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## **PROTECTION OF VALUES OR MANAGEMENT BY REPRESSION. ON THE FUNCTIONS OF CONTEMPORARY CRIMINAL LAW**

### **Abstract**

The study is devoted to an attempt to determine whether the analyses carried out at the level of the philosophy, theory and analysis and synthesis of criminal law, as well as the approaches presented in various criminological theories can be used in debates about the goals and functions of modern criminal law. The analyses carried out are based on the reconstruction of the current state of criminal law, dominated in many countries by penal populism. The coincidence of the repressiveness characteristic of the populist approach subordinated to the implementation of the concept of extreme deterrence, with the position of the legal elite as to the goals and functions of criminal law, illustrates the state of tensions and crises in which contemporary repressive law has found itself. The image of the public debate, characterized by the unambiguity of positions combined with the lack of perceptual openness to the views presented by the proponents of opposing approaches, provides a premise for the search for rational and verifiable arguments in disputes over the shape of criminal law. Given the limitations of the analysis and synthesis of criminal law in the sphere of disputes about values, an anthropological vision and a model of social structure make it reasonable to search for premises that order the debate about criminal law on other levels. In this regard, the study presents systemic approaches presented in the philosophy of criminal law combined with an attempt to justify that, in fact, complementary elements can be seen in them. Complementing the philosophical perspective is the plane of criminal law theory, on which one can also find elements that

are part of the universal approach to repressive law. Adding to this picture of modern criminological theories, the study presents the thesis that modern criminal law serves multiple, sometimes opposing functions justified by reference to other assumptions and models of social structure. The multiple functions of modern criminal law make it unreasonable to refer to the dichotomy capturing alternatively the functions and goals of criminal law either as an instrument for protection of socially valuable values or as a tool of management by repression. The text seeks to justify the position that modern criminal law performs, in part, both functions indicated above. At the same time, there are opportunities to rationally limit the use of criminal law instrumentally as a tool of management by repression in the interest of power and certain social groups. The science of criminal law, encompassing the following planes: theoretical and philosophical, can be a plane that provides premises and arguments to help resolve contemporary dilemmas. In particular, it seems that the approaches presented in the science of criminal law and criminology are not so much of an opposing and radically competitive nature, but are in fact harmonizing, containing a number of complementary elements in a complex set of assumptions and claims that make up a holistic approach to the criminal law system.

### KEYWORDS

retributivism, anti-naturalism, neo-retributivism, penal populism, populist policies, functions of criminal law, goals of criminal law, economic theory of criminal law, positivism, anti-naturalism, social control, conflict resolution, management by repression, protection of values

### SŁOWA KLUCZOWE

retrybutywizm, antynaturalizm, neoretrybutywizm, populizm penalny, polityki populistyczne, funkcje prawa karnego, cele prawa karnego, ekonomiczna teoria prawa karnego, pozytywizm, antynaturalizm, kontrola społeczna, rozwiązywanie konfliktów, zarządzanie przez represję, ochrona wartości

## I. INTRODUCTORY REMARKS

Over the past half-century, we have been observing a clash between philosophical and theoretical ideas about the goals and functions of repressive law in a constitutional democracy and the practical dimension of the establishment and application of criminal law norms based on manifestations of penal populism<sup>1</sup>.

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<sup>1</sup> See J. Pratt, M. Miao, *The End of Penal Populism; the Rise of Populist Politics*, 'Archives of Criminology' 2019, No. 2(XLI), pp. 15 ff.; W. Zalewski, *Contrology and Criminal Law: Genesis*,

The classical approach to criminal law based on the protection of values and the subsidiarity of repression is in retreat<sup>2</sup>. A clearly discernible increase in the level of repressiveness justified by the need for politicians to respond to social conflicts and expect their smooth resolution<sup>3</sup> justifies the thesis that repressive law is at a crossroads<sup>4</sup>. The tensions surrounding the shape of contemporary criminal law are synthesized in the form of an opposition: criminal law serving the protection of socially valued values and respecting the guarantee function against which criminal law treated as an instrument used in social conflicts in the interest of the authorities, an instrument of a kind of “social engineering”, in fact management by repression is contrasted<sup>5</sup>. The juxtaposition of possible approaches to the functions and objectives of criminal law reveals a deeper ground of disputes, related to the vision of social structure, the opposition between consensual and conflictual models, political philosophy, in particular the choice between liberal and illiberal approaches (communitarian), and finally philosophical and anthropological assumptions well reflected in the opposition of indeterminism and determinism. Contemporary disputes concerning criminal law go far beyond analyses related to the analysis and synthesis and theory of repressive law, taking on the character of fundamental disputes, essentially concerning the philosophical, anthropological, sociological and political-philosophical vision (image) of the individual and society and, consequently, of law. Their radicalism is fuelled by political disputes and the instrumental approach of representatives of the legislative and executive power to the functions and objectives of criminal law. The emotional colouring of the debates, reinforced by various versions of penal populism, causes their participants to display a tendency towards a one-dimensional view of the world, in which advocating one possible vision of the individual, society and the law

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*Current State, Perspectives*, ‘Studia Iuridica Lublinensia’ 2021, No. 2(30), pp. 383 ff.; W. Wróbel, *Prawo karne a standardy konstytucyjne*, (in:) M. Mozgawa, P. Poniatowski, K. Wala (eds), *Aktualne problemy i perspektywy prawa karnego*, Warsaw 2022, pp. 13 ff.; P. Kardas, *Współczesne koncepcje ujmowania podstaw odpowiedzialności karnej oraz ich wpływ na stanowienie i stosowanie prawa*, (in:) M. Mozgawa, P. Poniatowski, K. Wala (eds), *Aktualne problemy i perspektywy prawa karnego*, Warsaw 2022, pp. 49 ff.

<sup>2</sup> See J. Giezek, *W poszukiwaniu podstaw odpowiedzialności karnej we współczesnym prawie karnym oraz możliwości ich naukowego uzasadnienia*, (in:) M. Mozgawa, P. Poniatowski, K. Wala (eds), *Aktualne problemy i perspektywy prawa karnego*, Warsaw 2022, pp. 24 ff.

<sup>3</sup> See J. Pratt, M. Miao, 2019, *op. cit.*, pp. 15 ff.

<sup>4</sup> See W. Zalewski, 2021, *op. cit.*, pp. 383 ff.; D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, New York 2002, pp. 23 ff.; W.R.P. Kaufman, *Honor and Revenge: A Theory of Punishment*, Dordrecht-Heidelberg-New York-London 2013, pp. 45 ff.

<sup>5</sup> This is how criminal law has been characterised in anti-naturalist criminology, as well as works devoted to analysing the phenomenon of penal populism. See more extensively J. Pratt, M. Miao, 2019, *op. cit.*, pp. 15 ff.; K. Krajewski, *Teorie kryminologiczne a prawo karne*, Warsaw 1994, pp. 41 ff.

automatically prejudices the rejection of the alternative approach in its entirety<sup>6</sup>. Hence, modifications in criminal law aimed at increasing repressiveness and stronger protection of general (social, group) values, reinforced by the conviction that criminal law is suitable for effectively solving social problems by means of an appropriately shaped, i.e. harsh, criminal policy, which justifies the widespread use of this instrument of social control, are treated as a manifestation of the instrumental use of criminal law for political purposes<sup>7</sup>, which is a long-delayed reminiscence of the real socialist or authoritarian period<sup>8</sup>.

The increase in repressiveness is considered a sign of civilizational backwardness, an attitude that violates in an elementary way the modern penal and criminological paradigm<sup>9</sup>. It violates constitutional standards, including, in particular, rules and principles relating to citizens' rights and freedoms<sup>10</sup>. Opponents of an increase in repressive measures aimed at management by repression are accused of failing to understand the way in which the individual functions in society, of ignoring the importance of the impact of severe punishment, of an attitude geared to protecting the offender combined with ignorance of the rights of the victim and of society, and finally of failing to see that leniency towards offenders encourages crime, and thus not only fails to counteract it, but paradoxically stimulates it<sup>11</sup>.

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<sup>6</sup> See D. Garland, *Punishment and Modern Society. A Study in Social Theory*, Oxford 1990, pp. 250 ff.

