of deprivation of liberty is the priority" (Explanatory memorandum to Act of 13 June 2019: 19). In Poland, the right to conditional early release is generally acquired after serving half of the sentence – in the case of a sentence of 25 years imprisonment it becomes available after 15 years, and in the case of life imprisonment – after 25 years. However, release is not granted automatically. At the end of the periods listed above, the convict may initially apply to the court for a reduction of their sentence, which is not to say that the penitentiary court will grant such a request. Nevertheless, the authors of the June amendment deemed 25 years under lock and key to be insufficient for people sentenced to life imprisonment. In their opinion:

> the legal period of 25 years is too short to fulfil the segregating nature of this penalty and could in fact reduce its execution to the longest custodial penalty (25 years imprisonment). Due this it is necessary to maintain the exceptional nature of the impact of this criminal sanction and to extend the period of serving the sentence necessary to apply for conditional release to 35 years. (Explanatory memorandum to Act of 13 June 2019: 20)

3.5. Increasing criminal responsibility for paedophilia and sexual crimes

The authors of the June amendment proposed also a tightening of criminal liability for paedophilia, as well as other sexual crimes that had nothing to do with paedophilia. And so with regard to rape, an outdated description of the perpetrator's behaviour was maintained,[13] while significantly raising the penalty (the upper limit of the 2 to 12 years penalty bracket was increased to 15 years). It is worth mentioning that while the Code can include any level of penalty, the policy of its application by courts may be completely different. Compared to other European countries, Poland applies a moderate penal policy towards the perpetrators of this crime. We have one of the highest percentages of conditionally suspended custodial sentences and a large share of non-custodial sentences (Gruszczyńska et al. 2015: 40). Even absolute imprisonment is used in moderation in our country, with a preference for absolute imprisonment of one to five years (Gruszczyńska et al. 2015: 42). What will this increase in the severity of the punishment change in practice? It should be pointed out that the June amendment also stipulates a stricter criminal liability for aggravated rape (the upper limit of the 3 to 15 years penalty bracket was increased to 20 years), with some offences carrying more severe penalties, including, alongside already specified gang rapes and incestuous rapes, incidents where the perpetrator used a weapon, raped a pregnant woman, or recorded an image or sound of the act in progress. In the current legal situation, raping a minor under the age of 15 is punishable by 3 to 15 years imprisonment, which the legislator also wanted to increase by raising the lower limit of the penalty to 5 years, and if the minor was dependent on the perpetrator or remained under their care, the lower limit of the sentence could be as high as 8 years (in both cases, the upper limit was to be 30 years imprisonment). Likewise, rape with extreme cruelty, currently punishable by a minimum of 5 years imprisonment, would see the lower limit increased to 10 years. The June amendment also provides for 10 years imprisonment or life imprisonment if the victim of the rape dies as a

[13] The Polish provision of the Penal Code (Art. 197 of the Penal Code), which penalises rape, is completely inconsistent with the recommendation of the Istanbul Convention (The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence [Istanbul Convention], J.o.L. of 2015, item 398). Be that as it may, in Poland rape is understood as coercing another person to have sexual intercourse by violence, unlawful threat or deception.

result of it. Clearly, the legislator considered the reasons for introducing all these changes to be obvious, since the explanatory memorandum is extremely laconic in this respect and only addresses the issue of increasing the criminal liability for raping a minor in the care of a legal guardian (Explanatory memorandum to Act of 13 June 2019: 36).

It merits mention that the authors of the June amendment also intended to change the article on paedophile behaviour. Criminal liability for sex with a person under 15 was to be raised: the upper limit of the sentence was to be increased from 12 to 15 years, while maintaining the lower limit of 2 years. The act in question also assumed the introduction of an aggravated type: sex with a person under 7 years of age was to be punishable by 3 to 20 years imprisonment. Moreover, the draft amendments assumed that if the rapist acted to the detriment of a child who at the time of the act was dependent on the perpetrator, in particular under their custody, or abused a minor's vulnerable circumstances, the court was to obligatorily increase the severity of the punishment. The legislator did not justify the reasons for these changes.

