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John Pratt, Magdalena Grzyb 1 ■

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

Karanie w czasach populizmu. Wprowadzenie do Numeru Specjalnego

Abstract: The rise of populism, as a by-product of neoliberal policies in Western democratic societies, became a hallmark feature of the supposed end-of-history era and post-cold-war order. Surprisingly, that shift was also evidenced in post-communist "new" democracies in Central and Eastern Europe. The field of criminal justice became one of the core areas of populist discourse. Penal populism indeed became a way to address concerns and fears that emerged in other realms. A Free-Market economy, immigration, the decline of the welfare state opened up huge social divisions and in the form of previously undreamt

of levels of wealth for some, nothing but uncertainty and insecurity amidst poverty and crime fears for many more. Mass immigration from poorer regions challenged our cultural identity for both individuals and the nation state itself, which notion had been put at risk. Local contingencies also play an important role in this, of course. In some societies, versions of Christian values have joined populist forces in targeting women's rights or those of the LGBT community. Penal populism has reshaped how it was possible to think about criminal justice. This includes the abandonment of previous restraints on imprisonment in both old and new democracies. Nevertheless, the liberal democratic model of criminal justice may also have two unlikely saviours of its own. One of these may be the COVID virus itself. The successful antidote to this involves trust in scientific knowledge. The successful antidote to COVID involves trust in scientific knowledge and expertise; high levels of trust in a strong central government, greater trust in public broadcasting organisations, and much stronger, social cohesion rather than the divisions that populism thrives on. The second unlikely saviour may be Vladimir Putin. With his war against the Ukraine state and its people, we also see what might be next in the route that populism is following: a form of autocracy;

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

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

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

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

In contrast to totalitarianism, the democratic order of the West promised free and fair elections, a free press, an independent judiciary and civil service. And above all, perhaps, it governs through the rule of law. In democratic society, the criminal justice system could not be used to make individuals simply "disappear", or to subject them to torture, or die in concentration camps or labour camps, as a consequence of the excesses of the state's power to punish and control. Instead, there was a strong emphasis on protecting the rights of individuals from state excesses, a further response to the way in which criminal law had been used in Nazi Germany to legitimize the prosecution of is enemies. In effect, there was a reassertion of the values of classical criminology (as these influenced the 1948 UN Declaration of Human Rights). Accordingly, there should be no punishment unless a crime had been committed; and it should then be finite, fixed and certain. On this basis, the US sexual psychopath laws were declared unconstitutional in 1956 and status offences largely abolished. More generally, indeterminate sentences were almost completely phased out in these societies by the 1970s (Bottoms 1977), given that their justification was for crimes that *might be* committed in the future, rather than a retributory response to crimes already committed. Many of the reforms of this era were the product of expert knowledge and influence brought to bear on policy development. As regards the US for example, a Harvard law professor became the executive Director of the 1966 President's Crime Commission and "the Model Penal Code [1962] effort of the American Law Institute brought the best and brightest in academic law into the process of substantive criminal law reform" (Zimring 1996: 253).

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

That said, it is important to understand what it is that we mean by this term "populism", as Russell Hogg discusses in his contribution, *Rethinking populism and its threats and possibilities*: rather than simply denouncing it as a kind of aberration, we need to see how it emerges in its current form. While populism itself is not necessarily aligned to the political right, the contemporary resurgence of populism has become an overwhelming characteristic of right-wing politics with very few exceptions to this (such

as Syriza in Greece and Podemos in Spain). What seems to have been of central importance in this resurgence is the democratic order's embrace of the neo-liberal mode of governance. The importance this gave to the free market, as the determinant of economic policy, the reduction of welfare in favour of lower rates of direct taxation, opening up huge social divisions in the form of previously undreamt of levels of wealth for some, nothing but uncertainty and insecurity amidst poverty and crime fears for many more; and the free movement of labour, under EU rules especially, usually from East to West and South to North (which coincided with a growing number of refugees, asylum seekers or undocumented immigrants from wars in the Balkans, then the Middle East, then the Horn of Africa, as well as those trying to escape the consequences of climate change). In these ways, it seemed that both the economic well-being and cultural identity for both individuals and the nation state itself had been put at risk. Hence, the way that has helped to direct the contemporary course of most populist politics, with the criminal justice process being reshaped by it, is to try to address such concerns, notably in the form of *penal populism*.

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

But in populist discourse, bringing back order necessitates that a "strong man" saviour takes the helm of the ship of state (with very few exceptions, such as Marine LePen in France, such leaders are, indeed, all men), projecting, in their carefully crafted manliness, the strength of character that is needed to take on and vanquish Establishment elites (or "the deep state",

to use a Trumpian phrase) and supra-national organizations. This is the way, they say, to restore national identity and sovereignty. Their promises of a return to the order and certainty that this will then bring are frequently accompanied with great displays of pageantry: they surround themselves with national flags, order military parades, celebrate their victories (2022 has thus been set down for a "Festival of Brexit" in the UK), use phrases such as "world beating" or "world leading". Whether this is to do with, as in Johnson's Britain, administering the COVID-19 vaccine or hosting Ukrainian refugees, the reality is almost exactly the opposite. Pageantry is important not only in promoting a resurgent nation state but also in identifying the presence of the strong man leader / saviour with this possibility.

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

At the same time, there was a strong sense of victimhood running through populist discourse: most obviously in relation to crime victims; or potential crime victims which the liberal Establishment appeared to have done nothing to address. But then, as the world seemed to be ever more uncertain and insecure (the 2008 global, fiscal crisis coincided with rising immigration), those who threatened the well-being of ordinary citizens diversified and increased. It began to include those who seem unacceptably different in some way or other: sex offenders, for example, as with the UK article here by Ian Mahoney et al., *Populist and vindictive constructions of sexual offending, pluralities of violence, and the implications for criminal and social justice*; or ex-prisoners in Romania, as Gabriel Oancea and Silvia Neculcea demonstrate in *Compensatory remedy against criminal populism*; or young offenders in Chile as Daniela Rodriguez Gutierrez writes in *Elite punitive populism and youth justice reform in Chile: Legitimizing a new political order*. Or such enemies might simply be immigrants (their regular or irregular status does not seem to matter to those who feel aggrieved and

left behind by government policies and for whom immigration has become an unwanted and undesirable burden); and those members of the Establishment who stand in the way of the strong man's programme to restore national greatness in some way or other, judges, journalists and civil servants all become "enemies of the people"; and in Central and Eastern European societies especially, these enemies include EU elites who, as the story goes, have stripped away the sense of certainty and security that was known in these societies before the fall of the Berlin wall and the dangerous embrace of Western values and freedoms (Vermeersch 2019).

The consequence of such attacks on the democratic order has been that the criminal justice system has also been moving beyond the boundaries previously set for it in democratic society: adherence to the principles of the rule of law have become too narrow and restricting if enemies are to be defeated and if the conspiratorial threats of the deep state are to be curtailed. There are many illustrations of the way in which this *penal populism*, particularly strong in the Anglo-American world and feeding on "expressions of anger, disenchantment and disillusionment with the criminal justice establishment" (Pratt 2007: 12) because of its failure to protect ordinary people from victimization. At the same time, this form of populism, with its use of social media platforms, as discussed by both Michalina Szafrańska in Poland *([Penal] populism and experts in the age of digital crown wisdom*) and by Leandro Ayres Franca and Carlos Ferreira de Abreu in relation to Brazil (*Algorithm-driven populism: An introduction*) has further undermined the ability of criminal justice elites to maintain their previous monopoly of knowledge and information on such matters.

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

at risk of committing sex crimes, prohibiting them, for example, from going near school playgrounds and so on.

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

Nonetheless, under the influence of populism, such initiatives no longer seem to trouble politicians and judges (see Pratt 2020). When he was British Prime
Minister, Tony Blair acknowledged that his government's anti-social behaviour legislation disturbed "the normal legal process [but] if the practical effect of the law is that people live in fear because the offender is unafraid of the legal process then, in the name of civil liberties, we are allowing the vulnerable, the decent, the people who show respect and expect it back, to have their essential liberties trampled on." As this example illustrates, populism has been able to reshape the framework of criminal justice in supposedly liberal democratic societies. In essence, rather than protecting individual rights from excessive use of the state's power to punish, its purpose has been redefined to be one of protecting the public from those individuals who put them at risk by excessive use of the state's power to punish as necessary.

So, does this then mean that this new phase of criminal justice, suited to the demands and expectations of populism, and leaving the previous model of justice with its emphasis on individual rights and clear limits and restrictions on state power only as some kind of historical monument, is irreversible? This does not seem to be the case. As Luke Oldfield et al argue here (*Adventures in populist discourse: Could a solution to penal populism in New Zealand be hiding in plain sight?*), what is needed are a set of arguments against the direction of populism that can also speak directly to

public concerns without falling back on reasserting that criminal justice policy should be the exclusive property of elitist experts.

At the same time, though, the liberal democratic model of criminal justice may also have two unlikely saviours of its own. As John Pratt and Daisy Lutyens show here (*The pandemic as an antidote to populism: Punishment, immobilization and COVID-19*), one of these may be the virus itself. Notwithstanding the new regulations on personal freedoms it necessitated from governments, it is evident that the successful antidote to COVID involves trust in scientific knowledge and expertise (such as the development of vaccines and predictive models that show its rise and fall); high levels of trust in a strong central government acting in conjunction with its own bureaucratic in relation to distributing the vaccine and providing accurate public information; and greater trust in public broadcasting organizations to gain more knowledge of the virus rather than searching for this amidst all the conspiracy theories available on the internet; and much stronger social cohesion rather than the divisions that populism thrives on, amidst innumerable reports of volunteers helping citizens unable to do their own shopping, doctors and nurses coming out of retirement to assist and so on. All such matters are not only antidotes to COVID but also antidotes to populism. Indeed, it might be that the pandemic has had the effect of decoupling risk from crime and placing it in the public health arena, making populist appeals to law and order much less effective than has previously been the case. In this respect, Donald Trump has been COVID's "biggest loser", in the political sense, notwithstanding his attempt to present himself as the law and order candidate in the US presidential election in 2020, with the pandemic enlarging his faults "so they became too frightening to miss', regularly contradicting and undermining" the response of his own government (Freedland 2020). Meanwhile, elections and opinion polls during the time of the pandemic illustrate, for the most part, a strong shift away from populism. This is not a hard and fast rule, of course. There have been some significant exceptions to it, notably the 2022 general election in Hungary, which saw President Orban returned to power. Nonetheless, the more general pattern appears to be one of scepticism and distrust of populist saviours, who variously try to deny the reality of the virus, or, discrediting their own scientific experts, put forward their own "snake oil" cures ("have you tried injecting yourself with disinfectant?", as Donald Trump once famously asked); but growing trust in those politicians who conform to democratic values and expectations and tell their public the truth about the virus, whether this takes the form of good or bad news.

Meanwhile, the second unlikely saviour may be Vladimir Putin. With his war against the Ukraine state and its people, we also see what might be next in the route that populism is following: a form of autocracy; rigorous

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

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Russell Hogg

1 ■

Rethinking populism and its threats and possibilities

Ponowne zastanowienie się nad populizmem – jego wyzwaniami i możliwościami

Abstract: Resurgent populism – with crime as a core theme – is depicted as a dangerous perversion of liberal democracy. But by avoiding a definition of populism, critics tend to simply conflate populism with contemporary right-wing authoritarianism. Academic analysis, including criminological, is not free of such tendencies. After a brief consideration of criminology's engagement with penal populism and the recent spread of a more far-reaching authoritarian political populism, the article argues for the need to more carefully conceptualise populism. Theoretical clarity is needed for assessing the character of contemporary populism; for grasping its drivers in, for example, neo-liberal globalization and what Crouch calls "post democracy"; and for discerning its possible future trajectories, progressive as well as regressive. It is also argued that simple denunciations of populism often reflect a complacent liberal mentality that contributes to political disaffection fuelling populist movements, and overlooks legitimate grievances, including the (often criminal) failings of liberal institutions. Rather than being a political aberration, populism, it is argued, should be seen as a "normal" dimension of democratic politics with implications for criminal policy (as well as politics at large). **Keywords:** populism, liberalism, neo-liberalism, post-democracy

Abstrakt: Odradzający się populizm – który w dużej mierze odnosi się do przestępczości – przedstawiany jest jako niebezpieczne wypaczenie demokracji liberalnej. Jednak brak zdefiniowania terminu „populizm", prowadzi do tego, że jego krytycy nierzadko mają tendencję do mylenia go ze współczesnym prawicowym autorytaryzmem. Także analiza naukowa, w tym kryminologiczna, nie jest wolna od takich tendencji. Niniejszy artykuł, po krótkim omówieniu zaangażowania kryminologii w opisanie populizmu penalnego i rozprzestrzenienia się daleko idącego autorytarnego populizmu politycznego, przekonuje o potrzebie dokładniejszej konceptualizacji terminu „populizm". By ocenić

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charakter współczesnego populizmu potrzeba bowiem pewnej wiedzy teoretycznej. Jest ona także niezbędna do uchwycenia i zrozumienia m.in. neoliberalnej globalizacji czy tego, co Crouch nazywa „postdemokracją", jak również do zorientowania się co do jej przyszłych możliwych trajektorii – zarówno postępowych, jak i regresywnych. Potępienie populizmu, co zostało podkreślone w artykule, jest często przejawem zadowolonej z siebie liberalnej mentalności, która przyczynia się do politycznego niezadowolenia napędzającego ruchy populistyczne, pomijając przy tym uzasadnione skargi m.in. na błędy instytucji liberalnych (często mające charakter przestępczy). Populizm, zamiast być aberracją polityczną, powinien być postrzegany jako „normalny" wymiar demokratycznej polityki, mający implikacje dla polityki kryminalnej (jak również polityki w ogóle). **Słowa kluczowe:** populizm, liberalizm, neoliberalizm, postdemokracja

Introduction

According to a growing number of scholars and commentators, the world has entered a deep democratic crisis, a crisis that threatens the "mature", "western" democracies in ways not seen since the 1930s. A stream of ominous titles, many appearing in the wake of the watershed events of 2016 (the Brexit vote and the election of Donald Trump), go as far as questioning whether democracy can survive (see della Porta 2013; Coggan 2014; Levitsky, Ziblatt 2017; Grayling 2018; Is democracy dying 2018; Runciman 2018). Others pronounce *The Death of Truth* (Kakutani 2018) and *The Death of Expertise* (Nichols 2019). For many of the authors, but by no means all, the crisis is not so much one of democracy as it is one of *liberal* democracy, a decoupling of democracy from liberal institutions (constitutionalism and the rule of law) and the enlightenment values of truth, reason and tolerance.

As they cast around for culprits – searching for who or what might lie behind the crisis – few commentators omit mention populism: "the populist *zeitgeist*" (Mudde 2004), *The Populist Explosion* (Judis 2016), the "populist moment" (Mounk 2018; also see de la Torres 2015, 2019; Müller 2016; The

power of populism 2016; Goodhart 2017; Mudde, Kaltwasser 2017; Eatwell, Goodwin 2018; Luce 2018; McKnight 2018; Pappas 2019; Moffitt 2020). According to Sascha Mounk (2018: 3), "There can no longer be any doubt that we are going through a populist moment. The question now is whether this populist moment will turn into a populist age – and cast the very survival of liberal democracy in doubt."

The interest in populism is not new, but the scale certainly is. Earlier literature on populism tended to only associate it with the political traditions of certain regions and countries, like the USA, Russia and Latin America (Ionesco, Gellner 1969; Goodwyn 1976; Canovan 1981; Kazin 1998; Berlin 2008). Writing mostly in the interregnum between this older literature and the recent "explosion", criminologists and sociologists adopted the label "populist" to describe developments in the administration of criminal justice and social control in parts of the Anglo liberal democratic world. Penal populism or ("populist punitiveness"), they argued, was driving increasingly harsh criminal justice policies and rhetoric (Bottoms 1995; Johnston 2000; Garland 2001; Roberts et al. 2003; Ryan 2003; Pratt 2006, 2008; Freiberg, Gelb 2008; also see Hall 1979, 1980, 1983). In the article that follows, I will first provide a brief account of penal populism before considering how it has morphed into a more far-reaching political populism. I will then turn to the neglected issue of conceptualising populism before discussing the key driving forces behind the rise of right-wing authoritarian populism. I conclude with some discussion of the prospects for a progressive populism.

1. Criminology and penal populism

Crime acquired increasing salience as a political issue across much of the western world in the 1970s and after. The trend was particularly pronounced in the English-speaking world, mainly in the USA, but also in Britain, Australia and New Zealand. Although a hotly contested election issue, campaigning around law and order was not confined to the election season but became part of the permanent political campaign and has mostly continued despite declining crime rates since the 1990s. Criminologists showed how conservative penal populist politics selectively nurtured and exploited popular fears and enmities around crime, which increasingly sidelined evidence and expertise concerning effective crime policy and legitimised an expansion of the surveillance, policing and penal capacities of the state, including the adoption of intensely symbolic policies like zero tolerance, three strikes laws and preventive detention, policies that were

often aimed at the most visible and marginalized and not necessarily the most harmful offenders.

Criminologists and sociologists have therefore been tracing the rise of illiberalism in western criminal justice and social control institutions and the role of *penal populist* politics for an extended period, although this was previously largely associated with parties of the centre-right and centre-left. Many of these accounts also described the broad contours of economic and social change that had given crime its novel political currency. They showed how the adoption of punitive measures was fuelled by the weakened capacity of states to manage the economic, financial, social and political consequences of globalization and hence an inability to respond effectively to the "vertiginous" anxieties (Young 2007) they had unleashed. Bauman pinpointed the way in which complex, remote, uncontrollable sources of popular insecurity and uncertainty are readily collapsed into an obsession with the issue of personal safety. This in turn prompts the adoption of tough law and order measures as a palpable sign of political resolution towards the protection of public safety and as a salve for political impotence in the face of the deeply disruptive effects of globalization on everyday economic and social life (Bauman 1998: 117). As the political class ceased to represent a large portion of its citizenry –unwilling or unable to address issues of economic and social insecurity – but still needing to engage voters and shore up legitimacy, the politics of fear and resentment assumed a growing importance and were also invoked to frame other issues, such as immigration, minority rights and welfare. The promise of security became an ever more pervasive feature of public policy and daily life.

Nevertheless, these developments did not attract much interest from scholars in other academic fields as affecting broader trends in mainstream politics or as steps towards a more far-reaching authoritarianism. On the other hand, while criminological and sociological accounts tackled the broad sociological drivers of penal populism, with only a few exceptions (Lacey 2008; Garland 2013), until recently they neglected analysis of the specific political institutions, processes, and rationalities that mediated large-scale social forces and specific legal and penal outcomes in particular settings. This led Zimring and Johnson (2006: 267) to observe that, "Criminologists and sociologists rarely make the political dimension of crime policy a principal concern, and political scientists almost never do […] criminologists avoid dealing with political issues, while political scientists have traditionally avoided crime and punishment as scholarly concerns."

In similar vein I have argued elsewhere that criminological analysis of populism largely avoided dealing with the political meaning and logic of populism (Hogg 2013), something it shared with much recent academic scholarship on populism. The popular tendentious view of populism sees it

as simply an irrational turn in politics: the abandonment of Enlightenment values of reason, science, and expertise as the guiding tenets of public (and more specifically penal) policy (Pratt, Miao 2017). Little interest is shown in the history of populism or the wide variety of movements that have identified themselves, or been seen by others, as populist. For example, the self-defined populist movement in late nineteenth century America – a broad coalition of farmers, urban workers, Christian socialists, feminists, and others who formed the Peoples' Party in the early 1890s – protested the power of monopolies, extreme concentrations of wealth and government corruption. The populists promoted mass education through travelling lecturers, community libraries and vibrant rural newspapers. They pressed for labour reforms (recognition of trade unions, an 8-hour workday), financial reform, a graduated income tax, votes for women and a regulatory state (Goodwyn 1976; Postel 2009). Although short-lived as a third-party force, with its aspirations for radical social transformation unrealized, in the following years many of its reform goals were achieved when adopted by the major parties. It initiated a radical tradition that influenced progressivism in the early twentieth century and the New Deal in the thirties. Such experiences are rarely acknowledged in contemporary debates about populism, doubtless because they fail to accord with current pejorative constructions of populism. To prove the point, Jan-Werner Müller (2016: 85) is one theorist who *does* discuss the Peoples' Party, but only to conclude "that the one party in US history that explicitly called itself 'populist' was in fact not populist." Coupling populism as a concept, and more often simply conflating it, with other terms like "penal", "punitive", "authoritarian", or "xenophobic", where the latter bear most of the conceptual (and normative) burden, begs the question of what precise meaning is to be given to populism. Here, theory is not a luxury to be dispensed with; it is essential. Before addressing that point in detail, I will briefly consider some key features of the more recent "explosion" in populist political movements.