<sup>7</sup> See KIPK Opinions: Populist amendment of the criminal law. Act of 7 July 2022 on amending the Act – Penal Code and certain other acts (Senate print no. 762) – publication date 19 July 2022; Opinion on the Act passed by the Sejm of the Republic of Poland at its 12th session of 4 June 2020 on interest subsidies for bank loans granted to ensure financial liquidity for entrepreneurs affected by COVID-19 (Senate print no. 142) – date of publication 15 June 2020; Opinion on the Resolution of the Senate of the Republic of Poland of 24 May 2019 on the Act amending the Act – the Penal Code and certain other acts, passed by the Sejm of the Republic of Poland at its 81st session on 16 May 2019 – publication date 9 June 2019; Statement of 15 June 2019 on the announcement posted on the website of the Ministry of Justice on 15 June 2019: “Ministry of Justice sues Jagiellonian University professors for lying” – date of publication 15 June 2019.

<sup>8</sup> Public debates use the expression that the changes take criminal law back 50 years to the period of real socialism.

<sup>9</sup> See KIPK Opinions: Populist amendment of the criminal law. Act of 7 July 2022 on amending the Act – Penal Code and certain other acts (Senate print no. 762) – publication date 19 July 2022; Opinion on the Act passed by the Sejm of the Republic of Poland at its 12th session of 4 June 2020 on interest subsidies for bank loans granted to ensure financial liquidity for entrepreneurs affected by COVID-19 (Senate print no. 142) – publication date 15 June 2020; Opinion on the Resolution of the Senate of the Republic of Poland of 24 May 2019 on the Act amending the Act – Penal Code and certain other acts, passed by the Sejm of the Republic of Poland at its 81st session on 16 May 2019 – publication date 9 June 2019; statement of 15 June 2019 on the announcement posted on the website of the Ministry of Justice on 15 June 2019: “Ministry of Justice sues Jagiellonian University professors for lying” – date of publication 15 June 2019.

<sup>10</sup> Cf. W. Wróbel, 2022, *op. cit.*, pp. 13 ff.

<sup>11</sup> This was the rationale behind the increasingly repressive changes in the draft amendment to the Penal Code presented to parliament in 2022.

Contemporary disputes about the shape of criminal law seem to leave no room for any compromise. The proponents of opposing approaches consistently present an attitude that is an expression of their conviction of the exclusive or “only right” character of their paradigm and the total nonsensicality of other approaches<sup>12</sup>. Unambiguous and radically opposing positions are presented in the public debate. In this state of affairs, an insight into the essence of the disputes, taking into account contemporary aspects of the philosophy of criminal law and concepts presented in criminology, seems to be sufficiently justified. The fundamental aim of the analysis is to try to answer three basic questions.

Firstly, can the science of criminal law, encompassing the following levels: analytic and synthetic, theoretical and philosophical, prove helpful in resolving contemporary dilemmas concerning the aims and functions of criminal law?

Secondly, are the approaches presented in the science of criminal law and criminology really contradictory and radically competitive, or can we find complementary elements in them?

Thirdly and finally, is there a real and radical opposition between viewing criminal law as an instrument for the protection of values and treating criminal law as a tool for the management of social conflicts in the interests of power, or does criminal law perform partially both functions indicated above?

## II. THE CURRENT STATE OF CRIMINAL LAW

From the perspective of criminal law-making and application since at least the Thatcher era, criminal law<sup>13</sup> is increasingly acting as a tool for social governance<sup>14</sup>. Its use as an instrument to obtain and exercise power “from above in a society increasingly experienced as rudderless and out of control”<sup>15</sup>, observed globally from New Zealand, the USA, the countries of western Europe to the fledgling constitutional democracies of central and eastern Europe, is based on the instrumental use of criminal law by political and economic elites, for the pur-

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<sup>12</sup> See K. Krajewski, 1994, *op. cit.*, p. 142.

<sup>13</sup> For the diagnosis relating to contemporary Polish criminal law, see studies in the collection: M. Mozgawa, P. Poniatowski, K. Wala (eds), *Aktualne problemy i perspektywy prawa karnego*, Warsaw 2022.

<sup>14</sup> By social governance I mean the use of criminal law in the sphere of resolving social conflicts in the interests of power. In other words, an approach characteristic of penal populism. Social governance through criminal law is to be distinguished from the treatment of criminal law as an instrument of social control. See J. Pratt, *Penal Populism*, New York 2007, *passim*. Cf. also reflections offered in K. Krajewski, 1994, *op. cit.*, pp. 13 ff.

<sup>15</sup> J. Pratt, M. Miao, 2019, *op. cit.*, p. 16.

suit of particularistic goals<sup>16</sup>. Penal populism has been integrated into the development of populist policies and is used to justify the punishment and control of an ever-widening range of people considered to be enemies of society<sup>17</sup>. It has significantly altered modern societies' approach to the idea of crime and punishment. It has brought a different distribution of emphasis, manifested in a shift away from the protection of the individual from potential abuse by the state of the power to punish, towards the use of penal instruments by the authorities to protect society from the individual<sup>18</sup>.

In the populist view, in all its varieties, criminal law and punishment become an instrument of governance through repression<sup>19</sup>. Protection of values<sup>20</sup> is at best subsidiary in nature, since the primary purpose of criminal law is to resolve real or apparent social conflicts<sup>21</sup> and to pursue specific political objectives. This

<sup>16</sup> On the understanding of these terms, see *ibidem*, pp. 15 ff.

<sup>17</sup> In this respect, intentionally or accidentally, populist conceptions refer to the theoretical approach to criminal law presented by German science, especially G. Jakobs, who promotes the concept of enemy criminal law. See more in G. Jakobs, *Strafrecht. Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre*, 2. Auflage, Berlin-New York 1993, pp. 44 ff.; G. Jakobs, *Bürgerstrafrecht und Feindstrafrecht*, in: Y. Hsu (ed.), *Foundations and Limits of Criminal Law and Criminal Procedure – An Anthology in Memory of Professor Fu-Tsen Hung*, Taipei 2003, pp. 41 ff.; G. Jakobs, 1993, *op. cit.*

<sup>18</sup> The mechanism of criminalisation of the so-called vat crimes (Article 271a of the Penal Code and Article 277a of the Penal Code), consisting in issuing an unreliable VAT invoice, without the necessity to demonstrate that such behaviour was of any significance from the point of view of property interests of the State Treasury or other entitled entities, seems to be based on such an assumption. In this case, using the construction of substitute criminalisation in the foreground of the infringement of a legal good, with the use of the construction of abstract exposure, behaviours devoid of sufficient illegal content to be included in the category of crimes were criminalised in order to deter and declaratively protect the society from the consequences of tax fraud. In essence, a criminal law mechanism has been constructed to achieve certain political objectives.

<sup>19</sup> As indicated by Pratt and Miao, "since the late 1980, the penal expectations of many democratic societies have undergone dramatic changes. These include, on the one hand, large increases in imprisonment rates and, on the other hand, the growth of preventive criminal law, intended to control the conduct and movement of particular segments of the population thought to be at risk of committing crime, rather than sanctioning them for crimes they have actually committed" – 2019, *op. cit.*, p. 16. See also D. Garland, 2002, *op. cit.*, *passim*.

<sup>20</sup> The problem involves not so much the declarative indication of the protection of values as the basic aim of criminal law, but rather the manner of selecting objects or states of affairs considered valuable and subject to protection. J. Giezek aptly points out that the creation of a catalogue of goods deserving legal protection and the recognition that certain states of affairs are such goods is not a scientific problem, and its solution depends on a number of factors, which are rather classified as the sphere of political philosophy, which means that there is a considerable scope of discretion in this respect. The choices of values protected by law are not verifiable in terms of the paradigm of science. J. Giezek, 2022, *op. cit.*, pp. 34 ff.

<sup>21</sup> It is interesting that the view of criminal law as an instrument for conflict resolution is also presented in approaches that are an alternative to penal populism. P. Wilinski sees criminal law as "(...) an instrument for the elimination of conflicts in society". He assumes that it "serves to resolve and prevent conflicts between individuals and within society", adding later in the argument

approach is based on the belief in the omnipotence of criminal law, the ability to effectively solve social problems through specific criminal policies<sup>22</sup>. The result has been a steady increase in the punitive nature of criminal law systems, a radical increase in the degree of prisonisation of the people<sup>23</sup>, and the emergence of new grounds for criminal liability, including for behaviour which does not violate socially valued values but merely poses a concrete or abstract threat to them<sup>24</sup>. Finally, it leads to complete ignorance of the relationship between the rise or fall in crime rates and the shape of the criminal justice system<sup>25</sup>. Repressiveness has become a function of political assumptions, shaped by controlled public opinion. Where there is an increase in crime, such as in the USA in violent crime, populist tendencies are only further reinforced.