In addition to the changes described above, primarily focused – in accordance with the public declarations – on the modification of normative solutions with regard to sexual offences, the concerns of the authors of the June amendment centred also on numerous legal regulations not directly related to the key goal. From among many other points, the following examination will focus on changes regarding the criminalisation of stalking and the reintroduction of aggravated theft into the Polish legal system.

3.6. Increasing of criminal responsibility for stalking

Since 2018, if not even earlier, the Ministry of Justice had been planning to raise criminal liability for stalking (Art. 190a of the Penal Code). The reason for these plans had roots in the repeated reports (from NGOs providing support for crime survivors, lawyers and ordinary citizens, as well as by means of the parliamentary question (Question by MP Paweł Kobyliński 2018)) that victims of stalking face very serious difficulties in reporting a crime in that they are not taken seriously by the police or the prosecution. The problem was evidently not with the wording of the anti-stalking regulation itself, but the law enforcement policy. The actual will to solve the problem would perhaps entail examining the attitudes of police officers and prosecutors, followed by conducting trainings to increase their awareness of the problem, sensitise them to the suffering of survivors and highlight the seriousness of the crime. Taking a closer look at the policy of punishment would not go amiss either. As of 2011, Poland had the highest penalty for this crime (stalking was punishable by imprisonment of up to 3 years, and a fine or restriction of liberty could be imposed only exceptionally (cf. Woźniakowska-Fajst 2019)) in the European Union. Nevertheless, Polish courts have very rarely imposed (whether now or in the past) absolute imprisonment penalties for stalking, and they hardly ever imposed

penalties in the then maximum amount. In 2017, out of 1,304 convictions under Art. 190a § 1 of the Penal Code the sentence of absolute imprisonment exceeding 2 years was imposed only in three cases, which constituted 0.2% of all the penalties (Baza statystyczna n.d.). The first proposal to amend this provision came from the Ministry of Justice as early as 2018, and the only antidote to the reluctance of the police and the prosecutor's office to accept applications for prosecuting stalking was an increase in the penalty (from 3 months to 5 years imprisonment). The proposed change was preposterous and its justification could in no way be interpreted as an attempt to solve the real problem, when it referred directly to the language of neoclassical criminology in the following words:

> The indicated increase in the statutory penalty more accurately reflects the reprehensibility of the behavior covered by the criteria specified in Art 190a § 1 of the Penal Code and it will serve to strengthen the general preventive effect at the level of the act, whereas with regard to committed acts, it will facilitate the formulation of a decision on punishment in a manner consistent with the requirements resulting from the principle of an appropriate criminal reaction. (Government bill: 21)

The Ministry of Justice's proposal was repeated in the June 2019 amendment.

3.7. Re-introduction of particularly irreverent larceny

Another solution proposed in the June amendment concerned reintroducing the criminalisation of aggravated theft into the Polish normative order. It is worth noting that this type of crime was recognised by the previous Polish Penal Code, adopted in 1969, which penalized two types of aggravated theft – burglary and so-called particularly irreverent larceny. However, the latter turned out to be particularly problematic in the context of interpreting the features of the crime. Since the legislator did not then decide to introduce a legal definition for particularly irreverent larceny, the courts tried to clarify the meaning of this concept. An example of such an attempt is the judgment of the Polish Supreme Court in 1986, in which the cited authority indicated that

> the particular audacity of theft consists in the perpetrator's disrespectful and defiant attitude towards the owner or the environment, intended to intimidate or surprise. This behaviour is often characterised by openness and violence. It may consist in direct use of physical force against a person (knocking a purse out of someone's hand) or indirectly against a person and directly against things (snatching a purse from a hand). The use of this force cannot be overpowering and dangerous […]. (Judgement of the Supreme Court of 13 January 1986)

It is not difficult to notice that the cited description contains many elements that are evaluative, judgmental, vague and therefore subjective. It would be also

challenging to state that such an approach reflects the guarantee function of criminal law. Some issues already signalled here, as well as other doubts raised by both theoreticians and practitioners of the judiciary, prompted in the mid-1970s (see for instance Łagodziński 1977: 29–39[14]; Marek 1997: 528–529), so quite early on, widespread criticism of the regulations adopted in the Penal Code in 1969. Even after nearly 30 years of the provision being in force, it was still unclear what "particularly irreverent larceny" really meant, and the continuing doubts vis-à-vis the interpretation of the features of the act in question were more and more often invoked as an argument justifying the need to remove the problematic provision from the legal order. The new Polish Penal Code of 1997, therefore, rightly refrained from criminalising this type of crime.