2. From penal populism to political populism

For the most part, neither criminologists nor political scientists detected that penal populism might be "a prelude" to forms of populism that would invade the entire body politic and "mainstream society" (Pratt, Miao 2017: 3). For most criminologists it was an affliction specific to the domain of penal policy, with remedies close to hand: more knowledge and education for citizens and the news media and institutional measures that insulated

criminal justice policy from ill-informed popular pressures. This proved to be a short-sighted view.

There is now no disputing that right-wing, authoritarian populist parties have been on the electoral march for some time and in many cases hold power, share power or exert considerable political influence across many parts of Europe (Mudde 2019). In 2018 the already two-time election winner, Viktor Orbán's right-wing, nationalist, anti-immigrant Fidesz Party in Hungary, enjoyed a thundering election victory, winning 67% of the parliamentary seats. Orbán is something of a poster boy for the new authoritarian politics in Europe and elsewhere. Both Donald Trump and his erstwhile campaign strategist, Steve Bannon, are admirers. So too is leading Fox News commentator Tucker Carlson, who in an August 2021 broadcast from Hungary praised Orbán as a defender of western Christian civilization (Sexton 2021). On the back of his election wins, Orbán mounted concerted assaults on the independence of Hungary's political, legal and media institutions and used his power to dispense economic and political favours to his cronies. After his 2018 electoral victory, Orbán repeated his claim that, "The age of liberal democracy is dead. It is no longer able to protect people's dignity, provide freedom, guarantee physical security or maintain Christian culture" (Walker 2019: 18). Others, like Poland's Law and Justice Party, have followed in these authoritarian footsteps with similar electoral successes. Elsewhere in Europe (Norway, Austria) far right populist parties share power with centre-right conservatives. In Italy *la Lega* shared power with the Five Star Movement until recently but is now allied with the neo-fascist Brothers of Italy and Silvio Berlusconi's Forza Italia, where they currently govern 15 of the 20 Italian regions (Giuffrida 2021). A far-right party, AfD, has entered the German Bundestag for the first time since WW2 and in France Marine Le Pen (the National Rally leader) reached the second round of the 2017 presidential election, and is set to repeat this achievement or go one better at the next election. "Populist" strong men are also safely in charge in Russia, Turkey, India, Brazil and the Philippines. The reach of the rightward political shift was emphatically underlined when the chauvinist UKIP party (then led by Nigel Farage) joined with sections of the British Conservative Party in 2016 to support Brexit, and shortly after Donald Trump won the US presidential election. The electoral winds battering the political systems of some countries (Greece, France, Italy) have seen the eclipse of once dominant mainstream parties of both centre-right and centre-left. In others (the US, Britain) right-wing insurgents have dragged conservative parties dramatically to the right. Far less common, but worth noting, are parties and movements of the left that have been labelled populist, like Syriza in Greece and Podemos in Spain.

The dominant pattern is clear. It does not involve, as in the 1930s, the violent toppling of constitutional government by fascist parties, but rather

as Cas Mudde has argued, a progressive, long-term process of "mainstreaming and normalization of the far right" (Mudde 2019: 1). Democracy is not overthrown, but is made to favour the expansion and legitimation of executive power over the protection of the rights and freedoms of citizens and residents, the trend that criminologists earlier discerned in conservative rhetoric and reform around criminal justice. Nor does the influence of the far right only depend on winning elections. Their growing support has pushed other parties of the centre-right (and centre-left) sharply to the right on key issues, as traditional voting blocs have fractured and established parties seek to combat the drift (or sometimes exodus) of voters to new or rising parties or independents. It is a process of incremental erosion of democratic norms (Levitsky, Ziblatt 2017).

Few, if any, established democracies have escaped the impact of this shift. Australia's relatively strong two-party democracy, underpinned by its system of compulsory voting, has seen voters drift in growing numbers to third parties and independents. The appearance of a xenophobic right-wing party in the form of Pauline Hanson's One Nation[1] (Marr 2017) not only captured voters from both the major parties, but pushed them to the right on "hot-button" issues like the treatment of refugees and asylum seekers. It has also emboldened other far right fringe groups to make themselves more visible in street protests, demonstrations and in on-line platforms. The self-declared fascist who live-streamed his mass murder of 51 Muslims at prayer in two Christchurch (New Zealand) mosques in 2019 grew up in a regional Australian town, his extremist views nourished from an early age by on-line participation in far-right chat rooms hosted in Australia and elsewhere (Sparrow 2019). However, as in other countries, Islamophobia, anti-immigrant sentiment and white supremacy are not confined to a fascist fringe but have been indulged and fostered by leading conservative politicians and governments, typically conducted in code and often packaged in the language of national security, border control and fighting crime. Ambient racial tension has caused some to worry that in times of crisis and major electoral volatility this could quickly trigger a radical shift to the authoritarian right in Australia (Roggeveen 2019). Such concerns deepened after the 2020 US presidential election and the response of the incumbent president and his base in the Republican Party and the far right (if the two can any longer be spoken of as distinct). It is an object lesson in

[1] Pauline Hanson, a complete political outsider at the time, was disendorsed as a Liberal Party (i.e. conservative in the Australian context) candidate in what was thought to be an unwinnable seat in the 1996 federal election after publishing overtly racist comments directed at Indigenous Australians. She ran as an independent and won in a landslide. Her political fortunes have waxed and waned since, but she and a colleague currently share the balance of power in the Australian senate and Australia's preferential voting system gives her bargaining clout with other parties at election times.

the explosive and unpredictable character of contemporary politics and a warning against any complacent belief that there are countries, so-called "mature" western liberal democracies, that are immune to such authoritarian populist trends.

3. Theorising populism

I accept that the label "populist" correctly describes the parties and movements at the heart of these political shifts, although those who so freely use the term rarely pause to define what it means. It is also significant that with few exceptions it is not used as self-description, but only to describe *others* and to do so pejoratively if not with visceral repugnance. In most everyday political discourse and commentary populists are presented as manipulative, demagogic, anti-intellectual, anti-reason; they pander to the masses with symbols and rhetoric that are empty of meaningful political content; they elevate common sense and emotion over knowledge and reason, offer simplistic solutions to complex problems, are anti-pluralist, authoritarian and hostile to minority rights, and impatient with constitutional checks and balances and the rule of law. This powerful lexicon of denunciation compounded into a single word, "populist", facilitates use of the term less as an analytical tool for understanding politics than as a rhetorical weapon in political combat. To be clear, I share the revulsion of others towards xenophobic, right-wing, authoritarian populism, but I believe there are costs to simply conflating populism with these ugly expressions of it.

If we are to advance beyond populist name-calling it is essential to recognize that how populism is to be normatively judged (and responded to politically) depends critically on how it is to be defined and understood conceptually. Most political commentary, and a great deal of academic scholarship, eschews the necessary engagement with theories of populism. Definitions of populism (often implicit but sometimes explicit) are adopted which pre-determine its character, as anti-pluralist, demagogic, authoritarian, irrational, etc. and set it in opposition to what are taken to be the enlightenment ideals that defined liberal democratic political life before populists sought to sabotage it. This demonising of populism (aside from emulating sins attributed to populists themselves), has at least two negative effects. First, treating populism as a cancer on the liberal democratic body politic diverts from the important task of critical analysis of deficits in the constitution and current trajectory of contemporary liberal democracies themselves: their various (and often ingrained) illiberal, undemocratic, and exclusionary traditions, features and tendencies, that might in turn help

explain the rise of populism. Denunciations that simply set populism in opposition to liberal democracy and banish it from the realm of responsible and legitimate politics serve to distance its critics from their own exclusionary practices. Secondly, in a related vein, moralisation affords an impoverished basis upon which to politically engage with populism and its constituencies: it essentializes what is a complex, nuanced, protean phenomenon and thus over-simplifies what is required by way of political responses to it.

It is time that scholars interested in contemporary populism engaged with the concept as it is understood and debated in a growing body of political theory on the subject (for a brief, excellent introduction see Moffitt 2020). As Moffitt (2020: 4) points out, populism "is a core concept for understanding democratic politics across the globe." Taking theories of populism seriously might also enable criminologists (and others) to gain a better understanding specifically of why and how crime became a core theme within contemporary populist politics, how this relates to recent trends in liberal democratic states and is articulated with a range of other issues (like immigration and welfare), and the possibilities that might exist for a progressive politics (and even perhaps a progressive populist politics) of law and order.

The one constant across various definitions is that populism revolves around a core divide between "the people" and "the elites". Beyond that, efforts to conceptualise it vary both in theoretical terms and in the extent to which they are tied to particular historical and/or regional political traditions and experiences. Populism in Latin America has long been a focus of scholars who specialize in the study of politics in that region (see for example de la Torres, Arnson 2013). This influenced one influential concept of populism, in which it was understood as centring on a charismatic leadership figure (like Juan Peron or more recently Hugo Chavez) commanding a mass following, whose support is substantially unmediated by organised party structures or other institutional processes. This arose in countries (like Argentina in the 40s and 50s) where large sectors of the population, locked out of the existing political process by a privileged elite, were galvanized into a "people's" movement, who's will the Leader was understood to personify. Hostility towards, or exclusion from, institutional politics together with the weakness of party or other mediating organisations can, as is often pointed out, carry the seeds of both authoritarianism and movement instability. This empowers the charismatic leader who claims a sacred bond with "the people". There are examples other than those drawn from Latin America that fit the model quite well. Silvio Berlusconi's political rise in 1990s Italy might well be regarded as inaugurating the trend in "the West", which has been followed by others, like Donald Trump and, far less consequentially, Pauline Hanson's One

Nation party in Australia. What is often defined as the strategic approach to populism has also stressed the role of personalized leadership. This is unsurprising as it was largely pioneered by scholars of Latin American politics, but its adherents also incorporate a concern with the forms of political practice employed by populist leaders to secure and maintain power (Weyland 2017; Moffitt 2020: 17–21). In this latter respect it shares some features with the discursive-performative model of populism to be discussed below. Although the focus on charismatic leadership captures one important expression of populism, understanding of the phenomenon is not usefully limited to this aspect of it.

A second influential theory depicts populism as an ideology, but one of a peculiar kind. Recognizing that populism has no consistent left/right political or other ideological or social belonging, Mudde and Kaltwasser (2017: 6) argue that it is a "thin-centred ideology" only, which needs be considered together with other ideologies and ideas which give it specific shape and direction in particular settings. Beyond this, thinkers who share this approach tend to also argue that the core opposition upon which populism rests involves a Manichean conception of politics – politics as a moral struggle between the (virtuous) people and (corrupt) elites over irreconcilable differences (Müller 2016: 19–20). This, it is argued, leaves little or no room for the usual constraints, give-and-take and peaceful compromises of the political process. Political rivals are turned into enemies and populists in power are prone to dismantle constitutional checks and balances that stand in the way of executing the will of "the people". Populism therefore is a form of authoritarian identity politics: only the populist speaks in the name of "the people" but it is also the populist (usually but not necessarily a charismatic leader) who decides who comprises the *real* people. This approach sees populism as inherently exclusionary. It is, as Müller (insistently) and Mudde and Kaltwasser (a little more guardedly) argue, anti-pluralist and anti-political, denying the need or space for difference, dissent, or conflict within or amongst "the people". It is also anti-reason: "Rather than a rational process constructed via the public sphere, the populist notion of the general will is based on the notion of 'common sense'" (Mudde, Kaltwasser 2017: 18).

A third approach to populism, and the most fruitful in my view, is what Moffitt (2020) calls the discursive-performative approach. Moffitt discusses variations within this approach, but for my purposes here it is unnecessary to go into these. This approach has by far the widest potential application and, unlike the others, is normatively neutral. Although recognizing this, some of its most sophisticated theorists commend a particular progressive populism (Laclau 2007; Mouffe 2018). While sharing with the other approaches the focus on the people/elite divide, this is not seen in terms of fixed or pre-existing positions, groups or identities.

On the contrary, for Laclau, Mouffe and others, it is in the very nature of political struggle and processes of political representation, including populist movements, that they *construct* political identities; with the additional understanding that this is always a dynamic and contingent process. It is not then a question of *who* comprises "the people" but of *how* that identity is constructed in on-going political struggles. The work over many years of Laclau and Mouffe (1985) was a reaction against conceptions of politics (Marxist and others) in which political positions were read off from economic class location. If this was inadequate to account for the complexities of politics under industrial capitalism, it certainly fails to speak to the political realities that emerged with the emancipatory social movements of the 60s and 70s, with the restructuring of global capitalism beginning at the same time, and which has seen the emergence of the post-industrial information economy and the fragmentation of the old industrial working class. In the discursive-performative approach, populism is not an ideology, "thin-centred" or otherwise, but a mode of constructing politics and of constituting political identity. It is a way of discursively organising the content of politics, not the content itself. It is centrally concerned with questions of representation, style, presentation and performance, but this is to be understood in a deep-rooted rather than merely superficial sense. Consequently, as Moffitt and others stress, this conception of populism also does not see it in necessarily categorical or "binary" terms: populism as a fixed attribute of certain political actors which defines them in some complete way. As Francisco Panizza put it, "populism is never an encompassing totality that completely defines a leader, a party, or a regime" (Panizza 2013: 88). Populism is something political actors *do* (Moffitt 2020).

In this sense, populism as political logic might take its rightful place and be understood as part of the "normal" repertoire of political practice, rather than being consigned to the realm of political pathology. Laclau (2007: 17–18) made the point that in complex, modern, large-scale societies, any form of political participation, of access of the masses to the political process and connection between political leaders and the people necessarily involves elements of symbolism, simplification and indeed mystification. In this respect, many of those features attributed to populism as aberrations – its polysemic character, anti-intellectualism, simplification, the importance accorded to symbols, rhetoric, language – are instructive for understanding the positive processes of formation of political meaning and identities. They are intrinsic features of politics, not pathological intrusions, or fleeting attributes destined to be transcended in the passage to some higher, more mature, more rational political plain. This places populism as political logic (rather than a self-described political party or movement) at the centre rather than on the margins of modern politics, particularly in relation to

nationalist politics in the modern world. To secure political power and their political, economic, and social goals, parties and movements of both left and right, and from both above and below, contend for national-popular leadership, to effectively speak on behalf of "the people".

Nor is the process of constructing political identity ("the people" or any other identity) simply a matter of logic or rationality. It involves, as implied above, political labour centred as much on the non-rational domain of life – on symbols, on unconscious fears, on emotional identifications, on the affects – as on appeals to rational interest. Critics deprecate populist appeals to common sense, but democratic politics in all societies cannot dodge the task of translating complex policy agendas into readily digestible common-sense terms for citizen-voters whose busy lives and many responsibilities mean they can never be expected to study and comprehend all the relevant policy detail across the wide range of topics that affect them. Moreover, it is not simply a case of invoking common sense but also of shaping and transforming it in the process of constituting political identity.

As such, political identifications of "the people" are also inherently unstable and often (tentatively) held together by empty signifiers, symbols that succeed in uniting a chain of different democratic demands and/or grievances only in a sense by masking or suppressing them in their particularities (Laclau 2005). The crystallizing demand for "freedom" or "justice" may unite diverse constituencies precisely because in its diffuseness it permits them to pour their own content into the struggle if it is waged against some "other" elite, power bloc or system that can be blamed for denying freedom or inflicting injustice. Similarly, and closer to the concerns of criminologists, the promise of "zero tolerance" may resonate precisely because the lack of concrete meaning does not inhibit, and probably greatly enlarges, its emotional purchase with a wide variety of popularly felt grievances. Therefore, many of the negative qualities attributed to populism (authoritarian, anti-pluralist) are neither inherent in, nor specific, to populism and others (the importance of the affects, symbolism and language, common sense) may be regarded as intrinsic features of all modern politics.

The discursive-performative approach to populism also helps to make sense of the important role of cultural values and traditions over and against material interests in shaping political preferences and identities. It redresses the rationalist and economistic biases of liberal and radical theories and conceptions of politics, demonstrating that what is often at stake in political struggles is not the calculation of material interest but questions of belonging, community, identity and ontological security. Crime, moral transgression, and punishment are particularly pertinent to these questions. The idea that, until the advent of the populist disruptors, the politics of crime and punishment (and politics at large) were governed by reason and

science is belied by a long tradition of sociological inquiry influenced by Durkheim and others, concerned with the symbolic and status politics of law, crime and punishment (Gusfield 1963; Cohen 1973).

Anthropologist and cultural theorist Mary Douglas' entire corpus of work (1970, 1992) was directed against the idea that an epistemological gulf separates the modern from the pre-modern mentality in relation to misfortune and human suffering. According to this orthodoxy pre-moderns confronted misfortune by assigning it to supernatural forces (witchcraft, the wrath of the gods, etc) whereas moderns trace effects to their material causes according to the dictates of science and rational knowledge. The former moralises and politicizes danger to affirm social solidarity whereas the latter tackle the *real* causes of things, as objectively identified, or ascertained (Douglas 1992: 6–7). Against this, Douglas argued that "in all places at all times the universe is moralized and politicized. Disasters that befoul the air and soil and poison the water are generally turned to political account", and she added, "someone already unpopular is going to be blamed for it" (Douglas 1992: 5). The language of evil and criminal wrongdoing and the symbols and rituals of punishment have a deep historical and psychological resonance here, and provide a powerful framework for understanding, interpreting and isolating blame in relation to prevailing insecurities. It should come as no surprise that in troubled times leaders wield these rhetorical symbols, and ordinary people respond to them. In a secular age the nation state is the most potent embodiment of collective identity (the closest thing to a god or totem) and the most powerful instrument of protection against the violation of its most fundamental norms. The symbolic affirmation of its authority in and through the deployment of punitive rituals is a reminder of both the enduring role and importance of sovereign power in social organization and of its close relation to punishment (Garland 1996).

Philip Pettit (2002) has pointed out that modern criminal justice has always been susceptible to an "outrage dynamic" in which emotion, vivid storytelling, conspiracy theories and expressive politics tend to eclipse facts, evidence, and instrumental reason. This is also suggestive of how crime could become a pivotal issue for right-wing populist politics. Most critical accounts of the rise of right-wing populist politics in the US point out that the key to success depended on a conscious "culture war" strategy, on appeals to cultural grievance and the ability to "change the subject" (Lind 1997: 137), from economic discontents and concerns to cultural resentments: race, immigration, family values, abortion, gay marriage, public education, the role of the courts and of course crime. This influenced politics and political strategy elsewhere, including in Australia and Britain. The idea was that the moral order, and core American values, were being turned inside out. Hard working citizens who looked out for their families

and obeyed the law were left behind and saw their values disrespected as successive governments spent their hard-earned taxes on special programmes for undeserving minorities and criminals. Crime works well in culture wars because it can knit together a variety of social and cultural grievances and anxieties beyond any concern about crime. In a world where overt expressions of prejudice (racial and otherwise) are no longer permissible, crime can serve a powerful "dog-whistling" function. Objections to immigration, asylum seekers, welfare policy, gender equity and a host of other issues are frequently cloaked in the language of crime control. It supplies a powerful metaphor: that of innocents doubly victimized, first by threats to their security and then by misplaced elite and government priorities in which tax and spend policies support the unfit and undeserving at the expense of the responsible, law-abiding citizens.

4. Populism, neo-liberal globalization and "post democracy"

Mouffe stresses that nothing in the character of populism, as it is understood from the discursive-performative standpoint, depends upon the dismantling or weakening of liberal democratic political institutions. On the contrary, the progressive populism she commends recognizes the historically contingent relationship of liberalism and democracy, the exclusionary dimensions of existing liberal democracies and the threats to both liberalism and democracy that currently emanate from what Crouch calls "post-democracy" and the right-wing responses it has engendered (Crouch, 2004, 2011, 2019, 2020; Mouffe 2018: 13–16; also see Mair 2013).