In this state of affairs, it is understandable that there is a growing frustration among intellectual circles engaged in analyses of the aims and functions of criminal law and punishment, whose position is not only not taken into account in the process of law-making and application, but is increasingly less heard in the public space<sup>26</sup>. The fact that the populist approach is based on a programmatic rejection of the position presented by the legal elite is only one factor in the helplessness of the representatives of the rational approach to criminal law. Equally important is the role played by economic changes, the increase in wealth disparity, the decline in living standards, the precarity of the middle class, and finally the economic cri-

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that “criminal law serves to resolve only certain conflicts, namely those caused by the committed crime” – *Zarys teorii konfliktu w prawie karnym*, Warsaw 2020, pp. 15–16. In a different way, treating criminal law as an instrument enabling the resolution of conflict between the perpetrator and the wronged party on the basis of agreement, forgiveness, expiation and repair of damage, the possible functions of repressive law are presented by P. Kardas, *Zarządzanie konfliktem*, Kraków 2019, *passim*.

<sup>22</sup> See D. Garland, 1990, *op. cit.*, pp. 250 ff.; K. Krajewski, 1994, *op. cit.*, pp. 148 ff.

<sup>23</sup> See B. Obama, *The President's Role in Advancing Criminal Justice Reform*, ‘HLR’ 2017, No. 3, Vol. 130, pp. 812 ff.

<sup>24</sup> The justification for criminalisation in this respect is based on the conception of the protection of a legal good in the foreground of its infringement. See more in D. Gruszecka, *Ochrona dobra prawnego na przedpolu jego naruszenia. Analiza karnistyczna*, Warsaw 2012. Cf. M. Dąbrowska-Kardas, *Analiza dyrektywalna przepisów części ogólnej kodeksu karnego*, Warsaw 2012, *passim*.

<sup>25</sup> However, it should be noted that referring to the parameter of an increase in crime (e.g. significant) as a justification for changing criminal law towards increased repressiveness, perhaps unintentionally by those presenting this position, is a manifestation of treating criminal law as a tool of management through sanction (repression). Of course, this does not exclude treating criminal law as an instrument of social control and a tool for the protection of values. It does, however, lend weight to the thesis that an increase in repressiveness can be a tool to reduce crime levels, which the very fact of an increase in the number of crimes committed justifies an increase in repressiveness. Such an approach may prove troublesome when confronted with penal populism.

<sup>26</sup> The hallmark of penal populism is anti-intellectualism, a conscious and consistent disregard for the guidance of the legal elite, combined with the shaping of an image of criminal law based on intuitions and political assumptions reinforced by ‘guided’ public opinion.

ses occurring with great frequency, phenomena such as pandemics, the increase in the sense of threat and insecurity<sup>27</sup>. These generate social conflicts creating a conducive climate for populist demands. To some extent, criminal law acts as a substitute instrument. The disproportionate severity of punishment creates the hope of regaining a sense of security and social standing. It is sometimes seen as an instrument of compensatory justice, depriving offenders of the benefits of crime and social standing<sup>28</sup>.

In debates on criminal law, arguments related to constitutional determinants of the purpose and limits of the public *ius puniendi*, the functions of criminal law in a system based on the rule of law, the importance of limits to repression related to the concept of human rights are gradually losing their relevance<sup>29</sup>. References to the common values on which modern liberal societies are based no longer play a significant role.

In this state of affairs, the fundamental problems of criminal law philosophy and theory, as well as criminological theories, assume particular importance. A return to the sources, combined with an attempt to search for a rationally based model that takes into account the contemporary model of public debate on *ius puniendi*, seems necessary if we want to preserve the elementary sense of criminal law and punishment<sup>30</sup>. Indeed, critical analyses to date have not been successful, a good example of which is the abundance of research on the phenomenon of penal populism<sup>31</sup>. The ostentatious disregard for the demands and criticisms of legal representatives leads to a pessimistic view of the possibility of an effective scientific and convincing explanation of the basis, purpose and function of crim-

<sup>27</sup> See D. Garland, 1990, *op. cit.*, pp. 250 ff.; K. Krajewski, 1994, *op. cit.*, pp. 148 ff.

<sup>28</sup> See P. O'Malley, *Crime and Risk*, London 2010, pp. 23 ff.

<sup>29</sup> It is interesting that arguments related to constitutional rules and principles, referring to the model of pro-constitutional interpretation, interpretation in accordance with the Constitution and the mixed model of control of constitutionality of the law by the courts are currently, in principle, completely ignored in the process of interpretation and application of criminal law. See more in M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym Na Konstytucji RP*, Warsaw 2017, *passim*.

<sup>30</sup> It is aptly pointed out in the literature that some criminological theories are saturated with anti-positivist and anti-Enlightenment elements. In this last respect, in particular with regard to the guarantee function of criminal law, one has to agree with Krajewski who emphasizes that "(...) anti-Enlightenment should not be understood as anti-rationality. For its essence is the rejection of the belief in unlimited possibilities of solving social problems, including the problem of crime, by means of penal or social policy shaped in a rational way on the basis of scientific premises. In other words, what we are dealing with here is an abandonment of the belief in the possibility of creating an unambiguous and effective positive programme to combat crime based on criminological knowledge. (...) This does not, however, imply a rejection of rationalism, but merely basing it not so much on positive knowledge, but primarily on negative knowledge" – 1994, *op. cit.*, pp. 148–149.

<sup>31</sup> See N. Cusato, *Politics of Anxiety, Politics of Hope: Penal Populism and Duterte's Rise to Power*, 'Journal of Contemporary Southeast Asian Affairs' 2016, No. 35(3), pp. 91 ff.; M. Anselmi, *Penal Populism in the Multi-populist Context of Italy*, (in:) P. Blokker, M. Anselmi (eds), *Multiple Populism. Italy as Democracy's Mirror*, London 2019, *passim*.

inal responsibility<sup>32</sup>. An attempt to seek answers to the question of the functions, objectives and consequences of the application of criminal law in contemporary liberal societies<sup>33</sup>, based on a critical approach to the concepts presented in this area, seems fully justified. In order to provide a vision of the aims and functions of the public *ius puniendi*, it is worth taking as a starting point the opposites quoted in the title of this paper: protection of values or disposition through repression. The clash between the instrumental application of criminal law<sup>34</sup>, with a values-based approach to the protection of values as an expression of placing criminal law on a moral foundation<sup>35</sup>, should be the starting point of any debate on the issue of the aims and functions of punishment<sup>36</sup>.

### III. THE NATURE AND PERSPECTIVES OF CRIMINAL LAW DISPUTES

Although the basis for emotional debates about criminal law are specific instances of normative changes aimed at increasing the repressiveness of the system and the intensive protection of the authorities' preferred values based on harsh, often *prima facie* disproportionate and community-affecting<sup>37</sup>, punishment, just a slightly deeper look into the rationale behind the successive modifications reveals a radically different approach to the fundamental issues. In particular, we

<sup>32</sup> See J. Giezek, 2022, *op. cit.*, pp. 24 ff.

<sup>33</sup> See M. Królikowski, *Sprawiedliwość karania w społecznościach liberalnych. Zasada proporcjonalności*, Warsaw 2005, pp. 23 ff.

<sup>34</sup> By instrumentality I mean here the use of the criminal law to achieve an objective other than the administration of justice for the historical act committed. Such an objective is generally a deterrent and preventive effect of punishment. See, inter alia, R. Posner, *Ekonomiczna teoria prawa karnego*, 'Ius et Lex' 2007, No. 1(V), pp. 34 ff.

<sup>35</sup> See A. Wąsek, *Prawo karne – minimum moralności?* 'AUMCS Lublin' 1984, No. 3(XXXI), Sectio G, pp. 35 ff.; J. Stelmach, *Próba systematyzacji treści moralnych występujących w polskim kodeksie karnym z 1969 roku*, 'ZNUJ, Prace z Nauk Politycznych' 1979, No. 12, pp. 93 ff.; B. Wróblewski, *Studia z dziedziny prawa i etyki*, Wilno 1934, pp. 164 ff.; B. Wróblewski, *Prawo karne a moralność. Szkoła humanistyczna prawa karnego*, Warsaw, Library of "Gazeta Administracji i Policji Państwowej", Vol. V, (no date or place of publication); K. Buchała, *Koncepcje polityki kryminalnej w pracach Bronisława Wróblewskiego*, 'SP' 1983, No. 3, pp. 9 ff.; K. Szczucki, *W poszukiwaniu legitymizacji etycznej zasad karnej*, Warsaw 2020, pp. 12 ff.

<sup>36</sup> See R. A. Duff, *Towards a Modern Legal Moralism*, 'Criminal Law and Philosophy' 2014, No. 1(8), pp. 217 ff.