However, in 2019, an expansion of the catalogue of aggravated theft was proposed, in order to include particularly irreverent larceny. While justifying the change, it was indicated that the new regulation would primarily target the perpetrators of pickpocketing and, to avoid problems once connected with the interpretation of the concept of particularly irreverent larceny it was duly noted that a legal definition of the concept would be introduced into the current Code.[15] As emphasized, the new definition "was [...] built in such a way as to allow for an unambiguous legal classification of the events, to avoid discrepancies in interpretation, and to ensure a high standard in specifying the determining features of a prohibited act in the provision" (Explanatory memorandum to the Act of 13 June 2019: 45). However, it is difficult to agree with the statement, as the very beginning of the definition adopted in the act contains two evaluative and subjective features, i.e. it requires the perpetrator to show a dismissive or defiant attitude (towards the owner of things or towards other people). Thus, it is an exact repetition of the

[14] Numerous publications by Gutekunst (including 1973), with regard to doubts as to the interpretation of the concept of particularly audacious theft and the interpretation of the features of a crime stipulated in Art. 208 of the Penal Code of 1969 – see Resolution of the Supreme Court – the whole chamber of the Supreme Court – Chamber for Criminal Matters of 25 June 1980.

[15] The proposed definition stipulates that an aggravated theft will pertain to a situation in which the perpetrator's behaviour is characterised by certain properties, e.g. the perpetrator behaves disrespectfully or defiantly towards the owner of the property or uses violence not directed at the person in order to seize movable property, which may include various types of property – property that is directly on the person (e.g. a watch on the wrist), property carried by the person (e.g. a suitcase) or property contained in items carried or moved by the person (e.g. telephone in the said suitcase). The definition implies that the last two categories are property transferred or handled under conditions of "direct contact", so it is likely that the property is in the immediate vicinity of the person concerned (see art. 37b of the Act of 13 June 2019; more broadly – explanatory memorandum to the Act of 13 June 2019: 44 et seq; see: Oczkowski 2020, in reference to the text of the explanatory memorandum to the June amendment, the literature also includes opinions that the proposed definition provides in fact for two types of aggravated theft – open theft, the perpetrator of which would be disrespectful or defiant and use violence not aimed directly at the person, and hidden theft – so-called pickpocketing (cf.: Mozgawa et al. 2021).

phrases that appeared in the judgments when the previous Code was in force in Poland.

The objections raised in the doctrine regarding the definition of particularly irreverent larceny proposed by the authors of the amendment prove that the normative solution adopted in the act would not only replicate previous problems related to the interpretation of imprecise features of the crime (see for instance Giezek 2021; Mozgawa et al. 2021) under the Penal Code from 1969, but generate new ones as well. The literature indicates that the commented regulation violates Art. 42 § 1 of the Polish Constitution (with respect to the requirement of "sufficient specificity of behaviour prohibited under penalty of punishment"), limits the right of the accused to defence based on "features that are unverifiable and impossible to question in practice", and finally – leads to "gross disproportionality in terms of punishment and inconsistent consequences in the area of acts with minimal social harm, previously considered offences", thus violating the principle of equality before the law, expressed in Art. 32 § 1 of the Constitution (Barczak-Oplustil et al. 2020: 30).

These particular objections seem to be all the more valid, if we take into account the fact that the authors of the June amendment provided for a very severe penalty for committing the commented act – from 6 months to 8 years imprisonment (for comparison, for a basic theft, the statutory penalty is currently between 3 months and 5 years imprisonment). Therefore, the adoption of the proposed solutions would lead to a situation in which, based on controversial and extremely imprecise regulations, it would be possible to impose a bold, extremely severe penalty on the perpetrator of the theft. The analysed solution can be considered a manifestation of penal populism not only because it ignores the voice of experts, including those in academic circles, who for several dozen years and various reasons, have been questioning the validity of aggravated theft's presence in the Polish legal system. The populist bias of the change in question is also evidenced by the fact that it leads to an excessive extension of criminalisation and a tightening of the criminal response towards perpetrators of certain types of crimes without any rational grounds (let alone criminal or political ones) justifying such changes.