Liberal thought has been very successful at whitewashing liberal practice, conferring a timeless and universal gloss on liberalism that is belied by its own history, including its recent history. Liberal thinkers and liberal states have a long history of ambivalence not only towards democratic rights but often also to the principles of liberal constitutionalism they claim as their fundamental creed – the rule of law, equality before the law, political pluralism, human rights and so on. Reflecting the attitude of many nineteenth century liberals to democracy, Walter Bagehot argued in *The English Constitution* (1867; 1993: 278) that it "means the supremacy of ignorance over instruction and of numbers over knowledge." The idea that some were not fit for democratic participation or to enjoy other citizenship rights remained an article of faith well beyond Bagehot's time. Until the 1960s, the American liberal democratic compact rested on an acceptance of a system in the Jim Crow South based on single party rule, racial exclusion, and violence. For many decades it proved impossible to get a federal anti-lynching law through the US Senate. Much of US right-wing politics since the 50s and 60s has been rooted in thinly veiled efforts to exploit racial resentments and roll back the advances of the civil rights years, often through gerrymandering, voter suppression and other

measures. William F. Buckley, the Goldwater movement in the 1960s, George Wallace, Richard Nixon's "southern strategy" and the racial dog whistling of the Reagan and Bush administrations all played a part in these efforts, culminating in the openly racist, nativist populism of the Trump administration. Nationalist cultural conservatism and economic neo-liberalism are often assumed to be separate, even opposed, strands of latter-day conservative thought and practice in the US. Nancy MacLean's excavation (2017) of the early history of neo-liberalism in the US shows, on the contrary, that they were complementary. She demonstrates the extent to which a crucial strand of neo-liberalism, public choice theory, was a response to the civil rights movement and desegregation in the South. As with the Goldwater movement, William Buckley and other right-wing conservatives who opposed civil rights, resistance was couched in the racially neutral language of economic liberty, states' rights, and opposition to federal government over-reach.

Essential to the success of this political strategy since the 1960s was the emergence of coded language tying race to other issues, in the early days to communist infiltration, but subsequently to crime, welfare, taxation, public spending and the excessive power of federal government. Crime became a crucial proxy for the expression and political manipulation of racial grievances. America's gigantic penal estate (accounting for 25% of the global prison population while possessing only 5% of the global human population) and the racial disproportion that pervades it are no mere coincidence (Stuntz 2011; Alexander 2012). Populist rhetoric spurred a wide range of draconian penal strategies and measures, including the "war on drugs", "three strikes" laws and "zero tolerance" policing. Adoption of various instances of what Pratt (2020) calls a "security sanction" were central to the emergence of a novel form of preventive justice aimed at the "immobilization" of new categories of risk and social enemy, including the pedophile, the illegal immigrant, the gang member and (especially after 9/11) the terrorist (also see Zedner 2009). Derogating from what were once thought to be fundamental principles of criminal law (the right to liberty, presumption of innocence, and proportionality and finality in sentencing), these trends, and the demonizing rhetoric that supported them, signaled a marked shift towards illiberalism in the administration of criminal justice. Penality also became ever more tightly yoked to racialized social control through anti-immigrant scare-mongering and new border regimes (Davis, Shear 2019).

Neither the politics nor the history of illiberal penal policies and practices are confined to the US, even though they appear in prominent form there (for Australia see Cunneen et al. 2013; McNamara, Quilter 2016). In colonial settler states like Australia Indigenous peoples were until the 1960s segregated under racially discriminatory laws and the country's

immigration laws excluded non-whites. Today, indigenous Australians stand as both the world's oldest surviving culture and its most incarcerated (Anthony 2017). Conservative politicians and governments continue to practise the politics of white resentment, even if they cloak it in the rhetoric of law-and-order and national security. In assessing the extent and impact of the liberal reforms of the 60s and 70s in settler states like Australia and the US it is also necessary to look beyond changes in formal laws and official policies to the continuing force exerted by modes of informal belonging and exclusion (Hage 1998) that surface in structures of language and affect and in enforcement priorities and practices. Indeed, we appear to have entered a new age of white fear where democratic demands for recognition and substantive equality and genuine acceptance of diversity that threaten white prerogatives are often experienced as existential threats to white identity itself. Catch-cries of "the great replacement" and white victimhood — of "white genocide" even — appear as the core of a new race politics. Donald Trump's border policies, together with Brexit and the growing popularity of far right, anti-immigrant parties in Europe – all reflect a political phenomenon sweeping across large parts of the rich world demanding ever tougher measures to exclude certain groups, defined by their race, ethnicity, and religion. Old themes and phantasms have been disinterred and woven into a more overt and aggressive white ethno-nationalist populism. In addition to the formal and informal exclusions that historically characterize liberal states, other economic, social, and political changes have struck at the core of democratic politics and further opened the way for right-wing populist movements.

These movements are not first and foremost a threat to democracy, but a reaction to post-democracy. Colin Crouch (2004, 2020) uses the concept of post-democracy to describe a long-term tendency within "mature" democratic states whereby formal institutions, processes (elections, parliaments, etc.) and their trappings remain substantially intact, but democratic politics has been progressively drained of the energy and vigor that stems from mass citizen participation and engagement. Rather, effective decision-making and rule are increasingly concentrated in the hands of closed political and economic elites and non-democratic institutions. This represents a crisis of political representation, reflected in declining levels of trust, growing popular political disaffection, low voter turn-out in elections and falling political party membership. There are many contributing factors, but Crouch focusses on two major causes of post-democracy.

First, economic, or neo-liberal globalization has had the effect of displacing important decisions affecting the well-being of citizens from their locus within the nation state where they are subject to the democratic process to global markets and giant transnational corporations (especially

in the financial sector and IT). Alan Greenspan (former chair of the US Federal Reserve) told a German newspaper in 2007 that it didn't much matter who won the forthcoming US presidential election because, he observed approvingly, "thanks to globalization, policy decisions in the US have been largely replaced by global market forces. National security aside, it hardly makes any difference who will be the next president. The world is governed by market forces" (quoted in Tooze 2019: 574). Within a year the global financial system faced collapse, inflicting untold hardship on people around the world. Democratic governments came to the rescue, but in ways that propped up those responsible for the calamity – the most powerful financial institutions and bankers in the world. None were held to account (Ferguson 2012; Hogg 2013). Their obscene remuneration packages were barely impacted. The losses – jobs, homes, life savings, retrenchment of public services under austerity measures – were largely borne by working and middle classes. As Crouch pointed out of the "conundrum" at "the heart" of neoliberalism: "actually existing, as opposed to ideologically pure, neo-liberalism is nothing like as devoted to free markets as is claimed. It is, rather, devoted to the dominance in public life by the giant corporation." The fundamental reality, he argued, is that corporations are not just influential economic actors but "major insider participants in the political process" (Crouch 2011: viii, ix).

A second major cause of post-democracy according to Crouch has been the erosion of the social foundations of political identity (especially economic class and religion) in the "mature" democracies. This has resulted from the transformation of the structures of work and community in the transition from industrial to post-industrial society and a waning in the role of religion. Work in the post-industrial economy is for growing numbers more insecure and poorly paid with flow-on impacts on work-based status and solidarities, the stability of marriage and family and community cohesion. The widening gaps – both economic and social – between the rich and the rest have seen the more stable industrial order of working and middle classes, and their consequent opportunities for social mobility. give way to what Standing calls a new "precariat" class (Standing 2011). Most countries have also seen a decline in religious observance. In consequence, there has been a dramatic weakening of the forms of social identity and the institutions (trade unions, churches) that once linked citizens to political parties, grounded stable political loyalties and constituted countervailing powers to the influence exerted by elites over the political process. Thus, the crisis of representation has been brought about from both above and below: from an increasingly integrated global economy and the influence of money (campaign finance, lobbying) that have increased the power of corporate elites in politics; and from the "void" created by the slow disintegration of the class, religious and other institutions of civil society

which connected mass publics to mass political parties (Mair 2013). These trends have been further turbo-charged by a disaggregated media landscape. The internet, cable, and social media platforms have seen citizens increasingly enclosed inside their own information bubbles, devoid of any encounters with fact-based political news media, whose economic base and role have themselves been undermined by the new media and communications technologies.

The various forces behind post-democratic trends and developments are mutually reinforcing in numerous ways. This means that the potential for renewing democratic politics depends increasingly on movements and forces from outside the traditional parties, institutions, and processes. Rarely welcomed as guests at the political table, they must gate-crash their way into the political conversation. Crouch (2019) refers to feminism and environmentalism as examples of insurgent movements that are disrupting the political mainstream and energising democratic politics with novel demands and ideas. At the time of writing, women in both Britain and Australia are engaged in mass agitation around the right to live and work safe from gendered violence. Black Lives Matter has since 2020 also energised the struggle against racism and seen it morph into a global movement. However, by far the most consequential of these post-democratic insurgencies at the present time are the ethno-nationalist populist parties and movements, who have shown themselves adept at organising the disaffected, exploiting insecurities and the fear of immigrants it has induced and sharply tilting the political balance to the authoritarian right (Mudde 2019). Just as old modes of political representation have weakened, the new media landscape has enabled new insurgent political forces, those already mentioned and others like #MeToo and QAnon. New styles of populist political leadership, conspiracy theories and political cults flourish in the current fractured media and political environment, as Donald Trump's presidency so palpably demonstrated. On the other hand, the new environment is not something that can be wished out of existence.

5. Is progressive populism an oxymoron?

Blanket denunciations of populism should not obscure the fact that in the reality-based world elites *do* exist and there *are* conspiracies – the Catholic Church's world-wide cover-up of child sexual abuse, the systematic lying and denialism of the fossil-fuel industries concerning climate change (following the playbook of the tobacco industry), the Murdoch media hacking scandal. The examples are legion, but they are mere symptoms of a growing structural divide between powerful economic-political elites (a new oligarchy) and an increasingly alienated and politically powerless citizenry. Under oligarchy, elites face very different legal regimes to the

rest of the population; there is no clearer example than the crimes of the substantially de-regulated global financial sector. Anyone thinking this would change after the global financial meltdown of 2008-09 would be mistaken. A recent royal commission looking into Australia's financial institutions found systemic wrongdoing across the industry, leading the commissioner to observe: "Entities appear to have treated the law as applying only when and if they chose to obey it" (Royal Commission 2018: 280). Supine regulators largely indulged this attitude, allowing corporations to act with impunity.

There is little appetite among liberals or from elsewhere in the political mainstream to tackle corporate might and the abuse of market power. Those liberals who do see the need for serious reform to confront growing inequalities of wealth, power, and respect (e.g., Garton Ash 2021) typically couch their aims as resolutely anti-populist. They often offer radical policy proposals yet fail to consider how disaffected citizens might be united behind a progressive reform programme; that is the question of how politics can be organized to this end, given the post-democratic realities. Are the economic and political elites going to willingly surrender their positions of privilege? The record suggests that rather than countenance reform, they are more likely, even if they must hold their noses, to fall in behind right-wing populists, as the Republican Party and the big corporations did with Trump. Afterall, his anti-elite rhetoric did not stop him from enacting massive corporate tax cuts and implementing deregulatory measures to their benefit. How then is oligarchic economic and political power to be challenged, if not by a mobilization of "the people", a movement that "punches up" rather than (as with right-wing populism) "punching down". Populism needs to be reclaimed from the authoritarian right for progressive politics. There might even be room here for a progressive penal populism (Hogg 2013; Quilter 2013) that seeks to unite democratic claims such as the feminist and anti-racist campaigns against misogynist and racist violence, the demands to take environmental crimes seriously, and which re-directs attention from the usual suspects (the poor and minorities) to the vast and destructive catalogue of crimes, harms and swindles perpetrated by the powerful. Does populism carry risks? Of course. All politics carries risks; so too do cynicism and apathy.

6. What impact will the pandemic have on populism?

Global crises – think of the two world wars – produce transformative long-term effects on societies, but the likely impact of the Coronavirus pandemic can only be a matter for speculation. For the moment it can be said that the pandemic has laid bare many existing inequalities and vulnerabilities – such as those relating to insecure work, the neo-liberal erosion of state capacity, and the right-wing populist denigration of scientific expertise. Many

governments have had to overcome their aversion to debt and deficit budgeting and have spent extravagantly on social safety nets and protecting their populations. The choice between healthy people and a healthy economy has been shown to be a false one. President Biden has pursued an ambitious reform agenda, including early enactment of a $1.9 trillion covid-19 relief bill and plans for a massive infrastructure programme, a clean energy revolution, labour market regulation, increases to the minimum wage and raising the taxes of corporations and the wealthy (Economist 2021: 27–29). The pandemic also exposed the divisive and incompetent leadership of some leaders in the pandemic, like Trump and Jair Bolsonaro, who were dismissive of scientific expertise. Viktor Orbán, on the other hand, seized the opportunity to grant himself five-year emergency powers for use against his critics. And although Trump may, as many claimed, have lost the 2020 election due to his failure to take the pandemic seriously, his dominance (and that of Trumpism) of the Republican Party seems assured, and this even after multiple failed attempts to overturn the election result. Emboldened by Trump, Republican states are also waging a concerted backlash, enacting voter suppression and other deeply anti-democratic statutes as well as hard-line anti-abortion and pro-gun laws (Pilkington 2021). Attitudes to public health measures, like mask wearing, vaccination and lockdowns, have fuelled conspiracy theories, morphed into markers of political identity and been weaponised in the culture wars. Thus, along with some positive signs, many pre-existing divides appear to be widening rather than closing. As the social and economic pains inflicted by the pandemic persist, the "gloomy" forecast made by Fukuyama (2020) in mid-2020 is unlikely to warrant revision.

Concluding comments

Populist political movements and interventions play on essential democratic myths – popular sovereignty and rule by "the people". Populism is "a shadow cast by democracy itself" (Canovan 1999: 2). Of course, democratic institutions never live up to their myths, but perhaps the shadow of populism has become longer as politics more closely resembles rule by oligarchy and shows itself to be ineffective in the face of far-reaching economic, social, and technological change and its harmful and disconcerting impacts on so many. In a not dissimilar vein to Laclau and Mouffe, Margaret Canovan emphasised the essential role of popular investments (ritual, faith, redemptive belief, and utopian imagining) in the promise of democracy to institute a better world. The myths of democracy – "government of the people, by the people, for the people" – were and are

necessary, sustaining myths. More than just an institutional arrangement for the peaceful transfer of power and management of conflict, democracy is a repository of popular aspirations for a better world. The grand hopes, utopian imagining and emotional fervour it often inspires (cf. Barack Obama's 2009 Presidential inauguration) are essential motivating forces behind the mobilization of democratic publics. Canovan has pointed out that the populist promise that political power might be made transparent to the popular will "[…] is not entirely illusory: it really is the case that people who can manage to believe in the possibility of collective action and to unite behind it can exercise more power than if they give up and concentrate on their private affairs […] Unrealistic visions may be a condition of real achievements as well as being a recipe for disappointment" (Canovan 1999: 13).

Populism needs to be taken more seriously as a regular, inescapable dimension of politics, one with no essential ideological or social belonging and one, at least in the discursive-performative conception, that must be considered together with other dimensions of politics. In assuming it to be inherently irrational and reactionary, critics of right-wing populism and contemporary penal populism surrender significant political ground to opponents.

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Olga Sitarz 1 ■

Protection of Christian values – penal populism or a rational decision on criminalization?

Ochrona wartości chrześcijańskich – populizm penalny czy racjonalna decyzja kryminalizacyjna?

Abstract: Arguments referring to natural law, (public) morality, religion or Christian values are regularly put forward in debates on existing or planned criminal law provisions that will criminalize specific behavior. A prohibition on behavior contrary to the scriptures or the teaching of the Church on pain of criminal penalty encompasses not only abortion, but also euthanasia, (paid) surrogate motherhood, paid donation of organs for transplantation, sterilization, contraception, prostitution and bigamy. The arguments presented for the protection of Christian values are often linked with the protection of human dignity. This article seeks to address the issue of whether such a "pre-legislative" measure (reliance on the protection of Christian values) is a form of penal populism. Parliamentary and non-parliamentary discussions conducted during work on specific provisions of the Criminal Code formed the basis for analysis, with particular emphasis placed on arguments in favor of criminalization of the behaviors mentioned above. The findings were challenged against the concept of legal interest in criminal law, and the concept of human dignity in the Polish legal system (and its place in repressive law). The identified "religious values" and the need to protect them were subjected to analysis conducted against this background, underpinned by the constitutional principle of proportionality of the limitation of human rights and freedoms. The operational tools were not only established definitions of populism, including penal populism, and Weber's ideal type, i.e. a set of empirically perceived properties of populist style and perspective, sometimes called "the populist syndrome." The ultimate objective of this article was to

establish whether the cases under analysis involve religious populism or a rational decision on criminalization.

Keywords: criminalization, Christian values, natural law, dignity, moralism of the law

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Abstrakt: W toku debat nad istniejącymi lub projektowanymi przepisami prawa karnego, kryminalizującymi konkretne zachowania, niezmiernie często przywoływane są argumenty odwołujące się do prawa naturalnego, moralności (publicznej), religii czy wartości chrześcijańskich. Zabronienie pod groźbą kary zachowań sprzecznych z pismem świętym lub z nauczaniem Kościoła tyczy już nie tylko aborcji, ale też eutanazji, (odpłatnego) macierzyństwa zastępczego, odpłatnego dawstwa organów do transplantacji, sterylizacji, antykoncepcji, prostytucji, bigamii. Przywoływana przy tym argumentacja ochrony wartości chrześcijańskich jest często skorelowana z ochroną godności ludzkiej. W pracy podjęto próbę odpowiedzi na pytanie, czy taki zabieg „prelegislacyjny" (powoływanie się na ochronę wartości chrześcijańskich) jest formą populizmu penalnego. Podstawą analizy stanowiły dyskusje (parlamentarne i pozaparlamentarne) toczone w trakcie prac nad konkretnymi przepisami kodeksu karnego, ze szczególnym uwzględnieniem argumentacji na rzecz kryminalizacji przywołanych zachowań. Ustalenia te zostały skonfrontowane z jednej strony z pojęciem dobra prawnego w prawie karnym, z drugiej – z pojęciem godności ludzkiej w polskim systemie prawa (i jego miejsca w prawie represyjnym). Na tym tle ulokowano tytułowe „wartości religijne" i potrzebę ich ochrony. Zaś fundamentem tych rozważań stała się konstytucyjna zasada proporcjonalności ograniczania praw i wolności człowieka. Narzędziami operacyjnymi były nie tylko wypracowane definicje populizmu, w tym populizmu penalnego, ale także pewien weberowski typ idealny, czyli zestaw empirycznie postrzegalnych właściwości stylu i perspektywy populistycznej, określany czasem mianem „syndromu populistycznego". W ostateczności, sformułowana została odpowiedź na pytanie – czy w omawianych przypadkach mamy do czynienia z religijnym populizmem czy racjonalną decyzją kryminalizacyjną. **Słowa kluczowe:** kryminalizacja, wartości chrześcijańskie, prawo naturalne, godność, moralizm prawa

1. Preliminary assumptions

Some years ago Harold J. Berman wrote that as of the mid-twentieth century, the connection between law and religion in the West was so intimate that it was usually taken for granted. Even in the USA, where religious diversity was far greater than in most other Western countries, and where agnosticism and atheism were more tolerated, it was generally accepted that the legal system was rooted in Judaic and Christian religious and ethical beliefs. Speaking for a majority of the US Supreme Court in

1951, Justice William O. Douglas wrote that "We are a religious people whose institutions presuppose a Supreme Being." It was widely believed that not only law and legality in general, but many specific legal standards, principles and rules, were ultimately derived from the Bible and the history of the church. In the opinion of Harold J. Berman, the connection between the western legal tradition and the western religious tradition has been substantially broken in modern times (Berman 2015). It is hard to agree with the latter argument. Nowadays, the influence of religion on law-making and application is still strong not only in religious states. Despite the common assumption that the criminalization process should be a rational one, arguments derived from religious teaching are part of a substantiation of a legislative or court decision also in countries with a strongly dominant denomination, and even in countries declaring religious neutrality (e.g. Idleman 1993). As Erwin Akhverdiev and Alexander Ponomarev argue,

analysis shows that religious values and tenets are reflected in both the historical development of legal provisions and in modern society (Perry 2009; Akhverdiev, Ponomarev 2018). Moreover, it is increasingly recognized that in Europe and the United States, religion has become a significant component of the growing nationalist and supremacist political groups which contest the fundamental rights of religious, sexual or racial minorities in the name of the dominant religious identity. Outside western secular democracies, the rise of religious claims not only impinges on civil rights but also on the rule of law and democratic life in general (European Academy 2020). Although this article refers to Polish examples, they can serve as an illustration of the broader issue, with similar situations to be found in many other countries. For example, in Great Britain there is discussion over the problem of the prohibition of refusal to rent a hotel room to a gay couple due to the religious beliefs of the hotel owner (Chaplin 2011). Another interesting problem is criminal liability in faith healing (Cawley 1954).