<sup>37</sup> An example of this type of legislative activity can be seen in the provisions introduced into the Penal Code in 2017 typifying so-called vat crimes, criminalising attacks on tax documents, punishable by up to 20 years' imprisonment. In order to be held criminally liable, it is not even required to establish that a specific exposure of the property interest of the State Treasury or other legitimate entities has been created.

are dealing here with the vision of society adopted as the basis of the proposed solutions, which allows for contrasting the conflictual approach, characteristic of the supporters of change, with the consensual one adopted by the opponents of change. An important role is also played by the issue of beliefs as to the possibility of effective resolution of social problems through appropriately shaped repression, including, in particular, the belief in the effective implementation by criminal law of a general preventive function, treated as a deterrent<sup>38</sup>. It is based on the belief that the ultimate purpose of criminal law itself, and in particular the use of punishment, is to control crime, manage the behaviour of offenders and minimise harm<sup>39</sup>. A significant role in this approach is played by differences as to the way in which constitutional standards are reconstructed and, consequently, the limiting significance of constitutional standards, including in particular the principle of human dignity and its importance in terms of eliminating the instrumental, socially subordinated use of criminal law, including in particular sanctions<sup>40</sup>. On a constitutional level, the differences in the understanding of the guarantee standards stem at least in part from differences in political philosophy. Those in favour of increasing repressiveness and treating criminal law as a tool of management by repression show a preference for an illiberal approach. Opponents of these changes, opting to leave the classical model of criminal law in place, take liberal philosophy as their basis. There is a not insignificant sympathy for determinism or indeterminism, including in particular the possibility of basing repression on grounds other than personal guilt and the proportionality of the sanction to the gravity of the act<sup>41</sup>. Finally, an important element is the approach to the social consequences of a particular way of shaping the criminal law model, including the effects well reflected by concepts of social labelling, economic theories of punishment and criminal law<sup>42</sup>, and the possibility of a complementary approach to at least some of the assumptions outlined above. The approach underpinning the modification of criminal law towards increased repressiveness is based on

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<sup>38</sup> The model of criminal law change in Central and Eastern European countries, including Poland in particular after 2016, seems to be based on this belief.

<sup>39</sup> See W.R. P. Kaufman, 2013, *op. cit.*, pp. 19 ff; W. Zalewski, 2021, *op. cit.*, pp. 383 ff.; R. Posner, 2007, *op. cit.*, pp. 34 ff.

<sup>40</sup> The proponent of neo-retributivism, J. Kochanowski, wrote about this issue in an interesting way, pointing out that the neo-retributivist approach and the economic theory of criminal law are based on respect for the dignity of the offender, based on the assumption of influencing the offender's decision-making by shaping its premises. Both treat the offender subjectively. In contrast to the utilitarian approach, which declaratively respects the assumptions of the liberal approach, but in reality pursues concepts of social engineering through re-socialisation. J. Kochanowski, *Ekonomiczne podejście do przestępczości*, 'Ius et Lex' 2007, No. 1(V), pp. 10–11.

<sup>41</sup> See R. Posner, 2007, *op. cit.*, pp. 15 ff.

<sup>42</sup> See, inter alia, *ibidem*, pp. 15 ff.; M.A. Cohen, *Ekonomiczne podejście do przestępczości: równoważenie korzyści i kosztów*, 'Ius et Lex' 2007, No. 1(V), pp. 75 ff.; J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warsaw 2007, pp. 139 ff.

the juxtaposition of a rehabilitative approach to it<sup>43</sup>. It refers to neo-retributivism and economic theories of criminal law, assuming that both approaches, although competing, are to some extent utilitarian in nature, referring to the purposive functions of criminal law<sup>44</sup>. What is particularly important, however, is that they are treated as the opposite of “another kind of utilitarianism, which is the idea of a rehabilitative approach to criminal law”. It is treated by the proponents of changes that increase repressiveness as a kind of social engineering, despite the use of liberal slogans. The previous approach to criminal law based on the concept of re-socialisation, adopted as opponents of this approach, emphasised *a priori*, has persisted over the years despite the lack of evidence of its effectiveness. It has meant an instrumental approach to the offender, based on an often unintentional determinism that precludes taking into account the dignity of the offender and basing liability on guilt as a foundation for proportionate punishment<sup>45</sup>. Consequently, disillusionment with an approach based on the declarative protection of values, in fact utilitarian in its aspect of improving or correcting the offender through rehabilitation in prison, formed the basis of an alternative approach, directed away from the erroneous “(...) influencing the offender, which is in fact his objectification (...)”, towards “influencing his decisions by shaping his rationale – with the freedom to choose his course of action<sup>46</sup>.” “This is how the aims and functions of criminal law capture neo-relativism and an economic approach to the law by treating the offender subjectively”<sup>47</sup>. In order to address, to some extent, the contentious issues, it is worth looking at criminal law from a somewhat broader perspective, which also takes into account these concepts.

This makes it possible to assume that in order to analyse the opposites in question – treating criminal law as an instrument for the protection of values or as an instrument of social management through repression – one should reach back to the differences related to individualistic and communitarian models of society<sup>48</sup> and to a liberal, paternalistic or community-based justification of punishment. Let us consider consensual and conflictual visions of social structure. Let us consider contemporary perspectives on the relationship between morality

<sup>43</sup> See, in particular, A. von Hirsch, *Uzasadnienie istnienia I wymiaru kary we współczesnym retributywizmie*, ‘Ius et Lex’ 2006, No. 1(IV), pp. 47 ff.; J. Kochanowski, 2007, *op. cit.*, pp. 10 ff.

<sup>44</sup> See more extensively R. Posner, 2007, *op. cit.*, pp. 20 ff.; M.A. Cohen, 2007, *op. cit.*, pp. 113 ff.

<sup>45</sup> See, in this regard, the extremely interesting reflections of K. Krajewski, 1994, *op. cit.*, pp. 23 ff. and the literature cited therein.

<sup>46</sup> See J. Kochanowski, 2007, *op. cit.*, pp. 10 ff.

<sup>47</sup> See *ibidem*.

<sup>48</sup> See A. Wąsek’s interesting comments and also a sign of the times concerning the Marxist moral doctrine (which undoubtedly has a social, anti-individualistic character), 1984, *op. cit.*, pp. 50 ff. See also J. Nowacki, *Problem moralnej indyferentności przepisów prawa pozytywnego*, ‘ZNUŁ, Nauki Humanistyczno-Społeczne’, Series I, 1966, Vol. 47.

and law<sup>49</sup> as well as communicative functions of punishment as a means of institutional condemnation or a secular form of penance<sup>50</sup>. Let us acknowledge that criminal law is a conventional instrument for the settlement of conflicts caused by the commission of a criminal offence<sup>51</sup>. Finally, a critical return to the assumptions of neo- retributivism, particularly proportionality as a limiting principle with a significant function at the level of criminal law making and application, is called for<sup>52</sup>. In terms of proportionality, let us give due weight to its materiality and relateness<sup>53</sup>. Let us consider the aspect of the effectiveness of criminal law, also in its general-preventive sphere, without losing sight of the restorative perspective associated with restorative justice concepts.

Against such a background, it will be possible to present contemporary assumptions and social expectations regarding the aims and functions of criminal law and punishment. In the further perspective, an attempt will be made to build a theory allowing to maintain proper proportions between the protection of values, adequately shaped in the sphere of internal and external relations, and the elements of managing the conflict resulting from the fact of committing a crime, which in any civilised system should not take the form of instrumental social control through repression and fear.

Disputes about the shape and functions of criminal law have several facets. From the perspective of the analyses conducted here, four deserve emphasis: philosophical-legal, criminological, theoretical and analytic and synthetic. Each of them offers a view of criminal law from a different perspective, uses different methods, and, finally, is based on different assumptions and has limitations immanent to the area to which it refers. Disputes about criminal law conducted in the context of the ever-increasing importance of penal populism are conducted in a different way depending on the place, tradition, legal system or importance of the political context. In Poland, the debate, which has been conducted with great intensity since 2016, is strongly marked by two aspects: the view of criminal law from the perspective of constitutional standards, treated as determinants of the limits of repression that does not violate civil rights and as guarantee limits expressed in the Constitution<sup>54</sup>, and a view of the criminal law system from the perspective of analysis, synthesis and interpretation of the law in force. The state of analysis is somewhat different in countries of the Anglo-Saxon culture, where

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<sup>49</sup> K. Krajewski, 1994, *op. cit.*, pp. 5 ff.