4. "Doing good by stealth"[16]

To reiterate: the Act of 13 June 2019 amending the Penal Code and certain other acts was found by the Constitutional Tribunal to be inconsistent with the Constitution. The solutions proposed by the authors of the June amendment did not come into force. It should be noted, however, that this statement is only true in

[16] The phrase has been taken from the text 'Penal populism and the folly of "doing good by stealth"' (Green 2014: 73–86).

relation to some of the regulations discussed. As it turned out, in the period between the submission of the act to the Constitutional Tribunal and the ruling of the Tribunal, the Polish legislator introduced some of the discussed changes to the legal system, using the "side door", when passing so-called anti-crisis shields in response to the COVID-19 pandemic. The Act of 31 March 2020 amending the Act on specific solutions related to preventing, counteracting and combating COVID-19 and other infectious diseases and crisis situations caused by them, together with other acts (Act of 31 March 2020) also introduced amendments to the offence of stalking, the key difference being that, compared to the original proposal by the authors of the June amendment, the range of the criminal sanction was substantially increased, altering the initial 3 months (lower limit) and 5 years (upper limit) of imprisonment to 6 months and 8 years, respectively, and making Poland the country where stalking carries the highest penalty not only in the European Union, but also in the world. The Act also changed the penalty for aggravated offences (from 2 to 12 years imprisonment), a revision that was not even mentioned in the June amendment. Interestingly, the explanatory memorandum to the March 2020 shield does not explain the introduced change, nor does the list of legal acts subject to changes at the beginning of the document include the Penal Code as one of them.

The second "side door" entry was the Act on subsidization of interest on bank loans granted to entities affected by COVID-19 and simplified arrangement approval proceedings due to COVID-19 (Act of 19 June 2020) under which the previously discussed changes concerning Art. 37 a, 57 b and 278 a (and 115 § 9) of the Penal Code were adopted. Just like with the first shield, in this case the explanatory memorandum for the "anti-COVID" act also made no reference to the introduced regulations. The question is why did the Polish legislator decide to pass these particular changes in such a clandestine, publicity-shy fashion when adopting anti-crisis shields? And why did they choose these specific normative solutions over others?

There are no simple answers to these questions. It is likely that the choice of these particular regulations was informed by their lower potential controversy factor among all the presented solutions. Both stalking and aggravated theft are far removed from the main context that accompanied the amendment to the Penal Code of June 2019, which was the fight against sexual crime. On the other hand, the rules set out in Art. 37a and 57b of the Penal Code concern directives on penalties rather than specific crimes or perpetrators, therefore their abstract nature has, first of all, less potential to catch public attention and, second of all, makes them more complicated to present. The scale of the impact of the commented regulations is fully visible only when they are systematically analysed, rather than from the perspective of considering a single provision. Moreover, in all probability, the gravity of the proposed changes with regard to sexual crimes and custodial sentences, which led to such an animated, critical discussion in academic circles, suggests that these regulations should temporarily be held in a legislative void,

until the calming of the public mood. In the summer of 2020, the act regulating abortion was tightened in Poland, making Polish law the most restrictive in Europe. This was followed by intense protests, many of them several-thousand-strong, that lasted many weeks. These events contributed to a growing crisis of confidence in the government's decisions. The situation in Poland was also marred by social protests related to the Polish government having introduced a number of restrictions in various sectors of public life in connection with the COVID-19 pandemic. Perhaps then, the changes enacted in the anti-crisis shields, with their relatively uncontroversial character (less likely to stir up social or media hype) constituted a kind of test verifying how far the Polish legislator can afford to go.

The question remains why – if the changes were relatively uncontroversial – did the Polish legislator decide to pass them through the "side door", hiding these regulations among extremely extensive legislative solutions dedicated to completely different areas of public life? Is this an expression of loss of control, or quite the contrary? Further still, why was adoption of these changes so important for those in power that they would risk passing legislation that had been repeatedly deemed unconstitutional (Barczak-Oplustil et al. 2020: 16)?