Poland is a non-confessional state. The Polish Constitution lays down that public authorities shall be impartial in matters of personal beliefs, whether religious or philosophical, or in relation to outlooks on life (Art. 25 section 2). However, according to official figures, approximately 86% of Poles are Roman Catholics and the entities that make and apply law attach great importance to this fact. This has been increasingly noticeable since 2015, when the right-wing party, Law and Justice, won a majority of seats in Parliament.

In the course of debates over existing or planned criminal law provisions that criminalize specific behaviors, arguments referring to natural law, (public) morality or religion are frequently invoked. The prohibition of behavior contrary to the Bible or the Church teachings, on pain of a penalty,

concerns not only abortion, but also other behaviors. Arguments of this type are in general referred to in this article as arguments relating to "Christian values", although it must be borne in mind that "the ambiguity, vagueness and strong contextual nature of the concept of Christian values require that it should be used with caution and awareness of the dangers related to its use" (Bronk 1993). It is most often assumed that the concept of Christian values consists of three principles: the affirmation of the human person, hierarchy of values and tradition (Frączek 2017: 165).

This analysis is based on discussions, both parliamentary and extra-parliamentary (in the scientific world, but also in the media), conducted in the course of work on selected existing or proposed provisions of criminal law, with particular emphasis on arguments for the criminalization of behaviors under investigation. Those discussions are then compared with the basic principles and mechanisms of criminal legislation, including the negative phenomena occurring in that area. Importantly, criminalization or calls for the criminalization of behavior under discussion have been controversial in many countries worldwide. The arguments put forward will be compared with the basic principles and mechanisms of criminal legislation, as well as with the negative phenomena in that area.

The conclusions address the issue of whether the cases under investigation are penal populism generally, a specific variety, or a rational decision on criminalization. Rational criminalization is – in my opinion – the decision to criminalize a specific behavior based on scientific and logical premises, at the same time being well planned, taking into account the balance of profit and loss for society and individuals.

The methodology adopted in this article consists primarily of an analysis of legal texts, legislative assumptions and draft legislation, as well as a cultural analysis of statements made in the public sphere by politicians and those dealing with criminal law.

2. Abortion

The strongest reference to the values specific to Christianity is surely visible at present in drafts concerning the prohibition of abortion (ideas around strengthening anti-abortion laws have certainly not only arisen in Poland – this may be illustrated by US press reports on a draft law that envisages the death penalty for a woman who terminates her own pregnancy) (Gstalter 2019). The issue of the influence of Christianity on legal regulations has been repeatedly taken up in the literature. Criminal law expert Krzysztof Wiak argues that, regardless of the assumption that abortion is a mortal sin, moral condemnation expressed by the Catholic Church has exerted an

impact on secular law, which began to view abortion as the murder of a human person (Wiak 2001: 29, 81). Apart from taking the life of a conceived child, the arguments for the introduction of criminalization of abortion relate to the violation of certain values and wounding a woman spiritually and physically (Krajewski 2004: 73–74). Many scholars and politicians hold the view that current regulations are too liberal in that regard, and new proposals to tighten up abortion law are brought forward on a regular basis.

Proponents of various amendments to abortion law are very eager to make use of the rhetoric of the sanctity of life, dignity and broadly understood values. Note must be taken of a detailed analysis of one such proposal conducted in 2016 by Ewa Plebanek (Plebanek 2017: 15–52), which shows the particular essential features of populism used to justify the draft. The submitted citizens' draft is of interest because at least four statements by John Paul II were used as the (official) motto (sejm.gov.pl).

Priest Professor Tadeusz Guz (2020) calls for tougher abortion law. In his opinion, the current concept of not holding a mother liable for killing her child by undergoing an abortion is a serious misunderstanding and "whoever repeats that misunderstanding in a conscious and voluntary manner is an evident depraver of the legal and moral reality of the Republic of Poland." It is therefore necessary to remove the three situations under which abortion is permitted pursuant to the 1993 abortion Act, and introduce adequate statutory criminal sanctions for the commission of that act, also with respect to a mother who murders her child. The issue under discussion should thus not be the very existence of a penalty for the crime of abortion, but only its severity. Tadeusz Guz indicates that the concept of not holding liable a mother who commits that crime runs counter to the rule of law and our legal culture. He argues that natural law requires that the act of murdering a conceived child should give rise to a penalty. This argument is underpinned by one of the main truths of the Roman Catholic faith and jurisprudence of a universal nature, i.e. that any violation of law must result in a penalty. Departure from this principle must lead to the relativism of law. He considers that the legislator may not refrain from imposing a criminal sanction because both law and punishment must stem from care for the human person, and the purpose of law and the purpose of punishment is the good of the human person (Zakaz aborcji 2020).

Natural law is a frequent point of reference in discussions on the prohibition of abortion. By way of example, the Commissioner for Children's Rights Mikołaj Pawlak, while presenting his view before the Constitutional Tribunal on the constitutionality (or in fact lack thereof) of one of the prerequisites for legal abortion, concluded that "the hierarchy of rights deriving from natural law and positive law obliges all persons of good will to be on the side of the full protection of the right to life of every child

from the moment of conception, without any exceptions" (Position of the Commissioner 2020).

Given the above, it is appropriate to recall the dissenting opinion expressed in that matter by a Constitutional Tribunal judge, professor of criminal law Jarosław Wyrembak, who agreed with the argument that the challenged provision is unconstitutional, yet submitted his *votum separatum* as to the substantiation: In my opinion, one cannot deny the fact that among all the factors shaping in our cultural and civilizational circle the basic axiological context of the system of positive law – which gives the final meaning to the norms that form this normative system – is Christianity, in particular: the concept of man and the concept of human dignity based on the Decalogue. Having profoundly influenced the legal tradition and culture for several centuries, this factor promotes a specific understanding of the inherent, inalienable and inviolable dignity of a human person and his fundamental rights – in particular, the right to life, including the right to life of the sick and handicapped, especially conceived children. It should be stressed that this cultural heritage is approved not only by persons declaring faith in God – not only by persons following various religious practices in everyday life. It is symptomatic that the terms 'Decalogue' or 'Christianity' do not even appear in the substantiation of the judgement that I call into question – as

> if they were forbidden terms, or as if they were realities completely inadequate and useless for the analysis of the problem of depriving conceived children of life; as if they were categories or realities completely useless and inadequate or strictly forbidden in the language used by the Constitutional Tribunal to build the content of its judgments and substantiations – even though the preamble to the Constitution of the Republic of Poland makes a direct reference to God 'as the source of truth, justice, good and beauty' and to 'the Christian heritage of the Nation'. In this regard in particular, for a Constitutional Tribunal judge, regardless of his personal axiological preferences – also for the whole Tribunal – it should not be irrelevant whether something essential for the always valid and necessary enquiries into the axiological foundations of the Constitution and the entire legal system must follow from the fact that the contents of the preamble to the Constitution of the Republic of Poland explicitly define God 'as the source of truth, justice, good and beauty' and explicitly affirm 'culture rooted in the Christian heritage of the Nation and in universal human values' or, alternatively, this does not imply anything. (Constitutional Tribunal Judgement 2021)

There are calls in the criminal law literature for also extending criminal liability to the pregnant woman, and the arguments advanced (beyond

historical reasons) also include the regulations of canon law (Krajewski 2004: 93). Igor Zgoliński has no doubts as to the relation between religion and criminal law provisions on abortion when he claims that "The scope of criminalization is the subject of disputes, controversies and discussions, mainly influenced by religious and ideological issues." Interestingly, he argues that the legislative omissions in the matter of the postulated extension of the criminalization of the termination of pregnancy[1] are due to political populism, and withdrawal of the planned restrictions should be explained to the public (Zgoliński 2018: 141–143).

[1] Including, among others, the introduction of Art. 162 a –

"§ 1. The provisions providing for criminal liability for acts against human life and health also apply to acts against the life and health of a conceived child capable of living independently outside the mother›s body.

§ 2. The mother of a conceived child capable of living independently outside her body does not commit a crime for a prohibited act directed against the life or health of the child, with the exception of the prohibited act referred to in Art. 149a.

§ 3. Whoever persuades the mother of a conceived child capable of living independently outside her body to commit the prohibited act referred to in § 1 or grants her assistance to do so, shall be liable for incitement or assistance within the limits specified in Art. 19." The proposal of the Criminal Law Codification Commission for the Ministry of Justice in the 2009–2013 term, expressed in the draft the amendment to the Criminal Code of November 5, 2013, witch was finally not adopted.

3. Voluntary sterilization

Ethical doubts of a similar nature are invoked (though not so intensely) in the case of voluntary sterilization which results in infertility and therefore no reproduction. The legal issue of regulating voluntary sterilization has been resolved in many countries (Cook, Dickens 2000; Committee Opinion 2017), and ethical and moral concerns exist only over the issue of sterilization of disadvantaged persons, inter alia, mentally retarded individuals (Biesaart 2001).

The literature on the subject identifies the individual motives behind sterilization – voluntary sterilization may stem from "eugenic reasons" (to prevent the conception or bearing of children burdened with hereditary diseases), social reasons (difficult living conditions of a woman or a man that would prevent the exercise of parental functions), "convenience" (a man or a woman wishes to lead a carefree sexual life without the fear of becoming a father or a mother, which entails various types of obligations, burdens, restrictions), a principled stance (contribution to curbing the population growth in the world) (Wąsek 1992: 5). There is no doubt that

the motives may be far more complex – a mother of several children does not want to have more children and instead, like a person in a stable relationship, wants to focus on her own growth. One can hardly call such positions taking the easy way out. There is also the separate issue of sterilization due to gender reassignment surgery (also falling under the concept of voluntary sterilization).

The reasons set out for voluntary sterilization are that it is the most effective contraceptive method (besides sexual abstinence), does not cause any side effects and, at the same time, is "convenient" to use and cheap (in the long run). Another argument concerns respect for human rights – autonomy in the area of reproductive rights.

Opponents of legalizing sterilization argue that it is an irreversible method, socially harmful, in particular on a larger scale (a demographic argument). Małgorzata Świderska is of the opinion that undergoing sterilization "contains an element of autodestruction" and is "a form of mutilating a patient at his own request." (Świderska 2007: 330). Renowned Polish lawyers have held the view that consent to violation of health has no legal relevance (although it was noticed over a hundred years ago that the views on that subject are dependent on culture) (Makarewicz 1914: 178). Several decades later, it was declared that "the consent to grievous bodily injury is not legally relevant because effects of that type depreciate the social value of a human person" (Buchała, Wolter 1971: 184). There are also opinions that sterilization leads to a dissolute life (Karczewska 2011: 57–58). Further, the teaching of the Catholic Church is opposed to sterilization (Święta Kongregacja n.d.) – viewing it as morally unacceptable (Para. 2399 of the Catechism of the Catholic Church) because it violates the dignity and inviolability of the human person (Fryś 2009: 185). The Church expressly teaches that all contraceptive techniques are morally wicked and unacceptable. They violate the moral order established by God and are an expression of opposition to God (Pawłowicz 2011). Christian anthropology considers fertility a blessing that must not be resisted or treated as a threat (Kieniewicz 2013: 117).

4. Surrogacy and *in vitro*

Similarly, the issue of defining the scope of criminalization of (commercial) surrogacy is a current legislative and scientific problem in many countries worldwide (Behm 1999), with only India, Ukraine and California viewing commercial surrogacy as legal behavior (Saxena, Mishra, Malik 2012).

Advocate Paulina Witczak-Bruś began her monograph on the legal (including criminal) aspects of surrogacy with a telling quote from "The

Sociology of Religion": "Morality, as well as the pathology of marital and family life, have their roots in forbidden interpersonal relationships" (Witczak-Bruś 2021: 19). She also quotes the words of Tomasz P Terlikowski who argued that the boundaries of what is moral and immoral in the opinion of opponents of *in vitro* fertilization are derived from the broadly understood natural law, whereas the contemporary debate makes use of noble words, behind which lurk primitive human instincts (Witczak-Bruś 2021: 37).

A review of the British and US legal literature shows that surrogacy is one of the most controversial procedures related to assisted reproduction (Jadva et al. 2003: 2196). This is due to the fact that the phenomenon under investigation departs from the model of reproduction commonly accepted in society and deeply rooted in human consciousness. At present, it is possible to separate the individual stages of this process spatially, individually and temporarily. One of the main criticisms directed towards surrogacy is the claim that this procedure undermines human dignity (Żukowski 2013: 312) in connection with the objectification and commercialization of the human person. Feminists criticize surrogate motherhood for objectifying women – women are treated as living incubators (Soniewicka 2010: 106). Another criticism leveled in the doctrine at the phenomenon under investigation is the assumption of the devaluation of the institution of motherhood. This may lead to the exacerbation of gender inequality and promotion of a paternalistic stereotype where women are reduced to the function of childbearing for men seeking to extend their lineage (Żukowski 2013: 312). With respect to the regulation of surrogate motherhood, there are calls for prohibiting these procedures and imposing a ban on intermediation for consideration in concluding surrogate motherhood contracts, which should be considered illegal. The given argument is that surrogate motherhood leads to questioning of the hitherto existing concept of motherhood, undermines the parental relationship, and deprives procreation of its ethical dimension of responsibility (Nesterowicz 2006: 15). Hence the formulation of calls in the Polish scientific debate for a legal ban on surrogacy (Krajewski 2004: 118). Paulina Witczak-Bruś points to the violation of the dignity of the woman as a justification for the introduction of criminalization of commercial surrogacy, recognizing that it is an act contrary to nature, comparable to slavery. She holds the view that the woman's decision to use her own body for consideration (by giving birth to someone else's child) is the use of one's own body as a commodity, which is inconsistent with the universal and absolutely binding imperative of reason – Kant's categorical imperative (Witczak-Bruś 2021: 280).

The Commissioner for Children's Rights has a negative view of the process of surrogacy, claiming that the child's rights to biological parents

are violated in the process. He claims that it is dehumanization, an offense, and a crime that he will fight as long as he holds the office.

In the light of the teachings of John Paul II, the moral assessment of the phenomenon of homologous *in vitro* fertilization is negative, due to the detachment of procreation from the truly human context of the marital act, which implies the subordination of procreation to technique and technology. It is indicated that in this case it is difficult to ignore the fact of manipulation of the human person at the very moment of entry into existence. The manipulation of the human person is a sufficient negative criterion for the rejection of the entire process in the name of human dignity. For the sake of objectivity it should be noted that this argument calls for the recognition of certain principled and otherwise extremely consistent anthropological assumptions such as: the fundamental unity of the human person, the dignity of the person showing his/her subjective character, the exclusivity of the marriage act as the only one worthy of conceiving a new human being (Wielka Encyklopedia 2014). The President of the Ordo Iuris Institute for Legal Culture stresses that "The practice of *in vitro* fertilization makes a human person a product of a specific laboratory procedure that is subsequently subject to a quality assessment, selection, sometimes maintenance, etc., that is procedures that involve a completely instrumental treatment of the human person at the embryonic stage of development" (Stępkowski 2015). The Catechism of the Catholic Church clearly teaches that the deliberate conception of a child outside marriage is a mortal sin: "Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' right to become a father and a mother only through each other" (Catechism n.d.: 2376).

5. Bigamy

Under Polish criminal law, it is a crime to enter into a marriage while already being married. That regulation is in force in many countries worldwide (Ross 2011). Justification for the criminalization of bigamy is also still being sought (e.g. in Australia, by trying to demonstrate that the religious justification for the criminalization of bigamy – comparable to blasphemy – is incompatible with the secular nature of a democratic liberal state) (Bennet 2019). As given by S. Hypś, the prohibition on bigamy laid down in the Criminal Code aims to protect the family. He argues that it may be concluded that protection of the constitutive feature of marriage, i.e. monogamy, is at the same time the protection of the family itself, in particular its structure. Sławomir Hypś is of the opinion that it is not neutral

for the legislator to ignore which interpersonal relationships form the foundation for families as the basic social unit. He is convinced that a monogamous relationship is the most beneficial form of marriage from the point of view of social good. At the same time, he does not share the view expressed in the Polish doctrine that the provision of Art. 206 of the Criminal Code is directed at the statutory form of marriage or the authority of the judicial act of entering into marriage. He claims that the argument which makes it possible to question the above theses is that criminal law does not penalize other acts directed against the statutory form of entry into marriage (e.g. submission of a declaration of intent to enter into marriage by two persons of the same sex) (Hypś 2017: 994–995). It must be recalled that since 1932, i.e. the time of the enactment of the first criminal code in independent Poland, the legislator has not criminalized the other behaviors that threaten marital permanence – adultery or marital infidelity. This means that the subject of protection is not so much marital permanence as the "traditional" form of marriage. In the opinion of Lech Gardocki, the criminalization of bigamy is a relic of the old approach to it as a violation of the sacrament of marriage, and there is no sufficient justification for it in modern times. He claims it would be enough to apply the provisions of the Family and Guardianship Code on the annulment of a bigamous marriage, and in cases involving forgery of a civil status document or matrimonial fraud, the provisions of the Criminal Code on the forgery of a document and fraud should apply (Gardocki 2015: 282).

Maria Szewczyk notes that in modern times, Catholic teaching defines the monogamous nature of marriage. She further recalls that the subject of protection of the provision of Art. 206 of the Criminal Code is the family, and within it a monogamous marriage is defined as a union between a woman and a man in compliance with the Polish cultural and legal tradition (Szewczyk 2016: 952, 959).

There has not been much discussion on the significance of the family and the need to protect the monogamous family model but, it should be assumed, only because there is no ongoing debate in Poland on the introduction of polygamous relationships into the legal system. What the argumentation looks like in a similar area can be seen from the discussion on the regulation of same-sex partnerships. There, the family model established by God of a union of one woman and one man comes into the fore. Criminal law expert Alicja Grześkowiak regrets that modern criminal law no longer treats families founded on a marriage between a woman and a man as a value deserving protection, although such indications invariably stem from morality. She holds the view that the teachings of John Paul II makes it possible to reconstruct a coherent system of moral values that should form the basis for the entire law, including criminal law (Grześkowiak 2006: 11). Priest Mirosław Sitarz notes that it is unfortunate

that there is currently a dispute over the fact that every family is based on the marriage as a union of a man and a woman (Kędracka 2020: 220). The Ordo Iuris organization remains so strongly attached to the model family in the form of a union between one woman and one man that it treats various advantages for single parents raising a child (e.g. tax preferences, preferences for enrolling a child in a kindergarten) as discrimination against "traditional marriage", calling for appropriate amendments to the law (Założenia projektu ustawy n.d.). References have often been made in the debate to a judgment of the Constitutional Tribunal (Judgment of the Constitutional Tribunal of 12 April 2011) pursuant to which, "the protection of the family carried out by public authorities must take into account the vision of the family adopted in the Constitution as a permanent union of a man and a woman focused on motherhood and responsible parenthood (see Art. 18 of the Constitution). The aim of the constitutional regulations relating to the status of the family is to impose on the state, in particular the legislator, an obligation to undertake such actions that 'strengthen the ties between the persons that form the family, and in particular the ties existing between parents and children and between spouses' (...) However, these measures cannot result, even indirectly, in undermining the permanence of family ties by such solutions that would favor bringing up children only by one of the parents or even by both of them but without entering into marriage."