<sup>50</sup> See more in R.A. Duff, *Karanie obywateli*, 'Ius et Lex' 2009, No. 1(IV), pp. 34 ff.

<sup>51</sup> See more in P. Wiliński, *Zarys teorii konfliktu w prawie karnym*, Warsaw 2020, pp. 32 ff.; P. Kardas, 2019, *op. cit.*, passim.

<sup>52</sup> See more in A. von Hirsch, 2006, *op. cit.*, pp. 47 ff.

<sup>53</sup> See more in A. Ashworth, *Kryteria ustalania proporcjonalności wyroku*, 'Ius et Lex' 2006, No. 1(IV), pp. 133 ff.

<sup>54</sup> See, in particular, M. Gutowski, P. Kardas, 2017, *op. cit.*, pp. 90–121 and pp. 384–444; P. Kardas, *Prawo karne w świetle standardów konstytucyjnych*, 'PiP' 2022, No. 10, pp. 91–106; W. Wróbel, 2022, *op. cit.*, pp. 13 ff.

a criminological approach is clearly dominant, taking into account the whole spectrum of contemporary theories and a view from the perspective of criminal law philosophy and theory. Consequently, locally, disputes about criminal law are conducted in the context of compliance with constitutional standards and systemic consistency and structural correctness. From a methodological point of view, they are based on a constitutionally oriented analysis, synthesis and interpretation of criminal law as it is. In the Anglo-Saxon view, it is based on a philosophical and criminological approach, supplemented by economic and pragmatic, social or sociological aspects.

#### IV. THE PLANE OF CRIMINAL LAW PHILOSOPHY AND DISPUTES ABOUT CRIMINAL LAW

From the perspective of the philosophy of criminal law (and also, to some extent, from a theoretical perspective), the dominant strand of the criminal justice thought is still based on the assumption that the repression of an individual under the public *ius puniendi* is justified by the violation of the essential values protected by the law of the land<sup>55</sup>. It is based on the hypothesis of social consensus as to the socially valuable goods requiring criminal law protection combined with a consensual model of social order<sup>56</sup>. The presumption that repression is based on observance of the *ultima ratio* principle of criminal law and that its unitary dimension respects the principle of proportionality between the gravity of the act committed and the degree of severity of the offence inflicted on the perpetrator constitutes justification and sets the limit of the public *ius puniendi*<sup>57</sup>. In this approach, criminal law is first and foremost an institutional tool for the protection of socially valued values, serving a broader social interest resulting from the consensual acceptance of the criminalisation of certain behaviour<sup>58</sup>. In this sense, it is an instrument of social control and steering. It serves the general public and not the pursuit of power interests. In spite of the competing approaches to the aims and functions of criminal law and punishment presented within this current, it is accepted that its basic justification is the offender's violation of a good whose

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<sup>55</sup> In Polish literature such a position is consistently presented by A. Zoll, *O normie prawnej z punktu widzenia prawa karnego*, 'KSP' 1990, pp. 77 ff. From the perspective of criminological theories, it at least conclusively refers to the consensual picture of social order and criminal law. See more in K. Krajewski, 1994, *op. cit.*, pp. 10 ff.

<sup>56</sup> For more see K. Krajewski, 1994, *op. cit.*, pp. 12 ff.

<sup>57</sup> The views of proponents of neo-retributivism are based on similar assumptions, although leading to a slightly differently shaped vision of criminal law. See, inter alia, A. von Hirsch, 2006, *op. cit.*, pp. 47 ff.; M. Królikowski, 2005, *op. cit.*, pp. 54 ff.

<sup>58</sup> Cf. K. Krajewski, 1994, *op. cit.*, p. 142.

importance justifies protection by repression<sup>59</sup>. Any other functions ascribed to punishment and criminal law are treated as peculiarly subsidiary<sup>60</sup>. The disputes conducted around the interrelationship between the disadvantage proportional to the negative gravity of the act and the other objectives that can be pursued through criminal law and punishment do not question the assumption that the main justification and justification of punishment is the violation of a socially valuable good. The harm or damage caused by the commission of an offence is the primary justification for punishment<sup>61</sup>. This approach is based on a consensual vision of social structure linked to the assumption of indeterminism in the vision of the human being<sup>62</sup>. At the same time, the literature presents alternative views of the function of criminal law, indicating that the aim of the public *ius puniendi* is to protect the social order, a specific social structure and the interactions that take place within it, including in particular the impact on perpetrators displaying a 'hostile' attitude towards the social and legal order associated with an intent to violate them<sup>63</sup>. This approach focuses on the perpetrator as a rudimentary reference point for the legitimacy of legal norms and a conflictual vision of social order. It assumes the existence of a state of threat from a specific category of persons<sup>64</sup>, whose minimisation justifies the use of the tools of public *ius puniendi*. A peculiar development of this conception with a pragmatic orientation are the various forms of so-called penal populism, emphasising that the function of criminal law is not so much and not only to protect the rights of the individual against threats (abuses) by public

<sup>59</sup> See, however, the critical comments on the conception of criminal law as a tool for the protection of precious values by G. Jakobs, 1993, *op. cit.*, pp. 44 ff.

<sup>60</sup> It also relates to preventive functions. In terms of individual prevention, it is based on a peculiar combination of indeterminism, which is the basis of guilt-based liability, with at least partial determinism, justifying a corrective effect on the offender. In the perspective of general prevention, on a kind of instrumental treatment of the offender. Both generate specific problems when confronted with criminological theories. See more in K. Krajewski, 1994, *op. cit.*, pp. 14 ff.

<sup>61</sup> See J. Feinberg, *The Moral Limits of the Criminal Law; vol. I: Harm to Others*, Oxford 1987; J. Feinberg, *The Moral Limits of the Criminal Law; vol. II: Offense to Others*, Oxford 1985; J. Feinberg, *The Moral Limits of the Criminal Law; vol. III: Harm to Self*, Oxford 1986; J. Feinberg, *The Moral Limits of the Criminal Law; vol. IV: Harmless Wrongdoing*, Oxford 1988; B.E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 'Buffalo Criminal Law Review' 2001, Vol. 5, pp. 159 ff.; D. Gruszecka, 2012, *op. cit.*, pp. 167 ff.

<sup>62</sup> Referring to the typology of criminological theories, it can be assumed that it respects, to varying degrees depending on the approach preferred by individual authors, the classical, positivist current in criminology. See more in K. Krajewski, 1994, *op. cit.*, pp. 23 ff.

<sup>63</sup> See in particular G. Jakobs, 1993, *op. cit.*, pp. 44 ff. In the Polish literature, interesting reflections are offered in D. Gruszecka, 2012, *op. cit.*, pp. 208 ff. See also R. Posner, 2007, *op. cit.*, p. 20 and the literature cited therein.

<sup>64</sup> In doing so, he perhaps alludes to the classical paradigm of criminology. See K. Krajewski, 1994, *op. cit.*, pp. 13 ff.

authority<sup>65</sup>, as the protection of society from the individual, perceived as a threat to the whole<sup>66</sup>. In both cases, from the perspective of social order, a conflictual conception is adopted, with elements of limited determinism in the vision of the human being<sup>67</sup>.

The concepts outlined above seem to represent different anthropological models of criminal law: the classical, value-oriented position of criminal law philosophy refers to a liberal model in which the harm principle plays a fundamental role, while the alternative approach refers to a community approach with elements of paternalism<sup>68</sup>. From the perspective of the issues identified in the title, the first approach is based on the protection of values and the second on control and order through norms of repressive law. The first emphasises the guarantee elements, crucial in cases of clashes between the individual and the instrumentality of the state applying *ius puniendi*. It refers to the Enlightenment paradigm. The second emphasises the protection of the community threatened by the incorrigible individual, giving priority to individual or collective values over the protection of the perpetrator against the arbitrariness of the punitive power.

Somewhat independently of the alternative angles indicated above, there are approaches to criminal law which are presented as a tool for the elimination of conflicts in society, their institutional resolution through a formalised procedure for the realisation of the public *ius puniendi* and, to a certain extent, a non-institutional resolution, based on agreement, reconciliation, expiation and reparation of damage or compensation for the harm caused by the commission of a crime<sup>69</sup>. Emphasising the function of criminal law as an instrument for resolving social conflicts, these approaches are by no means necessarily based on a preference for a conflictual model of social structure. While recognising that crime immanently generates a social conflict, in the individual dimension on the perpetrator-victim line, and in the social dimension on the perpetrator-society line, at the same time they allow for shaping criminal law on the basis of the assumption of a consen-

<sup>65</sup> Which is a fundamental component of the Enlightenment paradigm of criminal law, with an equally protective and guaranteeing function.