The questions posed above provide plenty of food for thought. A likely scenario is that the Polish legislator's move was motivated by fear of losing control, underlined by the events of the summer and autumn of 2020, which led to the corrosion of trust in the government. A more likely explanation, however, hints at confidence in unwavering public support for the proposed changes and an unshakeable belief in the legitimacy of the proposed solutions, coupled with a strong need to adopt them at all cost. Perhaps a change of perspective is needed to appreciate that there are, after all, penal populists who consider their mission to be the implementation of a "heavy-handed" policy towards perpetrators of crimes, and their contribution to public service.

5. The beginning of the end?

Leaving aside disputes as to whether and to what extent "punitiveness" can be measured and what hard quantifiers enable the recognition that a given solution is part of a wider trend of strict treatment of offenders (see Hamilton 2014: 321–343), it seems that the normative solutions outlined in the text reflect neoclassical criminology, but also – based on its achievements – use the concept of fair retribution and the concept of social justice to create a penological offer typical of penal populism. Not only are severe penalties characteristic of penal populism, they even seem to fit into one of the initial concepts of punitive measures defined by Diana Gordon, placing the Polish solutions more in the category of "custody

factors" than "symbolic factors".[17] Regardless of the above assessment, however, the situation in Poland in the last dozen or so years with respect to the model of criminal policy, prompts reflection not only on the presence of penal populism in the area of justice, but also on its future and direction of development.

The relatively short history of democracy in Poland makes the phenomenon of penal populism a special challenge for us. Significantly, if we perceive penal populism as an expression of a democratic deficit, which, although it is more than happy to extoll the power of a sovereign people, in practice it does not offer adequate social capital that could actually lead to constructive changes and solutions in criminal policy (see Dzur 2010: 366). It seems, however, that with the passage of time Polish penal populism has begun to evolve. In the first years it was mostly preoccupied with solutions aimed at the perpetrators of crimes, or, more broadly, the administration of justice, which was manifested in case-specific and often random solutions (rather than considering the system as a whole). The events of recent years suggest that penal populism has in fact evolved to become a tool, albeit an insufficient one as it now turns out, for managing society. At least that might be the conclusion judging by the questions in the literature pondering the future (or possible end) of populism and the explosion of generally understood populist policies (Pratt, Miao 2018). If the situation in Poland were to be analysed from this perspective, then it would seem that recent years have been attempt to implement populist practices revolving around the issue of control ("taking back control" or "securing control" in various aspects of social life) and offering a return to (broadly understood) security and prosperity. At the same time, those in power imply that these values have been taken away from the citizens (or have been lost by them). If we indeed adopt such a perspective it seems that in Poland the use of punishment can also be seen as a measure that increasingly serves both to control (the perpetrator) and to guarantee the safety/protection (of others). Additionally, the populist context of the implemented solutions means that criminal law solutions alone are no longer sufficient to ensure said security and control.[18] The rhetoric of "taking back control" that John Pratt and Michelle Miao (2018: 2, 26) have written

[17] "Custody factors" are solutions sharing the same common denominator, i.e. the desire to extend control over perpetrators of crimes as much as possible, e.g. by tightening the conditions for early release or introducing preventive measures. Meanwhile, "symbolic factors" assume the use of more restrictive forms of control, but concerning a smaller group of people by definition. An example solution from this group is the introduction of the death penalty into the legal system (Hamilton 2014: 323–324).

[18] An example of a solution that goes beyond criminal law are measures introduced in Poland under the Act of 22 November 2013 on procedures for dealing with persons with mental disorders who pose a threat to the lives, health or sexual freedom of other people (Act of 22 November 2013). The new post-penal and indefinite measures include: preventive supervision and placement in the National Center for the Prevention of Dissocial Behaviors, which are used against perpetrators with mental disorders, personality disorders or sexual preference disorders, who have served a sentence of 25 years imprisonment and could theoretically commit another serious crime.

about, appears to be gaining ground in Poland too, if less conspicuously. Likewise, the solutions introduced in the public sphere have a distinctly conservative slant, which means that the program assumptions of neoclassical criminology may constitute a good starting point for building a model of dealing with perpetrators of crimes, without any collision with other conservative activities in the remaining aspects of social life.

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