6. Commercialization of the trade in organs for transplantation

It must be noted that initially the Catholic Church was negatively disposed towards the very fact of transplantation. Pope Pius XI (1922–1939) recalls in his encyclical *Casti connubii* (1930) that it is unacceptable that a human being could change the natural purpose of the human body and its individual parts. Pope Pius XII (1939–1958) discussed the issue of transplantation during the First International Congress of Histopathology of the Nervous System in 1952. The Pope did not support the use of that practice and stated in his address that "As for the patient, he is not absolute master of himself, of his body or of his soul." He held the view that donation is impermissible, consequently, transplants from a living donor should not be performed. In turn, in his address to physicians in 1953 he stated that "The patient, the individual himself, has the right to dispose of his person, the integrity of his body, individual organs and their capacity to function, only to the extent that the general wellbeing of the whole organism demands

it." Notably, Pope Pius XII approved of transplantation from a deceased donor as long as it did not entail a remuneration (Picewicz 2015: 100).

It is true that the greatest dilemmas in this regard arise from the issue of the commercialization of the trade in organs for transplantation. The general assessment of remuneration for activities related to organ transplantation and the legalization of organ trade varies in Poland and throughout the world (Friedman, Friedman 2006: 960–962). Lawyer Ewa M. Guzik-Makaruk views the call for freeing the organ market as a remedy for the lack of necessary transplants as "a bizarre solution," indicating that this stance is not isolated. She strongly stresses that the inherent and inalienable dignity of the human person stands in direct contradiction to the possibility of treating a human person as a living or dead "spare parts warehouse" for others (Guzik-Makaruk 2008: 58). Among others, Gabriel M. Danovitch and Fancis L. Delmonico support the need to keep the prohibition on human organ trade, arguing that the "regulated" market of organs poses a threat to both donors and recipients, and the thesis of free will is a myth (Danovitch, Delmonico 2008: 386–394). The prohibition on commercialization is based on the belief that the only basis for transplantation should be altruistic behavior (an organ is to be a gift) (Nowacka 2013: 229) and its commercialization results in an erosion of altruism (Kowal 2011: 147). It is also indicated that the prohibition was imposed due to the fear of an increase in criminal behavior and the fear of abuse carried out by doctors (Kowal 2011: 153). An argument of utmost importance for supporters of the ban on commercialization is the respect for human dignity (Rzepliński 2002: 61). Criminal law expert Wojciech Radecki indicates that the criminalized behavior may harm human health and freedom or undermine the principles of public morality that impose a prohibition on receiving remuneration for someone else's cells, tissues or organs (Bojarski, Radecki 1998: 216).

Physician Wojciech Rowiński expresses considerable caution as regards paid donation and takes the view that "the expansion of the circle of living donors in the world is inevitably accompanied or will be accompanied by the introduction of specific compensations and eventually fees" (Lasocik, Wiśniewski 2007: 98). Ethicist and philosopher Jan Hartman holds a similar view (Hartman 2009: 118). Anthony P. Monaco proposes the introduction of a system of rewards for donating an organ for transplantation in order to avoid classic commercial transactions (including price bargaining) (Monaco 2006: 955–957). Another proposed solution consists of allowing the conclusion of organ sale contracts in the event of death – the donor gets the remuneration during his/her lifetime, but the organ is collected upon his/her death (Zimny 2013: 234). Many authors have expressed the need to refrain from prosecuting donors who sell their organs, as they should instead be treated as victims rather than perpetrators of a criminal act (Lasocik 2011: 83).

Lawyer and Former President of the Constitutional Tribunal Andrzej Rzepliński, notes that the prohibition of profit and trade in products of human origin is not absolute – the sale of human hair and nails is not inconsistent with human dignity (Rzepliński 2002: 61). Importantly, in Poland, until the year 2017, a rare blood donor was entitled to a cash equivalent (Art. 11 of the Law on the Public Blood Service; J.o.L. of 2017, item 1371). As of 1 January 2017, the aforementioned persons are entitled (instead of the equivalent) to financial compensation "for the inconvenience related to the necessity to appear at every request of the organizational unit of the public blood service." Financial compensation is not envisaged for all blood donors but, among others, for those with a rare blood type and is independent from reimbursement of travel expenses and lost earnings. Moreover, the law does not criminalize similar behavior connected with the commercialization of blood donation. The question thus arises of whether, given the exception to the principle of unpaid and voluntary blood donation made for rare blood donors, such an exception should also be made for more valuable human organs. Consideration should also be given to the issue of paid clinical trials, provided for in Polish law (see Art. 37e of the Pharmaceutical Law of 6 September 2001, J.o.L. of 2001 No. 126, item 1381) – trials of new drugs are conducted on volunteers in return for consideration. In 2020, the SARS-CoV-2 pandemic prompted a search for 24 volunteers who would agree to contract the virus in exchange for £3,500 in order to help develop a vaccine (Coronavirus Vaccine 2020).

7. Physical punishment of children

Given the above, the issue of physical punishment of children seems intriguing. In contrast to the punitive views referred to above, in this case, in the opinion of many adherents to natural law and Christian morality, the beating (physical disciplining) of children should not be criminalized.

These views are presented by, for instance, lawyer and Minister of National Education P. Czarnek when he quotes ancient maxims on disciplining children, arguing that the ancients can hardly be accused of having an unrealistic vision of man (Czarnek 2018: 15). This is as if science, including psychology and the concept of human rights, has not made any progress for several thousand years. Interestingly, he makes references to natural law and constructs the principles of physical punishment of children by directly referring to Catholic educational ethics (Czarnek 2018: 390–391). He expresses the view that the absolute prohibition on a so-called "educational smack" introduced by the amendment to the Act on the Prevention of Violence in the Family "runs the risk of being in

contravention with the provision of Art. 48 of the Constitution" (Czarnek 2018: 18).

One may find books in Polish bookshops and libraries on bringing up children with telling tips: "Nothing can replace corporal punishment. Parents may want a more 'human' or 'easier' way, but corporal punishment is in fact the easiest way. Corporal punishment is not only 'human', but it comes from God. Corporal punishment is God's method by which parents may establish and maintain control of their children" and "Parents are commanded to use corporal punishment with their child early in life while there is still hope that the child will be receptive to instruction. (...) The rod to be used for corporal punishment has specific characteristics. It can cause welts (thin marks similar to those left by a whip), but it is small enough not to cause permanent harm, even if used vigorously" (Fugate 2008: 134). Words of caution are also offered: "You have no right to spank a child in a situation other than a biblically sanctioned punishment" (Tripp 2016). Catholic pedagogics makes occasional references to the Bible, including, among others: "because the LORD disciplines those he loves, as a father the son he delights in" (Proverbs 3: 12), or "Whoever spares the rod hates their children, but the one that loves their children is careful to discipline them" (Proverbs 13: 24).

The highlighted examples are not isolated extreme views. A debate on the withdrawal from the Istanbul Convention (Convention on preventing and combating violence against women and domestic violence) ratified by Poland is now underway in the Polish media and politics. Deputy Minister of Justice Marcin Romanowski turned to Twitter to comment on the issue: "The Istanbul Convention speaks of religion as the cause of violence against women. We want to withdraw from this gender mumbo-jumbo (...). We are not interested in the opinion of foreign countries. A sovereign nation-state is fundamental to us" (Romanowski 2020). In the opinion of Dr Jolanta Hajdasz, the Istanbul Convention undermines the foundations of a civilization based on family and traditional values, civilization based on the traditional roles of a woman and a man. The effect of this assumption is an assault on the family which is presented by gender ideologues as a space where violence unfolds and its members experience oppression. For years, Polish bishops have persistently opposed the solutions set out in the Istanbul Convention (Hajdasz 2021).

Polish criminologist B. Hołyst is of the opinion that still (despite the amended law) "the use of physical violence against children – beating, tugging, kicking, etc. is in fact almost permissible in our country inasmuch as it does not satisfy the elements of regular maltreatment prosecuted under Art. 207 of the Criminal Code. From a legal point of view, as long as a child is punished emotionlessly and moderately and where it does not exceed the

child's ability to endure the punishment enforced with an appropriate tool, corporal punishment of children is allowed in Poland" (Hołyst 2011: 431).

Joanna Szafran argues that "the long-established model of exercising parental authority by means of corporal punishment that is sanctioned by moral standards is still practised in Poland. There are still many of us for whom spanking children is part of 'the traditional model of child-raising' in which the aspect of obedience pursued through commands, prohibitions and punishments prevails" (Szafran 2017: 68). This statement takes on a particular meaning in the light of the interpretative declaration submitted by Poland to the Convention on the Rights of the Child (J.o.L. of 1991 No. 120, item 526) – "The Republic of Poland considers that a child's rights as defined in the Convention, in particular the rights defined in articles 12 to 16 (the right to freedom of thought, conscience and religion, as well as the expression of own views by the child and to act in matters concerning the child in administrative and judicial proceedings), shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family."

8. Synthesis of the phenomenon under investigation

All the examples above do not constitute an exhaustive list of acts where decisions on criminalization are based on Christian values or other aspects of Catholic religion. A similar line of argument may be put forward for the criminalization of abortion, euthanasia, incest between adults, insulting the cadaver, but also violating funeral regulations, etc. In contrast, for the very same reasons, domestic violence, the need to vaccinate, and combating hate speech are confronted by intense lobbying for decriminalization. The above typifications give a view of the issue under investigation and allow for further discussion.

It appears that a recurring pattern can be identified in the presented arguments (although it uses different wording). It is pointed out that the behavior that is to be prohibited violates certain general values such as life or health but, most of all, it violates natural laws and human dignity. By way of illustration, "Marriage – a monogamous and indissoluble union of a man and a woman that is an institution of natural law," (Wielka Encyklopedia 2014) or a recurring phrase that, for instance, is used to show that surrogacy or the commercialization of trade in organs for transplantation violate human dignity. At the same time, these terms are given meaning (frequently in the further part of reasoning) compliant only with the Christian teaching – "Dignity is the inviolability of life from conception to natural death combined with bodily integrity" or "Natural law

is the participation of rational beings in God's eternal law. It is universal, unchanging, and indispensable. (…) Moral norms along with the concept of man's purpose and a set of values constitute the moral order whose ultimate creator and guarantor is God" (Wielka Encyklopedia 2014). "'Human dignity' guaranteed by modern laws is understandable only on the basis of the words of Scripture stating that man was created in the image and likeness of God" (Wielgus 2006). Moreover, statements appear that the Catholic Church is called by the Lord to guard natural law and give its binding interpretation (Kucharczyk 2018).

This state of affairs of may be specifically confirmed by a collective scientific publication titled "Criminal Law Issues in the Context of the Teaching of John Paul II" which recalls at the outset the Pope's words: "A legal culture, a State governed by law, a democracy worthy of the name, are therefore characterized not only by the effective structuring of their legal systems, but especially by their relationship to the demands of the common good and of the universal moral principles inscribed by God in the human heart." Further, criminal law expert A. Grześkowiak argues that the principles underlying criminal law are indicated above all by morality which derives them from natural law. She reproaches common criminal law for secularizing and holds that the teaching of John Paul II makes it possible to construct a coherent system of moral values that should form the foundation for the entire law, including criminal law, and it should be a source of doctrinal inspiration, support and help in the search for the meaning of criminal law (Grześkowiak 2006: 7–11).

The Polish media space accommodates statements (made by, among others, persons responsible for the formation and application of law) that directly refer to the need to take into account Christian values in the activities of the state and lawmaking. For instance, Deputy Minister of Justice Marcin Romanowski said in an interview on TV Trwam that "The Ministry of Justice under the direction of the Minister of Justice Zbigniew Ziobro is a place where traditional values are defended very strongly and on a practical level: marriage as a union of a man and a woman, the permanence of such marriage. (…) We defend values, we defend tradition, we defend Christian values on which our legal system is built" (M. Romanowski 2019). In turn, MP and presidential candidate Krzysztof Bosak developed the following program for Poland: "Christian culture has been the core of the functioning of Poland as a political community since the creation of our state. This is a fact independent from the religious nature of individual Poles. It is therefore a natural necessity to establish a just institutional framework that at the same time fits in with the Polish community and is based on the norms arising from Christianity. The principles of Roman law, natural law derived from classical philosophy, Christian ethics, and the original Polish ideological and legal tradition form

a civilizational foundation for the creation of legal norms. If the law, institutions and culture of the new order are based on these values, it will be possible to remove the worst features of the present disorder: the instability of law, uncertainty as to the direction of its evolution and ideological conflicts that disrupt almost every area of the life of the state and society" (Bosak 2020: 19).

The phrase frequently recurring in the public space is that in the Polish culture, the attitude to Christian values can be described as a test of the actual approach to the national culture. It also appears in scientific publications (Frączek 2017: 165). The deep rooting of Christian values in the tradition and culture of Polish society, regardless of the attitude of a particular individual to religion, was confirmed by the Constitutional Tribunal by way of judgment in 1994 (Judgment of the Constitutional Tribunal of 7 June 1994).

A transnational dimension may be attributed to the words of Priest J. Krukowski, who claims that the European Union, being a supranational structure based on a system of positive law, is now in the grip of a sharp cultural crisis directed by a large part of its political elite adhering to an extremely liberal ideology. This is particularly evidenced by the new regulations enacted especially by way of directives of the European Commission or European Parliament committees, which require member states to adopt regulations that are in conflict with the respect for fundamental human values – relating to the protection of human life, freedom of conscience, freedom of expression, protection of marriage as a union of a man and a woman, and respect for parents' right to raise children in compliance with their beliefs in public education. The situation is becoming intense due to the conflict between positive law and the system of universal ethical values rooted in natural law. It should thus be borne in mind that Christians, being fellow citizens of the European Union, may not be treated only as passive observers of the elimination of Christian values from public life by means of law established by the organs of the European Union (Krukowski 2015: 73–74).

9. Concept and types of populism

The concept of populism and penal populism has been thoroughly researched and described, both in Polish and world literature (Brass, Peasants 2000; Kaltwasser et al. 2017). Suffice to say, one of the conventions of the Departments of Criminal Law was entirely devoted to this phenomenon (Sienkiewicz, Kokot 2009). At this point, only those statements that are necessary for further discussion will be referred to.

Wojciech Zalewski notes that a definition of populism constructed at a certain level of generalization may indicate that it is a description of the functioning of democratic mechanisms (Zalewski 2009: 13). Yet he highlights that populism is the reverse side of the representative democracy. It comes from within it and feeds on its mechanisms. It is a dangerous mutation of democracy, "a systemic virus" difficult to combat using democratic methods (Filipowicz 2017: 137).

Cas Mudde defined populism "as an ideology that considers society to be ultimately separated into two homogenous and antagonistic groups: 'the pure people' versus 'the corrupt elite'" (Wysocka 2008). Olga Wysocka argues that the above definition is relevant mainly because it shows the essence of the phenomenon which in its concept is based on a special split between people of exceptional, even supernatural significance, and depraved elites, that are in a sense identified by populists with unclean forces. This dichotomous division between good and evil is the ideological backbone of populism (Wysocka 2008).

Drawing on Cas Mudde, Paweł Przyłęcki distinguishes the following types of populism: agrarian, political and economic. Notably, this author identifies references to Christian values in the programs of political parties as an element of political populism (Przyłęcki 2012: 15; Szafrańska 2015: 27–28). A different typology was developed by Pierre-André Taguieff – protest populism and identity populism. The first is based on a conflict between the (political, economic and cultural) elite and the people. The second is a conflict between the nation (ethnic community) and the alien. Identity populism feeds on national resentments and aims to consolidate and mobilize the public to fight an external enemy that threatens the well-being of the national community (Taguieff 2010: 77–98).

The following four elements may be deemed to be constitutive for populist discourse: 1) the central location of a "mythically" understood people in the created vision of the world; 2) location of "the people" always in opposition to "non-people" (e.g. elites or aliens); 3) simplification of the linguistic image of the social world, combined with a high level of intelligibility of the message addressed to the largest number of recipients; 4) the presence of a leader who performs the function (real or self-proclaimed) of *vox populi*. All the above elements form the populist syndrome, yet their intensity and the manner in which they combine with elements not specific to populism are different and depend primarily on the populist leader himself (Kołodziejczak, Wrześniewska-Pietrzak 2017: 30).

Within populism, as defined above, penal populism can be singled out. In the opinion of Tomasz Kaczmarek, it consists of a socio-technical, purely instrumental manner of using the right to gain or perpetuate public power (Kaczmarek 2009: 35). Reference should also be made to the view put forward by M. Szafrańska that penal populism is a political tactic oriented

towards repressive penal policy. It manifests itself in three tendencies – offering simple, immediate solutions, promotion of the offered solutions in mass media, and manifestation of disregard for expert knowledge. Political rhetoric is thus marked by praise for the wisdom of the people, creation of social antinomy, development of a special bond with the people, dichotomy between the public debate on crime and criminal policy, discrediting political opponents and representatives of institutions that "disregard the will of the people", arousing strong emotions or appealing to social effects or resentments and affirmation of a repressive penal policy (Szafrańska 2015: 39–64).

Maciej Gajos holds the view that penal populism is shaped by two basic factors. The first factor relates to the communication of courts with the public and some specific instances of negligence on the part of representatives of the judiciary that affect the manner in which citizens view the system of justice. The second factor relates to mass media as the main source of information from which Poles obtain information on the operation of courts (Gajos 2019).

10. Christian penal populism?

In the literature it has been shown that in a broader context populism and religion are related. The issue is not the ideological aspect, but the presence of certain common features. Juraj Buzalka notes that populism and religion are combined by three main social features: dominance and defense of the patriarchal family and strict moral order, complicated "obsession" relating to the nation or other "elementary" group and, lastly, the role of the people and their tradition. Further, he holds that in post-communist countries, in many cases due to institutional changes, the Catholic Church obtained "a special position within the state". Against this background, religion (not only Catholic) seeks to maintain its position in the state, and this is the grounds for the relationship between populism and religion which, in the opinion of Juraj Buzalka, may be called "religious populism" (Wysocka 2008). This view is opposed by Olga Wysocka who argues that "first, it would mean that populism is religious, which is not true. Its relation with religion is purely instrumental. Second, the features of populism referred to above allow for the identification of some similarities it shares with religion. However, their mere existence is no basis for the creation of a relation of dependency between the phenomena in question that may be indicated by the use of the term 'religious populism'. Finally, I believe that it is politics that binds religion and populism. The question remains open whether populism needs religion or whether religion needs populism, but not whether it is an issue of religious populism or a populist religion" (Wysocka 2008).

At this point, I wish to adopt a slightly different approach to the relationship between populism and religion (on the basis of the Christian religion). I share Olga Wysocka's view that "whoever stands up for Catholic values and on behalf of the people is not necessarily a populist. It takes the one who, in the name of Catholic values, creates an enemy and, in defense of the oppressed people, manipulates their fear using political tools" (Wysocka 2008). The latter conduct may be deemed to be Christian populism (analogous to political populism). The former may well comprise statements from representatives of the Catholic Church and believers in the Catholic world order. It also encompasses passages from the Catechism of the Catholic Church on the relationship between natural and civil law.[2] In contrast, the group of Christian populists may include, for instance, Priest prof. Tadeusz Guz, who uses extreme comparisons even when speaking of natural law[3] (Guz 2020).

Others argue for the need to criminalize abortion using the following words: "Before anyone expresses their opinion on abortion, I would like them to see how a pregnancy is terminated, piece by piece" (Krajewski 2004: 76). These warriors for the Christian world order use tools specific to (political) populism. This approach may be aptly illustrated by a view expressed by Przemysław Czarnek in a scientific publication that "the calls for 'the right to abortion' for eugenic reasons are (…) in the light of the Act [on the Commissioner for Children's Rights; J.o.L. of 2017, item 922 – note of OS] a cry for the right to kill children simply because they are ill. Apart from being utterly barbaric, it in fact means spreading anarchy" (Czarnek 2018: 11). Populism as understood in this sense has a long list of features typical of political populism. It also includes folk religiosity, idealization and mythologization of the past, including the role of the Church, a critical attitude to integration with the European Union, idealization of the patriarchal family, criticism of liberal democracy and reliance on conspiracy theories (Kutyło 2010: 209–210).

The above view put forth by Olga Wysocka does not fully reflect the phenomenon under investigation. There are politicians or lawyers who make use of religion and its principles from a pragmatic point of view,

[2] "The inalienable rights of the person should be recognized and respected by civil society and political power. These human rights are not dependent on individuals or parents, and are not a privilege derived from society or the state. They are inherent in human nature and are closely related to the person by virtue of the creative act from which the person has its origin" (Catechism n.d. No 2273).