<sup>66</sup> J. Pratt, M. Miao, 2019, *op. cit.*, pp. 16 ff.

<sup>67</sup> The indication of limited determinism is intended to emphasise that modern criminal law recognises various types of phenomena affecting human behaviour, internal – related to the person of the perpetrator as well as external – which may provide a basis for moderate determinism. In this respect, criminal law offers a different type of response to dissocial behaviour than the attribution of liability and punishment, not referring to symbolic condemnation and deserved, proportionate punishment, but having the character of protective instruments. This is particularly the case for mentally disturbed offenders, for whom the criminal law, based on guilt and punishment, is not an adequate means of response. See in more detail A. Barczak-Oplustil, M. Pyrcak-Górowska, *Wprowadzenie*, (in:) A. Barczak-Oplustil, M. Pyrcak-Górowska, A. Zoll (eds), *Środki zabezpieczające. Ujęcie systemowe*, Kraków 2021, pp. 33 ff.

<sup>68</sup> A synthetic analysis of anthropological approaches to criminal law is presented in M. Derek, *Karnoprawne znaczenie woli dzierżyciela dobra prawnego*, Kraków 2021, pp. 101 ff.

<sup>69</sup> See more in P. Wiliński, 2020, *op. cit.*, pp. 13 ff.; P. Kardas, 2019, *op. cit.*, pp. 12 ff.

sual model of society, especially social acceptance of criminalisation of specific behaviours.

The trend of considering criminal law in the context of solving conflicts resulting from the commission of a crime is supplemented by the concepts of using criminal law as a security instrument, often realised through a specific form of isolation, serving to control individuals who display personal characteristics that create a specific type of threat. In this respect, it is also concerned with resolving conflicts arising from collisions with the law and the violation or endangerment of essential values, but specific in so far as they show a clear preference for determinism. The functions of criminal law in this approach are directed towards safeguarding society and individuals against further violations of essential values, and are a tool for ensuring a sense of security.

It appears that, despite the lack of major studies devoted to the contemporary philosophy of criminal law, there are views on the margins of various analyses that indicate the multiple functions of criminal law and various philosophical and criminological approaches to various phenomena of unlawful behaviour.

This makes the philosophical-legal plane look extremely promising from the perspective of the debates concerning the shape of contemporary criminal law, including in particular the opposing view of its essence and function either as an instrument for the protection of values or as a tool of social management through repression. Indeed, philosophical questions in criminal law refer, as a rule, to issues related to the grounds and justification of the repressive reaction, the essence and justification of punishment, the purpose of repression realised within the framework of the public *ius puniendi*, the possibility of realising functions of punishment other than a response to the evil committed by the offender<sup>70</sup>, the significance of the social conflict caused by the commission of a crime and possible ways of resolving it. They also refer to the anthropological assumptions of criminal liability, including, in particular, sympathy for determinism or indeterminism and, in the longer term, rational ways of influencing the offender and the community. The philosophical approach in criminal law directly influences the way political-criminal assumptions are framed. It also affects the sphere of criminological theories, whether criminology is seen as an 'auxiliary science' of criminal law or an autonomous sphere that addresses the essence of crime and its perpetrator<sup>71</sup>. A look at criminal law from a philosophical perspective allows us to see its moral roots, a link between the repressive reaction and the person of the offender, treated as a moral subject<sup>72</sup>. Naturally, it links repressive law to the concept of human rights. It gives it a guarantee character that takes into account both the perpetrator and the victim as a result of the crime and human dignity as an inherent value, ruling out an instrumental approach to punishment aimed at the

<sup>70</sup> See W. Załuski, *Law and Evil. The Evolutionary Perspective*, Cheltenham 2018, pp. ff.

<sup>71</sup> See K. Krajewski, 1994, *op. cit.*, pp. 142 ff.

<sup>72</sup> See more in A. von Hirsch, 2006, *op. cit.*, pp. 75 ff.

realisation of specific social or political goals by means of criminal law. It makes it possible to link repression to the protection of values, the violation of which, in liberal political philosophy, is a necessary condition for punishment. It makes it possible to illustrate the need for an internal balance between the values protected and the repression envisaged for their violation or exposure<sup>73</sup>. It justifies the need for internal consistency with regard to criminalisation of various attacks on goods of different values. In all the areas presented above the arguments are located in diverse concepts, a perspective which constitutes a complementary conglomerate of ideas determining the objectives and functions of criminal law. An illustration of the above may be found in the reference to economic theories of criminal law, which, being an alternative to the classical approach, well justify the need to preserve the relative and material principle of proportionality. From the perspective of the economic analysis of criminal law, looking for the most effective model to prevent the commission of crimes through a properly constructed and rationally applied system of punishment, it is emphasised that "one of the costs of increasing the severity of the punishment for a crime is to reduce the inhibition on the part of offenders to substitute a given crime with a more serious one. In other words, reducing the punishment for less serious offences may reduce the risk of committing more serious crimes"<sup>74</sup>. Undoubtedly, such an approach provides a rational basis for a debate on the manner and limits of criminal law-making. It makes it possible to critically address the draconian repressiveness that underpins extreme deterrence through repression, illustrating not only the ineffectiveness of this approach but, paradoxically, the immanent risk of it generating premises that increase the risk of crime in the long term.

A comprehensive view of criminal law from different philosophical perspectives makes it possible to see its multiple functions and diversity, the necessity to use appropriately flexible constructions, allowing for an adequate response both on the basis of the formula of deserved punishment, based on an indeterministic vision of a human being capable of culpability, and the use of essentially protective measures, related to the perception of the individual as an entangled subject, based at least in part on sympathies with the deterministic approach.

The picture of contemporary criminal law is interestingly complemented by contemporary criminology. Viewed not so much as a collection of competing paradigms and theories, charting opposing goals and functions of criminal law, but treated holistically, skilfully combining elements once seen as radically opposed and exclusive. In this way, it is possible to combine an approach to criminal law that sees the perpetrator as a moral subject, that bases responsibility on subjective accusability, that sees human dignity as a barrier to instrumentalisation of repression applied within the framework of the public *ius puniendi* with a view of crim-

<sup>73</sup> A.J. Ashworth, *Principles of Criminal Law*, 2<sup>nd</sup> ed., Oxford 1995, pp. 123 ff.

<sup>74</sup> R. Posner, 2007, *op. cit.*, pp. 40–41.

inal law as an instrument for the resolution of conflicts in the interests of society and, to some extent, of power. It allows seeing criminal law as an instrument of social, but institutionally framed, control. It allows debates on criminal law to take into account the consequences of symbolic condemnation and sanctions<sup>75</sup>, effects of prisonisation<sup>76</sup>, the need for a rehabilitation effect and the importance of a consensual and reparative way of resolving the conflict caused by the commission of a criminal offence<sup>77</sup>. It allows criminal law to be seen as an instrument for the protection of values whose violation or exposure to danger justifies repression, the communicative aspect of the attribution of liability and punishment, to take into account a properly understood secular atonement<sup>78</sup> and diverse preventive and educational impacts<sup>79</sup>. At the same time, it does not exclude treating criminal law in its properly designated scope as an instrument of social control for the management of social conflicts, without having to resort to a sanctioning response. Finally, it makes it possible to assess the social and economic consequences of punishment, in the short and long term, taking into account the individual and social dimensions. It is aptly emphasised in the literature that “the vision of a society permeated by social conflicts of various types and natures and of criminal law as an instrument used in these conflicts in the interests of power does not at all exclude the existence of even significant areas of social consensus, where social acceptance also applies to the criminalisation of certain behaviour, and where criminal law serves a broader social interest”<sup>80</sup>. It does not prevent the criminal law from performing a security function either, founded on the perpetrator’s being dangerous, to some extent respecting the entanglements of the individual showing a far-reaching affinity to determinism.

## V. THE PLANE OF ANALYSIS AND SYNTHESIS OF THE LAW IN FORCE VERSUS DISPUTES ABOUT THE ESSENCE OF CRIMINAL LAW

At the analytic, synthetic and interpretational level, analyses concerning fundamental issues related to the functions and objectives of criminal law are lim-

<sup>75</sup> See *ibidem*, pp. 31 ff.

<sup>76</sup> R. Witt, A. Dyrden Witte, *Odstraszanie i izolacja*, ‘Ius et Lex’ 2007, No. 1(V), pp. 141 ff.

<sup>77</sup> C.E. Moody, *Ekometryczna analiza poziomu przestępczości: więzienia, przestępczość a równania współzależne*, ‘Ius et Lex’ 2007, No. 1(V), pp. 235 ff.