[3] "Law is the soul of the state, natural law is the fundamental law in the sphere of form, and it was created by God. There is a serious substantive error in the Polish Constitution that the nation is the sovereign, a cardinal error that requires correction, only God is the sovereign

applying almost all the instruments seen as specific to populism. To be precise, this practice is based on two non-conflicting approaches.

First, given that Christianity is the highly dominant religion in Poland, voters are predominantly Catholic. Consequently, making references to Christian values is (politically) profitable. Taking into account that penal populism is an element of the political game and electoral games, it is not surprising that there are calls for tightening up the law to protect religion, dignity, and morality (understood in accordance with the teaching of the Church), life "from conception to natural death," a phrase that was to be included in the Polish Constitution. This Christian activity became so apparent that it has grown difficult to be accepted and is viewed as hypocrisy even in extreme right-wing Christian circles. Even the profoundly Christian *Polonia Christiana* openly pointed out the propagandistic nature of references to Catholic ethics when it ran a headline that read, "Defense of 'Christian values'. An electoral magnet for a Catholic" (Augustyn 2019).

I hold the view that in this case, politicians resorting to populism use religion as a tool to achieve their own goals. Criminal law becomes a method for the implementation of politics and, consequently, is affected by religion. I endorse the view of Priest Tomáš Halik who noted that "If right-wing politicians, especially in post-communist countries such as Hungary or Poland, call for a return to Christian values, and at the same time promote the fear of migrants and Muslims, these are just empty words serving as a cover for the populists' pursuit of power and their efforts to replace parliamentary democracy with autocratic systems." He further

in the strict sense of the word, the nation is a collaborator. Given the above, where politicians say that the law comes from society, you must know that this is the thesis previously put forward by men such as Marx with Engels, Hegel, or Rousseau and other precursors of the revolution that prepared only crimes for us" (Guz 2020).

added that "Today, in many places in Europe, we are witnessing the replacement of God with the nation, replacement of the Christian faith with the dangerous fetishization of xenophobia and populism" (Halik 2019). John Pratt indicates that populism represents the sentiment and emotions of specific groups of society (Pratt 2007: 10). It appears that religious feelings and attachment to the values relevant to a given religion fit in with such sentiments and emotions.

The second approach to using religion in politics, and also in criminal policy, consists of giving the public a simple, constant, universal formula for the perception and construction of the world that allows no exceptions. It is an attractive form of constructing a whole world around a single system of values. This may be illustrated by the issue of bigamy and statements on the family. In the modern world, marriages break up, there are betrayals and

permanent informal bigamous relationships. We are instead offered a world of happy, stable spousal relationships consisting of a woman and a man. Surrogacy generates numerous problems, for it is far from clear who is "the real" mother and who is "the real" father. The prohibition on surrogacy is a return to the old rule *mater semper certa est, pater uero is est, quem nuptiae demonstrant.* This perspective is wholly consistent with a view that there is also the constitutional possibility of establishing provisions that will not be observed in practice but will "enable the effective implementation of other goals justifying the restriction of an individual's freedom, such as the confirmation of the validity of a given social norm" (Tarapata 2016: 61).

Anna Siewierska-Chmaj may indeed be right in claiming that the modern globalized world does not give people a sense of certainty, neither within a political order legitimized from above, nor within the framework of a generally accepted axiological order. Drawing on political scientists Vittorio Possenti or Giles Kepel, she indicates that religion may permeate the political sphere to a greater extent than in the past. A phenomenon of "making religion non-private" is emerging. Interestingly, the Polish Solidarity movement is cited as an example of this "third wave of democratization". Siewierska-Chmaj argues recalling Leszek Kołakowski that a secularization of Christian values occurred in the Western civilization and Christianity will never run ahead of political ideologies in making promises of temporal happiness (Siewierska-Chmaj 2013: 115–117). It may be presumed that a simple, clear, legible and (relatively) constant picture of the world, its relations and mutual obligations is becoming a convenient and useful political tool. Along the same lines, José P. Zúquete puts forward the notion of "the enchanted world" (Zúquete 2017) and Peter Berger proposes the term of desecularization (Berger 1999).

These two approaches may be called Christian penal populism, although the motivation for resorting to the argument of "religious values" is slightly different in each. It must be borne in mind that these two approaches are frequently jointly adopted. They carry almost all the features of populism – a conflict between the (religious) people and a (liberal) elite, perceived as a conflict between the civilization of life and the civilization of death and a simplification of the world image.

Drawing on the aforementioned distinction of populism carried out by Pierre-André Taguieff, it may be assumed that the issue in this case is identity populism (or a specific form of it). There is no doubt as to the role of the media in such activities. Reference must be made here to not only Catholic media (along with Radio Maryja, itself a phenomenon of populism (Kutyło 2010: 204–215) and Television Trwam), but also extending to the public media, which are required to respect Christian values and which recently concluded an agreement with the Secretariat of the Polish Episcopal Conference. The agreement obliges Polish Television (TVP) to

take into account the position of the Catholic Church and "its intellectual achievements" in its "current affairs programs dealing with moral and social problems and issues regarding professional, social and cultural life" (Kozłowski 2021).

It must be stressed that whether the issue is Christian political populism or Christian penal populism (on both levels), they both leave no room for a different view of the world, different norms, different standards. Criminal law based on such an assumption is the criminal law of the Christian world. It is of no relevance that, even though, as anthropologists show, the majority of people live in monogamous relationships, out of 849 human societies, as many as 700 allow polygamy (which surely does not mean that is common practice) (Agnosiewicz n.d.). Studies conducted among Indians and African peoples show that polygamy is not contrary to nature (Baloyi 2013) and it is a natural (though not very common) practice in Muslim countries (Sakowicz 2011–2021).

Such a model brings to mind the old principle *cuius regio eius religio*, which should be transformed into: *cuius religio eius ius*. Law, including criminal law, is to guard the religion that the legislator considers to be dominant or important. Tomasz Terlikowski argued in a work titled "Moral Totalitarianism" that "only armed with classical philosophy and Holy Scripture can we free ourselves from the ethical chaos that utilitarianism gave us. They are the weapons that can be used to defeat thousands of proliferating masters of suspicion, critics of the Decalogue, or lawmakers who care more about public health money than about human life." Tomasz Terlikowski takes the view that "to regain the foundations for building morality, law and a coherent civilizational project" everyone should follow Pascal and assume the existence of God. He does not refer to an individual conversion, but a mental and intellectual assumption to be made by the whole civilization (Terlikowski 2006: 132–134). In similar fashion, Priest S. Wielgus (Professor of the John Paul II Catholic University of Lublin) argues that positive law may fall into degradation and must therefore be rooted in a code of unchanging values – the Decalogue. He points to laws contrary to morality and sees the following reasons for that phenomenon: the assumption that material well-being is the only criterion for action, cultural uprooting (perpetrated by "pseudointellectuals"), or citizens' declining sense of responsibility for the community ("egoistic hyperindividualism"). Stanisław Wielgus believes the only solution is the adoption of the Judeo-Christian canon (Wielgus 2006).

A further question arises as to whether religion and the canon thereby established may be the basis for the valuation of goods, and resolution of a conflict of goods, that is a process specific to establishing penal regulations, in the light of the notion of moral error of the ecclesiastical authority. Professor of theology Tadeusz Bartoś notes that "in 1866, the Holy Office

stated in response to questions from a vicar apostolic in Ethiopia that slavery was compatible with natural law" (Eilstein 2006: 666). The Church was wrong on many issues, e.g. human rights that it acknowledged only in the 20th century, which it itself critically admitted (Dudziak 2007: 377), or *Syllabus Errorum* of Pius IX of 1864 (Pelagius Asturiensis). The Catholic press (of the so-called Open Church) frankly admits that many of the biblical commands, such as the stoning of homosexuals, the expulsion of lepers from the community, and the rules for the treatment of slaves, are today considered immoral (which may mean external sources of morality), and the Ten Commandments refer to a woman as the property of a man, less valuable than a house (Majewski 2021: 31).

In part, the phenomenon under investigation (penal-Christian populism) fits in with so-called legal moralism – a view under which the validity of "moralistic provisions of law is ethically justified" (Pietrzykowski 2005: 104–119). This approach may be depicted by an argument that "the law should prevent and punish immoral behavior" (Feinberg 1998: 8–9). It is clear that "this leads to a situation where those who believe that they have come to the knowledge of the absolute good claim for themselves the right to impose their opinion and will on those who persist in error" (Pietrzykowski 2005: 104–109). Legal moralism does not exclude legal paternalism, that is the imposition of certain behavior on others for their own good regardless of their will (Pietrzykowski 2005: 115–116) by means of the provisions of law, including criminal law. Contemporary Polish law is sometimes given such assessments. By way of example, as Andrzej Wąsek rightly pointed out, criminalization of voluntary sterilization is a manifestation of legal paternalism (Wąsek 1988: 94) (regardless of Polish criminal law assessments of voluntary sterilization, because the views on this issue are not uniform). Legal paternalism can also be seen in the prohibition on commercialization of the trade in organs for transplantation, or the commercialization of surrogacy, but also in the prohibition on euthanasia (not discussed in this article).

Polish criminal jurisprudence seeks a systemic justification for decisions on criminalization. Such decisions may be taken for various reasons, and depend on the assessment of undesirable behavior by the legislator. Lech Gardocki calls these reasons the theories of criminalization. He distinguishes among them symbolic criminalization, which he defines as "the collective need to punish". A provision of criminal law is in this case a manifestation of a commitment to social morality and order. Drawing on Heinz Steinert, he stresses that the issue is "the sanctification" of a particular value, which he illustrates with the provision prohibiting abortion (Gardocki 1990: 62–66). The situation arises where human dignity is protected (even against an individual's will). In a sense, one can also consider criminalization where the motive is to relieve social tensions. Lech

Gardocki indicates that the sociology of morality draws attention to this kind of function of the norms of ethos (which can be compared to praying for rain, thus helping overcome the feeling of helplessness) and illustrates it with the French law on the protection of the home in wartime, and the ban on adultery. Interestingly, he classifies these criminalizations as rational criminalizations because they fulfill certain goals intended by the legislator (Gardocki 1990: 59–61).

11. Christian penal populism and the issue of punitiveness

One of the distinguishing features of penal populism is punitiveness, which may be defined as "the result of the tendency to make extensive use of instruments provided for in criminal law to limit the scope of phenomena assessed as socially undesirable" (Jasiński 1973: 23).

The above analysis of selected criminalized behaviors and a short list of others with similar characteristics make it possible to recognize that decisions based on the protection of Christian values in the area of criminalization policy do not necessarily mean introducing or increasing criminal liability. There are behaviors which, accepted or even promoted by the Catholic religion, should not be subject to criminal liability. A violation of the bodily integrity of a child should not be punishable, nor should the refusal to undergo vaccination if cell lines of aborted fetuses were used in the production process. This means that in the case of penal-Christian populism, punitiveness is not an element that permanently constructs it.

Account should also be taken of the argument of Karolina Kocemba and Michał Stambulski that the relation between populism and human rights is not straightforward and cannot be reduced to a simple incompatibility thesis (Kocemba, Stambulski 2020: 153). This issue is more evident in the case of populism based on the fight for Christian values. The criminalization indicated may form the basis for a criminal response, not so much to a violation of human rights, but to a violation of certain values. There is therefore no conflict between the good of the minority, the social majority, and the related dilemma. The issue in this case is (almost) exclusively a restriction of human rights to protect (Christian) values.

12. Rational response

This discussion may in essence stop at this point, but I believe that it seems worthwhile to reflect on whether and what can be done in the case of identification of penal-Christian populism (provided the issue is given a broader dimension).

Wojciech Zalewski claims that the most effective factors that curb populism include: international law, a strong civil service, appreciation of the role of specialists, independent media, a welfare state, and the pursuit of independent paths of development (Zalewski 2009: 23–29). I hold the view that a rational response to penal populism requires proper communication between public authorities and the public, reliable information and openness to other models of functioning – other cultures, religions and points of view. This approach makes it possible to pose questions as to what dignity really is, and whether, for instance, selling one's own organs in fact violates it (such a question is put by, e.g. Radcliffe-Richards 2006: 66).

It should be noted that when armed conflict between Roman Catholic and Protestant forces within the Holy Roman Empire ended with the Peace of Augsburg and the principle of *cuius regio eius religio,* one of the responses was the Lockean concept of toleration (for more details see Szwed 2014). This very same tolerance should be a response to the aforementioned principle *cuius religio eius ius.* The problem is that as a rule the legislator's thinking rejects tolerance of a different view of the world and employs symbolic and emotion-defusing criminalization as a tactic.

It is clear that the underlying basis for the thesis of the unacceptability of penal-Christian populism is the principle of proportionality of the establishment of criminal liability (*ultima ratio* of criminal law), principle *in dubio pro libertate* and the related right to self-determination.

In Poland, the principle of proportionality has a constitutional status and is established in Art. 31 (3) of the Constitution. One cannot fail to notice that it is precisely the protection of morality that is one of the justifications permitting the limitation of human rights and freedoms. Putting aside a detailed constitutional analysis of the provision, two issues should be pointed out: 1) the provision of Art. 31 (3) of the Constitution does not indicate what variety of morality it refers to, and whether it refers only to one (by implication, Christian), whereas the Preamble seems to suggest a possible "multi-view" approach (taking into account many standards of behavior); 2) morality in the name of which human rights are restricted should not always be protected by means of criminalization – it requires the fulfilment of three conditions defined as the principles of usefulness (adequacy), necessity and balancing of goods. Reference should also be made to a view of Joel Feinberg that no matter how flexible the limit of

criminalization may be, it will never be sufficient to justify the penalization of a particular behavior by referring to the fact that it only harms the perpetrator or is utterly immoral (Feinberg 1984). These views allow for the development of the concept of the moral neutrality of law (liberal neutrality) referred to as reasonable pluralism. Under this concept, the state may not enter the sphere of individual choices of "good life", which means the prohibition on preferring certain moral concepts and legal regulations of a moralistic nature (which is a postulate of the anti-perfectionism of law) (Pietrzykowski 2005: 132–133). I believe that one of the most significant arguments for this perception of law is the indicated difference between religious norms and legal norms. Religious norms do not apply to nonbelievers and those who do not intend to abide by them, whereas legal (universal) norms apply to everyone in a specific space. The latter must therefore take into account the different perceptions of religion in the individual and social world, as well as of different religious and areligious attitudes. It is important to note that the postulate of "moral neutrality" does not imply the amorality of law and underestimating the role of morality in social life (Sadurski 1990, Sadurski 1992; Sadurski 1994: 22–30).

The principle by which dilemmas in the field of criminalization policy are (or may be) resolved is the principle *in dubio pro libertate*, the spirit of which partially relates to the postulate of "the moral neutrality of law". Bogusław Banaszak expressed an interesting opinion that the principle *in dubio pro libertate* makes it possible "to ensure the greatest possible effectiveness of constitutional rights and freedoms" (Banaszak 2012: 375). In turn, Szymon Tarapata raises the question of the scope of the rule *in dubio pro libertate* in the process of the establishment of law, i.e. whether the legislator should refrain from regulating an issue if in doubt as to the possibility of laying down a specific provision, e.g. a new typification. He differentiates two approaches: vertical and horizontal. Under the vertical approach, i.e. the relation between lawmaker and individual, the legislator should refrain from dubious regulation due to the principle *in dubio pro libertate*. Under the horizontal approach, i.e. between individuals, the principle *in dubio pro libertate* is equivalent to the principle *in dubio pro dignitate*, which Sz. Tarapata derives from the constitutional principle of human dignity (Art. 30 of the Constitution of the Republic of Poland). Thus, in the event of a conflict, for instance, between freedom and another constitutional principle that is more closely related to the principle of dignity, the latter principle should be more strongly protected (Tarapata 2016: 62–63). Partially refuting the above thesis, it should be recalled that when dignity is understood in such a broad manner and, at the same time, is assigned a metaphysical meaning, the principle *in dubio pro libertate* virtually ceases to have any relevance. Further, all legal restrictions on autonomy, including criminal law provisions, must raise the question of the

obligatory protection of basic rights. The above-mentioned restrictions are justified precisely by reference to human dignity. Given the above, an interesting question is posed by Anna Podolska who wonders whether the interference of the sovereign, from whom dignity is not derived, with the freedom to dispose of dignity, constitutes its violation (Podolska 2013: 30).

It is easy to justify the criminalization of certain behaviors by making a reference to human dignity, and this formulation is indeed most frequently cited (see e.g. the earlier criminal liability for homosexuality). A human person also enjoys freedom and the right to self-determination and this choice should be free from any pressure and manipulation. I find it hard to come to terms with the paternalistic or moralistic vision of criminal law (Preisner 2014: 51–65; Fernández-Ballesteros 2019) which, in order to protect human dignity, prevents a person from taking actions that do not harm others. John Stuart Mill argued "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right" (Mill 1959: 129). This view still holds true. It is hard not to agree with Andrzej Kopff who argues that each individual should be able to independently shape their personality and their fate according to their own will (Kopff 1972: 3). In turn, Arwid Mednis is of the opinion that the provisions of the Polish Constitution allow a conclusion that the lawmaker seeks to confirm, that the subject of protection is a broadly understood autonomy of the individual which "manifests itself in a defense against having decisions made for us or meddling in our actions" (Mednis 2006: 113–115).

13. Summary

The answer to the question of whether making references to the protection of Christian values (as a specific "pre-legislative" measure) is a form of penal populism must be that it is a specific form of penal populism with slightly different characteristics – punitiveness is not its distinctive feature, sometimes the calls for criminalization in this area go in the opposite direction. Is it rational criminalization? From the legislator's perspective, the answer is that it is, which poses a unique threat to human rights and freedoms.

Legislative decisions based on the protection of "Christian values" as tools of the political game (taking advantage of the domination of Catholics

in society and/or constructing an attractive and simple world based on a single moral system) violate the standards of a democratic state – they often fail to comply with the principle of subsidiarity, breach the principle *in dubio pro libertate* and disrespect the right of a human person to self-determination. Moreover, Daniel N. DeHanas and Marat Shterin warn that "The multifaceted roles of religion in populism should prompt us to abandon any naive assumptions that religion is merely an empowering force, or that when it does empower it will work for the social good." They are of the opinion that "studying populism movements should give us pause to reflect on our understandings of the sacred and how these can, in some cases, bring social harm" (DeHanas, Shterin 2018: 177–185).

It is obvious that any interference of the law in the area of morality implies a restriction of freedom (Bunikowski 2010: 379–380) because lawmaking is itself such a restriction. The question should be put another way – can morality be a justification for that restriction, and can morality connected with a specific religious viewpoint affect the shaping of law applying to everyone; regardless of the beliefs of the addressees of the law and without respecting their free will? Therefore, the conclusion must be that criminal law that is free of any moral populism (including, among others, Christian populism) must rely solely on the minimum ethical requirements common to believers of different religions and non-believers, and with respect for the rights and freedoms of all members of society.

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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 kr~~yminologia neoklasyczna, w tym jej retrybutywne podejście do karania oraz odwoływanie się do poczucia sprawiedliwości społecznej. Kryminologia neoklasyczna stanowi także **Dr hab. Dagmara Woźniakowska-Fajst**, University of Warsaw, Poland, dagmara.wozniakowska@uw.edu.pl, ORCID: 0000-0002-3212-8901 **Dr Katarzyna Witkowska-Rozpara**, University of Warsaw, Poland, kwitkowska-rozpara@uw.edu.pl, ORCID: 0000-0002-4729-4697

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,[4] and Polish politicians have been using them

[4] 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

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, 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.

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."

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 rehabilitation 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,[5] 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

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

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.[6] Neoclassical rhetoric enforces slogans and solutions for the greater common benefit, pits the perpetrator against 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

[6] 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.

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[7] 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

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

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 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",[8] 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

[8] 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).

publicity. Events that happened in Poland in 2020 (although 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.[9]

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

[9] 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.

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, 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.[10] 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.[11]

[10] 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).

[11] 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

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 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

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).

offence[12] (draft Article 57b).[13] 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).

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

[12] 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).

[13] 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.

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)[14] 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 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

[14] 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).

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,[15] 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 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

[15] 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.

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[16]; 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.[17] 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

[16] 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.

[17] 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).

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 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"[18]

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 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

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

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".[19] 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

[19] "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).

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.[20] The rhetoric of "taking back control" that John Pratt and Michelle Miao (2018: 2, 26) have written 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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[20] 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.

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‘Let there be order!’: Rising criminal populism in Hungary

„Niech zapanuje porządek!”: Rosnący populizm penalny na Węgrzech

Abstract: The article explains the birth and development of criminal populism in Hungary – a serious deficit of a young democracy since 2010. Ten years ago, the governing party Fidesz gained a twothirds majority in the Parliament and immediately pushed penal policy reforms to the forefront of politics under the slogan ‘Order at last!’ The article describes the growing social and political tensions and the serious conflicts arising from the segregation of peripheries of society as a consequence of penal populism. Particular attention is paid to populist criminal policy regarding juveniles, which predominantly favours disciplinary measures. The scope of criminalised behaviour and punishable persons has been expanded; punishments are doled out and the prison population has increased considerably.

Keywords: criminology, criminal populism, Hungary, social and criminal segregation of juveniles, school guard, criminalised homelessness, increasing prison population

Abstrakt: Artykuł wyjaśnia narodziny i rozwój populizmu penalnego na Węgrzech, stanowiącego poważny deficyt młodej demokracji po 2010 roku. Dziesięć lat temu rządząca partia Fidesz uzyskała w parlamencie większość 2/3 głosów i natychmiast przeforsowała reformę polityki karnej pod hasłem „Nareszcie porządek!”. Artykuł opisuje

narastające napięcia społeczne i polityczne oraz poważne konflikty wynikające z segregacji niektórych grup społecznych, będących konsekwencją populizmu penalnego. Szczególna uwaga została zwrócona na populistyczną politykę penalną wobec nieletnich, która w przeważającej mierze zakłada stosowanie środków dyscyplinarnych. Rozszerzono zakres zachowań przestępczych, a także zakres osób podlegających karze. Wymierzane kary przyczyniają się także do znacznego wzrostu populacji więziennej.

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Słowa kluczowe: kryminologia, populizm penalny, Węgry, społeczna i kryminalna segregacja nieletnich, ochrona w szkołach, kryminalizacja bezdomności, wzrost populacji więziennej

1. Characteristics of criminal populism

Norbert Elias’s research, and recently Steven Pinker’s, prove that parallel to the development of civilisation, the use of force and the culture of everyday violence are steadily declining (Elias 1987; Pinker 2011). Statistics show that crime in long-standing democracies rose sharply between 1960 and 1980 and has then stagnated or even declined since the early 1990s. The number of homicides has remained relatively low over the past three decades. Yet it was exactly during this favourable turn that criminal populism emerged on the government agenda in several long-standing and new democracies. Its decisive influence was first explored in respect to the United States (Gönczöl 2014). According to some experts, commitment to stricter punishments and susceptibility to criminal populism are on the rise in cultures where belief in individual performance is strong, but acceptance of an institutionalised response to inequalities is weak (Green 2009).

Populism, proclaiming the primacy of popular will, refers to the people and the will of the people as the cornerstone of a fair and legitimate order. In countries where confidence in political and professional elites has permanently faltered, there may be a general loss of confidence. This may be the result, for example, of a serious, protracted economic crisis or of a relatively short-term political, economic turn that reconfigures the structure of society. The resulting disintegration of social cohesion may breed strong insecurity in a large part of the population, leading to the loss of a sense of security at the individual and societal levels, but it can also indicate a democracy deficit (Garland 2001; Gönczöl 2013).

In such circumstances and under public pressure, the ruling political elite may respond to complex social phenomena such as crime in a way that promises spectacular and rapid success, but delivers simplistic solutions – like 'Three Strikes' or 'zero tolerance', i.e. simple ideas and phrases which are easily understood by ordinary people – rather than policy devised by experts.

In other words, instead of mitigating or meaningfully dealing with serious social conflicts, it simply extends the scope of social control. It does so by expanding the scope of criminalised conduct and punishable persons, and by imposing sanctions that are unreasonably harsher than before. Meanwhile, it hails the reigning in of the *errant* as the single-most effective political solution (Garland 2001). Criminal populism can easily become a weapon in the hands of the incumbent political elite, since penal policy is one tool and technique for exercising power. It may also be the case that the ignorant public, with the active participation of the media, puts pressure on the judiciary, claiming and at the same time demonstrating an increased need for a more stringent treatment of offenders (Lee 1999; Pratt, Miao 2019). Incumbent populist governments then refer to direct democracy in order to maximise votes. Pretending to respond to emotions whipped up by the media, they say, 'Let there be order!', whilst putting aside the traditional values of penal policy and the rule of law. One of the main features of criminal populism is that it ignores professional expertise citing emotions and public pressure. 'Its true objective is to maximise votes, and not to find professional, meaningful solutions' (Gönczöl 2013). This is where it differs from a criminal policy that works for protection with a long-term perspective, is responsive to the reactions of an informed public, and operates on the basis of professional expertise. Along with the burgeoning of illiberal criminal populism, new penal paradigms are emerging.

A central concept of these paradigms is *control science*, which suggests that the socioeconomic damage caused by crime can be effectively managed and that crime risk may be controlled; it rests on the premise of public welfare combined with an investment in self-provision. Control science privatises the management of security deficit and crime risk. It tries to find a predictable solution to these issues, like insurance companies offering coverage for weather damage through insurance. As pointed out by Andrea Borbíró, alongside the police, it is the security industry and insurance industry players who are populating this new market. One side effect of the ever more dominant control science is that certain forms of control and the implementation of sanctions erstwhile considered to be state monopolies may be transferred to the competence of private security market participants. 'Meanwhile, together with the expansion of the expectation of selfprovision, the threat of vigilantism grows' (Borbíró 2014). It indicates a weakness of the authority of the central state, in contrast to the growing

authority of the populist leader, Viktor Orbán, who responds to ‘the will of the people’ rather than central state bureaucracies.

2. Democracy deficit following the regime change of 1989

In the period following the fundamental change of political regime, Hungarian social scientists Ferenc Pataki (2010), János Kornai (2010), and György Csepeli (2010) recognised the threat of populism gaining ground. Post-socialist countries saw the rapid emergence of a market economy, followed by mass mobility and the structural transformation of society. For a significant portion of society this transformation was not the sweet, lasting experience of the onset of freedom, but rather a disruptive, unsolicited gift. It is no coincidence that in Central Europe, public opinion attaches more importance to order than in traditional capitalist countries.

> A quarter of a century after the regime change, the majority of citizens still do not live or think in terms of fundamental democratic values. They conform to the pressures of globalisation and the expectations of a market society as subjects rather than self-conscious citizens. (Kornai 2010)

In transition countries like Hungary, security ‘granted from above’ is apparently received with nostalgia. Until 2010, this democracy deficit in Hungary had not yielded a predominance of criminal populism. Like other post-socialist countries, successive governments adjusted their penal policy reforms to the Western European model and EU expectations (Lévay 2006, 2009; Gönczöl 2010).

3. Populist criminal policy in Hungary: Juveniles and children

However, in 2010, the Hungarian government acquired a two-thirds majority in Parliament and, citing direct democracy and public pressure, brandished the slogan ‘Let there be order!’, effectively pushing criminal policy to the top of the political agenda. Since that point in time, growing social and societal tensions – in particular, conflicts arising from social exclusion – were managed through the power/political tools of criminal populism. Today, the delicate balance between support and control has been upset: the government’s strategy and policy are dominated by the

instruments of disciplining. Perhaps it is no coincidence that the policy of 'Order at last!' has hit disadvantaged children and juveniles the hardest. In what follows, I elaborate on the situation of this age group, referring to the examples mentioned above.

Following the political shift of 2010, the Act on Misdemeanours was amended. This made it possible to 'detain juvenile offenders aged 14–18 for up to 60 days in case of a failure to pay a fine' (Ombudsman's Report 2012). Contrary to the Ombudsman's petition requesting an ex post review of this amendment, the Constitutional Court did not consider the introduction of a custodial sentence for offending juveniles to be a violation of international obligations (Constitutional Court's Decision 2013). The Court took into consideration two UN General Assembly resolutions on children's rights in criminal justice, adopted in 1983 and 1985, when assessing the compatibility of the contested legislation with international legal norms (UN GA Resolution 1983, 1985). These resolutions stated that detention may only be applied as a last resort and only to the extent strictly necessary. Laws must also specify the minimum age below which such a sanction cannot be applied. Moreover, any custodial sentence may only be imposed after careful judicial consideration. The resolution emphasised the need to apply the broadest possible range of alternative sanctions. In the course of the execution of a custodial sentence, human rights must be observed, the development of a healthy personality and a sense of responsibility should be promoted, and an effort should be made to facilitate the integration of the juvenile offender into society. In the Constitutional Court's view, taking into account these provisions governing the detention of juvenile offenders, the contested norm did not violate the provisions of international conventions. Therefore, the Constitutional Court found that the new Act on Misdemeanours did not violate the obligations enshrined in the international treaty cited by the petitioner, and therefore it rejected the petition (Constitutional Court's Decision 2013). The Constitutional Court essentially followed the position of the Ministry for the Interior, which claimed that 70 per cent of property offences are committed by juveniles, and that courts have either failed to impose fines or these have proven to be irrecoverable. Thus, in the Court's view, it is prison that effectively solves the problem. However, as Justice Miklós Lévay explained in his dissenting opinion, 'the Constitutional Court should have found an unconstitutionality caused by the omission. The Parliament failed to fulfil its legislative obligation under the international treaty by failing to provide for the possibility of imposing alternative sanctions on juveniles instead of detention, which would allow juvenile offenders to pursue educational goals, abide by the law, and facilitate their reintegration' (Lévay 2013). Furthermore, the Constitutional Court failed to consider the findings of Hungarian research cited by the Ombudsman, although the expert opinion

prepared by the National Institute of Criminology and the example presented in it clearly illustrate that a custodial sentence not only violates the rule of law, but is also an expensive and senseless legal institution. The Ombudsman described the situation with the following example:

> In 2011, a 17-year-old juvenile was admitted to Tököl Penitentiary. He had stolen two bottles of cognac from a store, committing a crime against property. The damage caused amounted to 1,447 forints, which was immediately returned, since the young man was caught red-handed. He was detained for 20 days. Since he had committed the crime on a Friday, the young man spent the weekend in lockup, and then on Monday he was transferred to Tököl. Admission was speedy, but he could not be integrated into the penitentiary’s school. Following the finalisation of the admission procedure, the procedure for the young man’s release had to be started almost immediately, at which point it turned out that the juvenile had no money to travel home. If we were to add up how much money the state spent on this case, we would have to calculate the following amounts: daily board (20×8,000 forints), transportation of approx. 300 km (20,000 forints), and return travel costs (8,720 forints) – coming to a total of 188,720 forints. This adverse balance is further aggravated by the fact that during his 20day confinement, the young man presumably learned some things that he should not have. Based on the rules in force that year, he was still required to attend school but did not, and we can only hope that the county clerk accepted the penitentiary’s proof of absence. According to the available data, between 15 April and 31 December 2012, 24 juveniles served their sentences in a juvenile detention facility or, temporarily, in ‘good company,’ in police lockup over the weekend. (Ombudsman’s Report 2012)

A custodial sentence may only be imposed by a court. Juvenile offenders are still routinely fined, followed by warnings; community service is also applied broadly, while the incidence of detention is negligible. In 2019, detention was applied in less than 100 of the approximately 24,000 cases in Budapest (Elzárás 2020).

By 2011, the year of ‘child-friendly justice’ in Hungary, the criminal justice system addressed to juvenile offenders, which had operated on the basis of a criminal policy applied consistently since 1908, was abolished, including the juvenile court and the juvenile prosecutor’s office. What remains are the correctional facilities, juvenile detention facilities, and a semblance of the juvenile probation officers’ system. This deterioration took place despite the fact that the Council of Europe’s recommendation on child-friendly justice had set new requirements for member states (Council of Europe 1998). These requirements foresaw the establishment of a special

judicial, procedural, and institutional system for minors coming into conflict with the law. The regulatory concept whose principles had been laid down between 2004 and 2006 by the then Ministry of Justice and Law Enforcement would have fully complied with these requirements. This concept was not carried further, falling victim to political indifference (Ligeti 2006). A special court for juveniles has still not been established. While certain provisions of the current Act on Criminal Procedure pay more attention to the specific needs of juveniles than the previous law, experts nevertheless claim that 'compliance with the law does not suffice for achieving a child-friendly justice system without specific, complex training for juvenile investigators, prosecutors, and judges and where their criminal proceedings can drag out for years' (Nagy 2018).

The new Criminal Code of 2012 reduced the age of criminal responsibility in respect of offenders in certain violent crimes to 12 years.[21] When the draft Criminal Code was made public, the Hungarian UNICEF Committee protested against lowering the age of criminal responsibility. According to the Committee, Hungary had seriously violated the UN Convention on the Rights of the Child, introducing rules that fly in the face of UN standards on juvenile criminal justice, and are clearly and demonstrably ineffective. In the Committee's view, the Hungarian justice and penitentiary system or the training of experts are not prepared to provide adequate care to minors who have committed a crime. The biological, physical, mental development of a 12-year-old child is still in progress; their ability to make choices autonomously, overcome their instincts and emotions, delay satisfaction, and consider the consequences of their actions is imperfect. It is an undisputed medical fact that the human brain reaches its full development around the age of twenty. As such, a child's behaviour merely reflects deeper symptoms, for childhood crime is more often than not rooted in family problems, abuse, and experience of violence (Az UNICEF 2020). Children are very often victims themselves, a situation to which the criminal justice system cannot adequately respond.

In countries where the age of criminal responsibility is lower than 14 years, legal consequences are geared towards protection of the child and family and the focus is not on punishment, but instead on rehabilitation or reintegration and assistance. The Ministry of Justice took the opposite stance. According to the Ministry, the age of criminal responsibility

[21] 'A person shall not be liable to punishment if he has not attained the age of fourteen years when committing a punishable act, except for homicide, homicide in the heat of passion, causing bodily harm, a terrorist act, robbery, or robbery of a vulnerable person, provided that the offender has attained the age of twelve years when committing the criminal offence, and he possessed the faculties required to recognise the consequences of the criminal offence at the time of commission' (Section 16 of Act No. C of 2012 on the Criminal Code).

enshrined in the new Criminal Code is fully in line with the Convention on the Rights of the Child. Namely, the Convention does not lay down a specific age of criminal responsibility, but merely requires States Parties to set a minimum age below which the presumption that a child had committed a criminal offence cannot be applied. The Ministry emphasised that *the general rule regarding the minimum age of criminal responsibility had not changed: it remained 14 years*. It is in the case of exceptionally serious crimes that the new regulation lowers the age of criminal responsibility to 12 years. According to the new Criminal Code, those who are not yet 14 years of age at the time they commit a criminal offense can only be subject to measures and cannot be incarcerated or receive other forms of punishment. This line of argumentation, however, does not change the fact that the recent legislation extends the disciplinary, punitive force of criminal law, which should only be applied as a last resort to children. This power/political tool is clearly a kind of compensation, carried out instead of building professional capacities in family and child protection. I agree with Mihály Tóth that this major paradigm shift is much more a form of window dressing to satisfy proponents of a strong state than a well-thought-out, professionally mature position and that, as such, it is a product of criminal populism. Tóth wrote that based on the similar or rather declining trend over the past years, it seems that the discretion necessary for ordering a penal measure will only be assessed in the case of about 60–70 children per annum, and since in the majority of cases the answer will be in the affirmative, this will affect about 40–70 children a year. It is highly doubtful that the amendment can be justified in the face of such a high figure (and that it is not merely a sham measure to satisfy proponents of the strong state). Especially if we take into account that to date, in serious cases, institutional placement (admission to care) of unpunishable children was available under the Act on the Protection of the Child. (Tóth 2012)

4. School guard

In 2013, after ten years, the Parliament repealed the National Strategy for Social Crime Prevention and the government replaced it with the National Crime Prevention Strategy (Parliamentary Decision 2003; Government Decision 2013; Parliamentary Decision 2013). With this, *parliamentary control over crime prevention was abolished*, replacing the concept of crime prevention as part of social policy with situational crime prevention, and in particular, police control. The launching of the so-called school police, in operation since 2013, was the first major indication of change. According to the concept and guidelines of the Minister for the Interior,

school police officers work together with the teachers in high-risk schools. Based on police reports, starting with 2014, 100 police officers in nearly 200 educational institutions 'enriched' the schools educational programme, ensuring compliance with the disciplinary rules for more than 100,000 students (Tanévnyitó 2014). However, this approach also failed to satisfactorily resolve school violence. Pro-government media regularly cover sensational stories about students insulting teachers, and fighting between pupils being very common in schools. Meanwhile, school psychologists trained in non-violent conflict resolution and social workers have almost completely disappeared from schools. There is also a grave shortage of special education teachers capable of dealing with problematic children.

In May 2020, the government presented a new 'proposal for a solution' and a draft bill. The bill, also containing an amendment to the constitution, was quickly passed by the Parliament (2020. évi LXXIV), with the aim of establishing a new school guard which pertains to the police and performs police tasks to maintain order in educational institutions. School guards are now employed by the police, with salaries exceeding those of the teachers. According to the law, family allowances will be withdrawn from the parents of violent children and the punishable age of offenders of school violence will be reduced to 12 years. With this, the scope of punishable persons was significantly expanded. School guards are to be deployed in problematic schools – an estimated 500 institutions – working as a new uniformed school guard and enjoying enhanced protection under criminal law, with the task of restraining violent students with physical force, batons, and handcuffs right until their colleagues in law enforcement arrive to take matters into their hands. This means that the pedagogical, psychological, special needs educator and social expertise which has had long-standing traditions in Hungary has been replaced by an openly populist approach, rooted in the omnipotence of control and a governing technique that responds to violence with force. The Hungarian model comes from the USA, from a country where the police assassination of George Floyd resulted in a national movement with a professional and political debate in 2020 about the abolition of the school police. 'In New York City last weekend, hundreds of teachers and students marched in a protest calling for the police to be removed from schools and replaced by a new crop of guidance counsellors and social workers' (Goldstein 2020).

5. Social exclusion of children and young people

As of 1 September 2012, primary school pupils will only be required to attend school until they reach the age of 16 instead of the previous 18 (2011. évi CXC: Art. 45, Para. 1). Since 2010, unemployment among unskilled, under-educated youth has presented a growing societal concern. Hungary

is in the bottom third of EU and/or OECD countries in terms of the changing proportion of 'NEET' youths aged 14–24, taking 33rd place out of 41. The ratio of young people aged 15–24 who do not take part in education, employment, or training has increased between 2008 and 2013 by 4.4 percentage points, amounting to 15.4 per cent (Boros at al. 2014). This phenomenon plays an outstanding role in the process of crime reproduction.

Ever the pragmatic nation, recognising the detrimental consequences of globalisation, the British raised the compulsory school-leaving age to 18 in 2015.[22] British legislature justified the amendment with reference to, among other things, the fact that the longer young people were kept in school, the less likely social order would be disrupted, risking public safety (Boros et al. 2014: 14). According to this reasoning, even the worst school is a better place for a young person than a public space lacking control of any kind. An unskilled, out-of-work young person, on the fringes of society, poses a veritable social and public security risk. With basic education, the motivation to lead a law-abiding lifestyle is stronger anyway, and labour market opportunities also look more favourable. The Hungarian government – consistently shunning professional expertise – does not seem able to, or willing to recognise this very simple equation. With the active support of some teachers, Hungarian primary schools were adamant to rid themselves of problematic students who usually come from a segregated environment. These were students incapable of or struggling to adapt to school order and discipline, mainly due to the growing deficiencies of the public education infrastructure, and as such were an obstacle to the progress of other students. Until now, the bulk of these problematic students were placed into home tuition. And now, instead of developing a school model based on integration and conflict resolution, these schools can get rid of such students with the help of the law. This was made possible under the most conservative school programme ever, developed in 2011, providing for the re-nationalisation of schools (2011. évi CXC).