<sup>78</sup> See R. A. Duff, 2006, *op. cit.*, pp. 21 ff.

<sup>79</sup> See in more detail A. Ashworth, 2006, *op. cit.*, pp. 143 ff.; S. Rex, *Proporcjonalność i resocjalizacja. Szanse na pojednanie*, ‘Ius et Lex’ 2006, No. 1(IV), pp. 89 ff.

<sup>80</sup> J. Utrat-Milecki, *Podstawy penologii. Teoria kary*, Warsaw 2006, pp. 23 ff.; K. Krajewski, 1994, *op. cit.*, p. 142.

ited by the nature of the method used in this area. Regardless of whether one makes the interpretation of the law in force, the normative analysis or the mixed approach the basis of analyses<sup>81</sup> which encompass both of the above-mentioned methods sometimes supplemented by elements of the historical, legal-comparative and empirical method, the discussion of the grounds and justification of punishment encounter peculiar obstacles. They concern the aspect of establishing a catalogue of goods that deserve criminal law protection, arranging them into a specific hierarchy, and finally the possibility of arguing on the level of structural elements related to general assumptions and properties of typifying provisions. The approach involving interpretation of the law in force is, as a rule, inherently descriptive and serves to rationally reconstruct the patterns of criminal liability encoded in the law. Its boundaries are determined, on the one hand, by compliance with the currently adopted paradigm, and on the other, by adaptive interpretation, pro-constitutional and in line with the Constitution, and finally by the capacity of certain models and theories adopted in the science of criminal law. In this respect, the approach that involves interpretation of the law in force may rationalise the reconstruction of the statutory basis of liability, but it often remains completely defenceless when confronted with the change in the anthropological, philosophical and criminological assumptions of criminal liability, linked to a particular way of perceiving the nature of social order<sup>82</sup>. Different approaches, sometimes extremely opposite, are possible in each area signalled above. Their choice determines to an important extent the way in which reconstruction is carried out on the level of analysis, synthesis and interpretation of law. From a constructional and modelling point of view, it is possible to rationalise liability with different scopes, functions and objectives, the best example of which are investigative and theoretical analyses that justify the constantly expanding scope of criminalisation in the foreground of the violation of a legal good<sup>83</sup>. The lack of clear indications as to how the catalogue of goods protected by criminal law is defined, the primacy of libertarian (liberal) or communitarian elements, the assumptions of a consensual or conflictual vision of the social order, means that the analysis-synthesis-interpretation plane can be of little use in the area of disputes concerning the foundations of liability and the model of criminal law<sup>84</sup>.

<sup>81</sup> As to the methodological aspects of the analyses conducted on an analytical and interpretative level, see more in P. Kardas, *Teoretyczne podstawy odpowiedzialności karnej za przestępne współdziałanie*, Kraków 2001, pp. 45 ff.

<sup>82</sup> These issues are aptly analysed in J. Giezek, 2022, *op. cit.*, pp. 24 ff.

<sup>83</sup> See, inter alia, D. Gruszecka, 2012, *op. cit.*, pp. 12 ff.; Sz. Tarapata, *Dobro prawne w strukturze przestępstwa*, Warsaw 2016; P. Kardas, *O osobliwościach przestępstw abstrakcyjnego narażenia na niebezpieczeństwo*, 'PiP' 2022, No. 11, pp. 1–19.

<sup>84</sup> Interesting reflections concerning the limitations of a synthetic and interpretative analysis in disputes concerning the bases of criminal liability, including the possibility of using model approaches and synthetic and interpretative constructions to justify opposing proposals are presented in J. Giezek, 2022, *op. cit.*, pp. 24 ff.

A discussion on the analysis-synthesis-interpretation level may provide a basis for an analysis of the shape of the measures currently in force, comparing them to the regulations previously in effect, pointing out certain tendencies and characteristics of particular models of criminal law, including in particular those characteristic of autocratic, totalizing and democratic systems<sup>85</sup>. In this respect, they may also form the basis of assessments formulated in relation to the criminal law system currently in force<sup>86</sup>. From the perspective of the purpose and function of criminal law, in particular the nature of the protected legal goods, the said plane allows for a systemic analysis that includes, inter alia, some reflection on the assumed hierarchy of protected values, internal consistency and internal proportionality<sup>87</sup>. Also, by applying the concept of pro-constitutional interpretation and interpretation in accordance with the constitution, it allows an evaluation of consistency of regulations contained in the criminal law with the constitutional rules and principles. However, it should be borne in mind that an important role is played in this area by the assumptions adopted in the field of political philosophy, which impinge on the manner of interpreting the constitution. A change of approach in this area, in particular a rejection of liberal concepts, may result in a different reading of the constitutional rules and principles and, consequently, in a different assessment of the regulations adopted in criminal law.

However, an analysis conducted at the synthesis-and-interpretation level does not provide sufficient grounds for categorically negating a specific type of criminal-political solutions as irreconcilable with a specific interpretative approach, as inaccurate, or as subject to general falsification. They make it possible, to a small extent if at all, to address the question of the functions and objectives of criminal law. In this respect, the analysis-synthesis-interpretation plane does not constitute a useful tool for valuing the characteristics of a particular model of criminal law. Of course, this does not mean that it is not possible to make critical remarks relating to systemic inconsistencies, structural defects, model inadequacy, lack of internal coherence, etc. However, these are structural elements, not relating how grounds and objectives of criminal liability are shaped. It may be said that this plane allows an assessment of certain legal measures from the perspective of the current interpretative paradigm, which is of fundamental importance for the correct shaping of the law-making process<sup>88</sup>. It also makes it possible to set a limit

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<sup>85</sup> See in this respect interesting reflections in A. Zoll, *Konstytucyjne aspekty prawa karnego*, (in:) T. Bojarski (ed.), *System Prawa Karnego*. Vol. 2. *Źródła prawa karnego*, Warsaw 2011, pp. 219 ff. Cf. also J. Giezek, *Funkcje prawa karnego w autorytarnym systemie sprawowania władzy*, 'Studia nad Autorytaryzmem i Totalitaryzmem' 2021, No. 1(43), pp. 185 ff.

<sup>86</sup> This is how the position sometimes presented, indicating that certain changes made to the criminal law system set the system back 50 years, to the criminal law system of the real socialist state, should be understood.

<sup>87</sup> See in this regard A. Ashworth, 2006, *op. cit.*, pp. 133 ff.

<sup>88</sup> See in this respect the extremely important remarks in S. Wronkowska, M. Zieliński, *O korespondencji dyrektyw redagowania i interpretacji tekstu prawnego*, 'SP' 1985, No. 3-4.

to the legislator's activity as long as one accepts the premise that lawmaking is an element of legal culture. In this context, it is worth recalling that "legal culture is the peculiar environment of law-making. (...) It is autonomous from the legislature and insists on the autonomy of law. The principles and rules it comprises protect the fundamental values of law, such as certainty, publicity, trust in the relationship between the legislator and the addressees of the norms it establishes, and protect the ability to shape the social order. It is therefore a valuable asset. The legal community, although it co-creates it, is not called to dispose of this asset, but to guard it. We are, as lawyers, first and foremost custodians of legal culture"<sup>89</sup>. It also offers certain possibilities for corrective interpretation to prevent excessive repressiveness on the basis of general solutions, including in particular the principles, directives and rules for determining the consequences of the attribution of criminal liability. In this area, the principle of guilt in its limiting aspect, accepted at the analytical, synthetic and interpretative level, as well as the principle of proportionality and deserved punishment, as a determinant of the degree of ailment that should not be exceeded by the court applying repression without a flagrant violation of the law, may prove extremely useful<sup>90</sup>. However, it must be borne in mind that all of these treatments are essentially corrective in nature, making them actualised at the stage of interpretation and application of the law, rather than at the stage of debates about the shape of the law integrally related to the process of law-making.

## VI. THE THEORETICAL PLANE AND DISPUTES ABOUT THE ESSENCE OF CRIMINAL LAW

On the theoretical level, the possibility of assessing the criminal law system from the perspective of the basis of liability can also provide a foundation for rationalising debates on the functions and objectives of criminal law. Theoretical analyses in criminal law refer to issues related to the shape of particular regulations, the possibility and manner of using certain constructions for the characterisation of the bases of liability, the assessment of the consistency of the adopted solutions. The theory of criminal law is a space in which answers are sought to the question of the meaning, basis and scope of criminal liability in the scope

<sup>89</sup> S. Wronkowska, *O stanowieniu i ogłaszaniu prawa oraz o kulturze prawnej*, 'PiP' 2007, No. 4(LXII), p. 15. See also A. Grabowski, *Wprowadzenie*, (in:) M. Florczak-Wątor, A. Grabowski (eds), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz*, Kraków 2012, pp. 23 ff.

<sup>90</sup> See more on this issue in P. Kardas, *Zasady i dyrektywy sądowego wymiaru kary w kontekście proponowanych zmian normatywnych*, (in:) J. Bojarski, N. Daško, J. Lachowski, T. Oczkowski, A. Ziółkowska (eds), *Księga Jubileuszowa Profesor Violeta Konarskiej-Wrzošek* (in print).

of various manifestations of human behaviour, the justification for shaping the bases of this liability, the purpose and sense of repression. It is relevant from the perspective of the aspects of liability for behaviour that does not infringe a legal good and that does not pose a concrete threat of infringement, i.e. criminalisation in the so-called pre-frontier of infringement, which is extremely important within the scope of contemporary debates on criminal law and from the point of view of penal populism and the concept of management by repression, which is one of the most important instruments enabling criminalisation based on formal aspects. Such criminalisation is simplified in terms of the construction of elements and, consequently, the requirements of proof, substitutive in essence, radically limiting the possibility of using the tool of so-called corrective justice in the assessment of individual cases. In this respect, theoretical-legal analyses can provide a basis for evaluating various proposed criminalisation measures, including a depiction of their internal and external systemic consequences.

A specific theoretical approach may provide justification for postulates concerning the scope of criminalisation in the sphere of stages and forms of committing a crime and the possibility of using corrective tools. An assessment of the legitimacy of shifting the foundations of liability in the sphere of the forms of committing a crime, including in particular the method of “streamlining”, which classically and theoretically belongs to the sphere of “non-criminal” forms of committing a crime, which is extremely popular among advocates of increasing repressiveness. It may also prove helpful in the search for an answer to the question of the limit of criminal liability related to the age of the perpetrator, i.e. the conventionally determined threshold of maturity, the crossing of which determines the capacity for culpability. The theoretical approach also provides opportunities to present a holistic vision of repressive law, which also covers its basic objectives and functions. It makes it possible to use the principle of proportionality in its relative and material function, as one of the criteria co-determining a rational scope of criminal liability that corresponds to theoretical assumptions. At the level of criminal law theory, it is possible to concretise and prioritise the functions of criminal law, to search for a reciprocal relationship between the paradigmatic reaction to the evil resulting from the crime committed and the realisation of utilitarian and pragmatic goals, including those aimed at guaranteeing social security and deterrence, and to search for criteria to assess the effectiveness of criminal law.

However, it is of little use where disputes over the shape of criminal law are based on choices of anthropological models, visions of social order, and finally political philosophy, including in particular a preference for a liberal or communitarian and paternalistic view of the social community. It also does not bring with it support when the disputes focus on the choice of values protected by criminal law, the manner of their protection, or the basing of repressive law regulation on a particular vision of society and law.

## VII. IN LIEU OF A SUMMARY

The comments presented above seem to indicate that holding contemporary debates on the shape of criminal law that take into account all aspects indicated above is worthwhile. A holistic view, noting the various aspects of punishment, including social expectations, often instrumentally aroused and irrational, makes it possible to illustrate the consequences of excessive punitiveness and populist management by repression, supported by the concept of an enemy criminal law, not so much arbitrarily questioning the social expectation to provide a sense of security through draconian repression, but illustrating that the momentary sense of satisfaction from criminal law shaped in this way must soon give way to the cognitive dissonance resulting from observing the social consequences of management by repression<sup>91</sup>. Consequently, such an approach lays the foundations for acceptance of a multifunctional and diversified criminal law system, providing the basis for an adequate response to diverse cases. It provides an instrument for varied ways of resolving conflicts that arise from the commission of a criminal offence, which also allows it to be resolved consensually, without the need for symbolic condemnation of the perpetrator and the attribution of criminal liability<sup>92</sup>. At the same time, it is based on the recognition that in each of the perspectives and visions of the human being and of the social structure, repression is inflicted on the individual, with the result that, whatever one's preferences, it is impossible to find justification for the instrumental application of criminal law in the manner characteristic of the penal populist trend<sup>93</sup>.

The above allows a conclusion that the radical and alternatively disjointed opposition of criminal law seen as an instrument for the protection of values or an instrument of social management through repression can hardly be considered valid. Indeed, contemporary criminal law is highly diverse, multifunctional and based in its various areas on different philosophical, theoretical, model and criminological assumptions. It also serves criminal and political purposes understood in various ways. This diversity, including the complementary approach to opposing assumptions, models and theories, allows an assumption that the vision of a society permeated by various types of social conflicts and criminal law used

<sup>91</sup> See in this regard the instructive remarks in B. Obama, 2017, *op. cit.*, pp. 812 ff.

<sup>92</sup> See more in P. Wiliński, 2020, *op. cit.*, pp. 220 ff.; P. Kardas, 2019, *op. cit.*, pp. 23 ff.

<sup>93</sup> An interesting level of criticism of the populist approach may be the economic theory of criminal law indicating the need to respect the relationship between the inconvenience of punishment imposed for a specific type of behaviour and the objective of effective deterrence. It is rightly pointed out by R. Posner that "if the penalty for theft of bicycles was increased to the level of the penalty for theft of cars, the number of car thefts would increase. Moreover, even if all offences were punished with the same severity, some marginal deterrence would still be preserved (...). With this in mind, marginal deterrence is unlikely to be a decisive factor in the design of a punishment system." – R. Posner, 2007, *op. cit.*, p. 41.

as a tool for their resolution does not exclude the existence of significant areas of social consensus, within which social acceptance relates to the basis and scope of criminalisation of specific behaviours. In contemporary criminal law, there are solutions based on indeterministic assumptions, where the basis of sanctions is the personal guilt of the perpetrator, understood as the reprehensibility of the behaviour he or she has undertaken, and solutions based on assumptions close to determinism, where the basis of a specific way of responding to unlawful behaviour is the danger of the perpetrator. The elements of symbolic condemnation and institutional attribution, which also perform communicative functions, are accompanied by solutions enabling consensual solutions to the conflict that arises from the commission of the offence, based on the agreement of the offender and the victim. In essence, modern criminal law serves to protect socially valuable values for which social acceptance has been obtained, to the socially approved extent, taking into account the principle of internal (material) and external (relative) proportionality. However, it also performs other functions, including compensatory and protective functions. To an important extent, it is an instrument of social control and management, especially of the conflict resulting from the commission of a crime. It serves the purpose of preventing future offences through a variety of instruments, both by strengthening the belief in the existence of norms prohibiting and prescribing certain behaviour, with the aim of persuasive positive influence leading to internalisation of norms and strengthening compliance with the law, and by influencing future attitudes through punishment, both prescribed as a threat for particular types of behaviour and imposed in individual cases, i.e. through deterrence. However, it cannot be an instrument of management by repression in the interests of power for a number of philosophical, theoretical, constitutional, economic and pragmatic reasons. Indeed, such shaping and applying criminal law, which violates all the principles accepted in criminal law regardless of the preference for a particular criminal law philosophy and criminological approach, can work in the short term. In the long term, it produces only negative consequences, both in the social and individual sphere and with regard to the representatives of the authorities or certain social groups who use criminal law instrumentally. It leads to an atrophy of norms and paradoxically increases the tendency to disobey them, as proponents of the economic approach to criminal law rightly point out. It causes, in the long term, an increase in the level of crime in that it is used as an excessively harsh, disproportionate, even draconian reaction to the commission of a crime, the primary purpose of which is to have a general-preventive effect through deterrence. In other words, order by repression. In this view, the criminal law is also not an effective instrument of social control. It therefore does not fulfil any of the functions ascribed to it in various philosophical and criminological approaches.

In conclusion, the following conclusions flow from the discussion of the three issues this paper looked at:

Firstly, the science of criminal law, encompassing the following perspectives: analytic-synthetic-interpretative, theoretical and philosophical, may constitute a plane providing premises and arguments helpful in resolving contemporary dilemmas.

Secondly, the approaches presented in the science of criminal law and criminology are not so much contradictory and radically competitive, but harmonizing, containing a number of complementary elements in a complex set of assumptions and claims.

Thirdly and finally, there is no real and radical opposition between seeing criminal law as an instrument for the protection of values and treating criminal law as a tool for managing social conflicts. Criminal law performs, in part, both of the functions indicated above, with the necessary proviso that there are rationales limiting the possibility of criminal law being used instrumentally as a tool for management by repression in the interests of the authorities or certain social groups.

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