In parallel with the institutional disciplining of Hungarian children and young people, child poverty has grown to an extent unseen in the modern age. Compared to other age groups affected by social exclusion, children are most at risk of poverty in Hungary. Following the turn of the millennium, almost 40 per cent of Hungarian children lived under such conditions (this figure is 31 per cent in the entire population, 31.7 per cent for those aged 18–64, and 18 per cent for those over 65 years of age (A

[22] In England and Wales, school attendance has been compulsory between the ages of 5 and 16 ever since 1973. Scotland also adopted this standard in 1980. In Northern Ireland, compulsory education spans 12 years, from 4 to 16 years of age. It is after many decades that England has changed the school-leaving age, raising the upper limit in 2013 to the age of 17, and in 2015 to the age of 18. See Mártonfi (2015).

gazdasági 2011). According to a UNICEF survey conducted in 2014, when it comes to child poverty Hungary ranks 29th out of 41 developed countries. According to the report, the child poverty rate rose by 3 percentage points to 22.6 per cent between the years 2008 and 2012.[23] As a matter of fact, since the year 2008, two thirds of European countries have seen an increase in severe financial hardship. In absolute terms, Hungary is one of the three countries with the fastest and highest poverty growth in the four years examined in the report (A gazdasági 2011: 21). International analysts examined the government's efforts to combat this adverse phenomenon. The Hungarian government was condemned in this instance as well. According to the analysis, Hungarian public policy merely pays lip service to the problem of child poverty and exclusion; meanwhile, the real value of the majority of social benefits has decreased, and the conditions for access have become more stringent (A gazdasági 2011: 45). As a result, by 2017 child poverty in Hungary increased by a further 3 percentage points and the proportion of families struggling to make a living was 18.5 per cent, which is double the EU average (Csengel 2019). Cutting benefits to deprived children and families, restricting the conditions for access to these benefits, and finally, proliferating rules and controls have caused immeasurable damage to the majority of the population, amounting to a populist technique that can only be corrected in the very long term, with extremely serious professional work. With the 'right' communication, by whipping up emotions and adopting certain pieces of legislation, it is relatively easy to establish controls that result in total social exclusion, but serious efforts over multiple lifetimes will be needed to mitigate the grave damage that is caused.

6. Criminalised homelessness

By expanding the scope of punishable acts and persons, using power political techniques under the slogan 'Let there be order!', Hungarian criminal populism temporarily won the confidence of the majority of voters. In this vein, the Parliament *criminalised homelessness* (2012. évi II. törvény). As of 15 October 2013, being in a public space is punishable by a fine and, ultimately, by confinement. By the end of the year, 20 people had been locked up for failure to pay the fines. After the law came into force, the Constitutional Court declared the rules on the criminalisation of homelessness to be unconstitutional and annulled them (Constitutional Court's Decision 2012). However, bringing forth a new legislation

[23]This amounts to an increase of around 33,000 people.

proposal, resulting in the amendment to the constitution, the government with its two-thirds majority in Parliament achieved the nationwide criminalisation of homelessness taking effect 15 October 2018.[24] Upon the motion of three judges presiding in such cases, the Constitutional Court was yet again asked to rule on the criminalisation of homelessness.[25] This time, however, the Court no longer considered the rule to be unconstitutional. Two former constitutional judges and three civil society organisations expressed an opposing view in an *amicus curiae* (Kiss, Lévay 2020).

It is clear from the text of the decisions "that the Court does not consider homelessness to be a situation of severe crisis, but rather as a breach of the obligation to cooperate with law enforcement." It does not consider the sanction of confinement to be disproportionate either, arguing that it is merely a last resort, notwithstanding the case, that depending on the specific situation, this sanction may be imposed already after three warnings – even within the span of 10 minutes (Embertelen n.d.). I share the view of the NGOs also on the point that homelessness is a severe crisis that needs to be addressed, but not by the means of criminal law, but through social measures.

> Criminal sanctions do not solve the problem, instead, people being in public spaces are pushed out of the city and out of the sight of the social care system. This increases their social exclusion and vulnerability. Homelessness is not a sin but much rather a condition, the intent to commit cannot be discerned. Homeless people cannot be forced into the care system, whose institutions are often of low quality and lack sufficient accommodation. The new provisions of the Act on misdemeanours are in violation of fundamental rights. (Embertelen n.d.)

According to the data provided by the Ministry of the Interior, a total of 16 proceedings were initiated in 2018 on grounds of residing in a public place. Between October 2018 and the end of the year, the police issued

[24] Article XXII, Para. 3 of the Fundamental Law. Available online: https://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf [06.08.2020]. 'Following this amendment to the Fundamental Law, homelessness will be banned throughout the country. At the same time, the Fundamental Law does not oblige the state or the local government to provide decent housing, or even to provide accommodation'. Available online: https://tasz.hu/cikkek/hetedik-elemzesunk-az-alaptorveny-legujabbmodositasarol [23.06.2020].

[25] Decision No. 19/2019. [VI. 18.] AB of the Constitutional Court on dismissing the judicial petition for the establishment of the unconstitutionality and annulment of Section 178/B of Act No. II of 2012 on misdemeanours, the misdemeanour procedure and the misdemeanour register system, and the establishment of a constitutional requirement regarding the application of the same.

almost 300 on-site warnings, but only five cases were brought to justice (Tessza 2019). Based on these data, as well as my personal experiences of encountering crowds of homeless people on the main city streets, it is clear that law enforcement bodies, i.e. the police and the courts, are making less and less of an effort to put into practice the exclusionary, populist provisions of the existing legislation.

7. Flourishing criminal populism in Hungary

In view of the above, perhaps it is no exaggeration to say that the Criminal Code codified under the current government is also a product of criminal populism. I agree with *Mihály Tóth*'s comprehensive assessment, who claims that the new penal policy, premised on stringency, actually restricts the leeway available to law enforcement bodies.

> When enacting mandatory provisions into law, the legislature often focusses on those circumstances inherent in the personality of the offender that allow for, or even foresee, a stricter liability. This is evidenced by the statutory lowering of the minimum age of criminal responsibility, a further aggravation of the consequences of recidivism, and the expansion of the scope of legal consequences associated with longer imprisonment or life imprisonment without the real possibility of parole. Contrary to European trends, the issue at stake here is no longer the possible substitution of the deprivation of liberty, but its extent. In this vein, hardened, professional criminals can be put behind bars for life, while first-time offenders are held for only a few days or weeks. The former will be committed to actual life imprisonment without the real possibility of parole, while the latter for a few days or weeks of confinement. In any case, the point is to put them away. (Tóth 2012)

A predictable outcome of this criminal policy paradigm was that the *prison population* in Hungary has increased significantly, which is today one of the highest in Europe (Nagy 2013). While the prison population per 100,000 inhabitants in Hungary was 180 in 2016, 179 in 2017, and 172 in 2018, to my knowledge it is now approaching 200 in the north-eastern region of the country. In 2018, 57 convicts were serving actual life sentences without any chance of parole (Rutkai, Sánta 2019).

Governments must tackle exclusion and the ensuing conflicts threatening the fundamental values of democracy with a long-term strategy that is grounded in European values, complies with the rule of law, and builds on available expertise. If they choose populist solutions, primarily ones centred on law enforcement and criminal control, in their aspiration to consolidate or maintain power, they must be aware that they themselves are

contributing to the exacerbation of the crisis, jeopardising the functioning of basic democratic institutions and even democracy itself.[26]

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[26] This idea is reflected in a 1998 recommendation of the Council of Europe, according to which ‘social exclusion not only offends human dignity and denies people their fundamental human rights, it also leads, in conjunction with social and economic instability and worsening inequality, to the phenomena of marginalisation, withdrawal, or violent reactions, thereby creating conditions which undermine the democratic foundations of our societies’ (Council of Europe 1998). Available online: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTMLen.asp?fileid=16581&lang=en [15.03.2014].

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Populist and vindictive constructions of sexual offending against children, pluralities of violence, and the implications for criminal and social justice

Populistyczne oraz mściwe konstrukcje przestępstwa seksualnego, większość względna przemocy i implikacje dla sprawiedliwości karnej i społecznej

Abstract: Drawing upon the "sociology of vindictiveness" (Young 2003; 2007) and Sumner's (1990; 1994) work on censure the authors examine the construal, responses and treatment of individuals who have committed a sexual offence against a child/children (ICSOAC). We seek to understand the dynamics and social processes of the exclusion of others and the way negative, sectional and bureaucratised discourses, policies and practices can "other" marginalised groups, for political expediency. We argue that to fully understand these responses we need to better understand the wider social dynamics and constructions which inform and shape societal perceptions in pursuit of an essentialised "good enemy". In line with this, we go on to outline the interaction between vindictiveness and populism in the administration of justice and situate the challenges this poses for both punishment and the rehabilitation and reintegration of individuals convicted of sexual crime.

Keywords: censure, populism, sexual offending, social justice, structural violence, symbolic violence, vindictiveness, individuals convicted of a sexual offence

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Abstrakt: Opierając się na „socjologii mściwości" (Young 2003; 2007) oraz pracy nad cenzurą Sumnera (1990; 1994), autorzy badają zagadnienie traktowania osób, które popełniły przestępstwa seksualne przeciwko dziecku/dzieciom (ICSOAC) – interpretacje tych zachowań i reakcje na nie. Autorzy chcą zrozumieć dynamikę i procesy społecznego wykluczania innych osób oraz sposób, w jaki negatywne, zbiurokratyzowane zasady, praktyki i dyskursy dla politycznej korzyści mogą marginalizowane grupy uczynić „obcymi". Zdaniem autorów, by kompleksowo zrozumieć te zagadnienia należy lepiej poznać procesy społeczne, które kształtują społeczne postrzeganie „dogodnego wroga". Autorzy badają relację między mściwością a populizmem w wymiarze sprawiedliwości oraz wskazują na wyzwania związane z karaniem, resocjalizacją i reintegracją osób skazanych za przestępstwo seksualne.

Słowa kluczowe: cenzura, populizm, przestępstwa seksualne, sprawiedliwość społeczna, strukturalna przemoc, symboliczna przemoc, mściwość, osoby skazane za przestępstwo seksualne

Introduction: Penal populism

Populism poses major challenges to prevailing neoliberal democratic political systems (Lacey, 2019). Criminological analysis has long pointed toward the role that populism and public support for harsh criminal justice policies plays within the increasingly punitive responses to deviant and criminalised behaviours (see for example Pratt 2007; Samet 2013; Côte-Lussier, Carmichael 2018; Garland 2021). The responses to deviance are of particular importance here when considering the censure applied to behaviours which challenge the entrenched views of the societal mainstream, particularly when it comes to sexual attraction and sexual offending.

Penal populism "refers to a broad set of criminal justice preferences [...] that favor 'tough' stances on crime and crime control issues" (Fenwick 2013: 217). Fenwick (2013) identifies three overlapping ways of thinking about penal populism: (i) as a programme of "tough" criminal justice responses; (ii) as a political project intended to garner popular electoral

support; and (iii) as a process in which new actors and groups influence justice policy and debate. He draws attention to the fact that these forms of penal populism are not just located in Western societies; but more widely around the world; something reinforced by Samet's (2013, 2019) analyses of penal populism in Venezuela and Ruiz's (2018) work in Colombia. Fenwick also notes that while populism in its multiple forms exists throughout the world the forms taken exist in specific cultural circumstances in each nation state and are not wholly universal.

Debates in Britain and the US around the role and origins of penal populism grew out of concerns surrounding rising crime rates in the 1970s to 1990s. There has been a subsequent decline in recorded and reported crime and yet penal populism still remains a dominant force. Other forces are then in play and the pervasive influence of mass opinion upon penalty means that penal populism is not something that politicians can ignore (Sparks 2003). Pratt (2007: 9) argues that "populism in various guises is the moods, sentiments and voices of a significant and distinct segment of the public" who feel as though they, and people like them, have been ignored and alienated with "the victim" taking on a particularly symbolic role. Jennings et al. (2017) meanwhile note that there is increasingly an air of inevitability in discussions around penal populism, whereby political elites seek to satisfy perceived demands for increased punitivity. In response, Garland (2021) notes that there has been a fundamental shift in the dynamic when it comes to addressing criminal justice with the common sense and experience of the public now trumping knowledge and evidence developed through criminological research.

While other forms of populism are normally built around the mobilization of social forces, penal populism can be seen in concerns with safety security of citizens and the state, as a "form of disenchantment with the efficacy of government" (Lacey 2019: 90). Penal populists invoke "the people" to drive through repressive and punitive penal reform whereby penal populism becomes a "characteristic of societies in which public opinion matters and especially of democratic societies with a commercialized and competitive mass media" (Garland 2021: 260). Garland argues that there is very rarely an evidence base applied to populist measures and that it is frequently forms a way of garnering immediate public support and political advantage in the arena of highly emotive debates around crime and justice. For Garland (2021) populist approaches seek to create and gain support for interventions intended to address a particular problem, presenting it in such a way as to appeal to a specific demographic. This necessitates the creation of "in" and out groups; a theme to which we return later. Accordingly, Samet (2019) argues that populism – particularly punitive populism – appeals because of the way that people experience the injuries caused by being wronged. For Samet (2019: 274)

"populism brings this dimension of the punitive turn more sharply into focus and allow us to understand how tough-on-crime policies grow out of particular historically contingent articulations of victimhood." He argues that the idea of people suffering is particularly powerful because of the way in which it shapes the political ground where communities develop and exclusionary "us" versus "them" narratives are founded. In the case of sexual offending – particularly against children – the idealised victimhood (Christie 1986) of a child can then act as a lightning rod, channelling public sentiment.

The rise of populist sentiments and the intensity of feeling surrounding the issues of injury and feeling "wronged" – either on a personal or societal basis – often coincides with growing insecurity, fragmentation and precarity (see Young 1999, 2007, Pratt 2020). This growing insecurity, fragmentation and precarity combines with individualised responsibility for risk management in neoliberal societies so that people have an unrealistic expectation of risk management. Thus any risk of (re)offending is largely seen as unacceptable and something to be avoided altogether (Garland 2021); Persons with criminal convictions are deemed to have limited rights, while politicians, aware of the potential for crime related scandals and sensationalised stories, adopt increasingly risk averse positions. Ruiz (2018: 37) found that symbolic and excessively punitive sanctions, "generate a feeling of tranquillity and illusion in the community", despite doing little to reduce crime and the associated insecurities it generates. Deviant "out" groups are thus created (Samet 2013) and stigmatizing moral censures are applied (Sumner 1990, 1994) while populist groups and advocates go on to demand that something is done about these out groups which are frequently portrayed as "the enemy" (Grover 2010). This is what Young (1999) framed as "the exclusive society".

Within this context we explore the role and impact that vindictive, populist discourses play in society and the challenges that they pose for criminal and social justice. We draw upon the censure theory of Sumner (1990; 1994) and Jock Young's (2003; 2007) "sociology of vindictiveness" to explore these challenges in relation to the construction and treatment of individuals convicted of a sexual offence (ICSO) against a child (ICSOAC). We then explore the ramifications of these constructions for ICSOAC. Our work here is intended as an initial foray into the field with a view to identifying important future conversations that need to be had, and research that needs to be done, to address our collective societal responses to ICSOAC in the face of the ongoing primacy of populist responses to crime and deviance. Equally, while our primary focus is upon the constructions and treatment of ICSOAC in the UK, there are wider ramifications given parallels in the populist and vindictive re

sponses to ICSO across the Western world, particularly in the US and Western Europe, and we begin to identify some of these similarities throughout.

Before embarking on our analysis it is important to define the behaviours and actions that we are focusing on, namely that of people who commit sexual offences against children; something most commonly (and often inaccurately) referred to as "paedophilia". There are two key sources for the definition of paedophilia: (i) the Diagnostic and Statistical Manual of Mental Disorders (DSM, currently on version 5), published by the American Psychiatric Association, and (ii) the International Classification of Diseases (ICD, currently on version 11), published by the World Health Organisation. The ICD diagnoses paedophilia as "sustained, focused, and intense pattern of sexual arousal—as manifested by persistent sexual thoughts, fantasies, urges, or behaviours—involving pre-pubertal children". For a paedophilic disorder to be diagnosed, the individual must have acted on these thoughts, fantasies or urges or be markedly distressed by them (WHO 2018, section 6D32).

A distinction is made in the DSM-5 between diagnosing a "paraphilia" and diagnosing a "paraphilic disorder". While "paraphilia" refers to the sexual interest itself, a "paraphilic disorder" is diagnosed where this interest causes distress or harm to oneself or others (American Psychiatric Association 2013; Pullman, Stephen, Seto 2015). The distinction between a "paraphilia" and "paraphilic disorder" is important. It provides a space for people with a sexual interest in children to be passive holders of said interest/or a passive (non-acting) holder of a sexual interest in children. While passive, this can nonetheless cause other persons distress, in line with the societal portrayal of someone with "paedophilic disorder" as being someone who acts on this interest and abuses children. Note, for this latter group, this is also likely in the majority of cases to cause the individual mental and emotional distress.

Vindictiveness and censure

To make sense of the processes which underpin these vindictive, and often contradictory, responses we turn to the work of Colin Sumner and Jock Young. Sumner (1990; 1994) has developed key ideas surrounding censure. Young (2003; 2007) meanwhile has explored crime in terms of the wider

contradictory structures in society through the lens of "the sociology of vindictiveness". Their combined works build on previous elaborations of the development and role of stigma (see Goffman 1990). For Sumner (1990: 16) social censures are expressed in discourse as ideological "moral judgements". The words we use to condemn are an attempt to exert a disciplinary effect as part of a project of "moral and political hygiene" (Sumner 1990: 17). Primarily censures are "negative notions within dominant ideological formations" (Sumner 1990) and are an essential component in helping to secure "the practical networks of domination" (Sumner 1990). Censures attempt to condemn certain social practices as being profoundly "deviant" and "pathological", marking out those who are censured for their unacceptable "difference". They are an attempt to, "signify, denounce and regulate, not to explain" (Sumner 1990: 27). Secondly, censures are sectional because they involve "partisan judgements" (Sumner 1990: 16). In attempting to prevent or regulate certain social practices and exert control, "They mark off the deviant, the pathological, the dangerous and the criminal from the normal and the good" (Sumner 1990: 27). They are inherently moral labels which, "signify worth and correctness against wrong and danger" (Sumner 1990: 27) and are bina

ry concepts dividing the social order into "good" and "bad", or "them" and "us". Thirdly censures, unlike labels, are bureaucratized because of the regularity of their appearance in discourse and recurrence as "organized slanders in what is essentially a political or moral conflict" (Sumner 1990: 17). They endure and persist over time, becoming routinized and institutionalized to the extent that they are, "recurrent in essence if not form" (Sumner 1990: 26). The specific social censures of ICSOAC are aimed at forming a hegemonic effect (Gramsci 1977; 1978) by attempting to secure consent in terms of, "justification for repressive action against the offender and for attempts to educate the recipient into the desired habits or way of life" (Sumner 1990: 27).

According to Chambliss (1974: 38), "those who control the economic and political resources of the society will inevitably see their interests and ideologies more often represented in the law than with others". In explaining why the sectional censures of the white, predominantly male bourgeoisie tend to become the dominant censures in late modern societies, Sumner (1990) intimated that it becomes inevitable that the interests of those with greater levels of power and access to the tools of popular communication are better reflected in the censures and public sense of morality displayed in societies with greater levels of social, economic and political division. The populist "get tough" approach towards ICSOAC has ramifications for the way in which they are spoken about in shared language amongst the public. For Farmer (2017: 57) it becomes important to situate

our understanding as to how the legal system works to both allocate blame for a breach of the law, and to provide meaning to specific forms of (criminalised) conduct. Sexual offences involve harmful social practices with real consequences. However, the way in which the popular censure of the "paedo", "kiddy fiddler", "pervert" or "nonce" is framed in popular discourses assumes that there are widely shared beliefs about what constitutes what is the normative age of consent for those in the transitory phase of youth. In reality no shared normative order exists. Farmer (2017: 50) suggests that when faced with a lack of a clear and shared moral order in neoliberal society, criminal law acts as a tool to censure blameworthy conduct that is perceived to threaten the social order, and to express moral disapproval as is reflected in the eyes of the dominant and powerful segments of society. Crime does not exist in isolation from wider society and nor do the censures applied to it (Young 2007). From this position, we can then begin to situate what Young (2003; 2007) has termed a "bulimic society".

In a bulimic society cultural inclusion is accompanied simultaneously by structural exclusion. Young draws upon the examples of socially excluded and marginalized groups including migrant populations and the chronically unemployed to explore the way in which we preach tolerance, and engagement with mainstream values while simultaneously excluding such groups and individuals from society. He underpins his arguments with the work of Sven Ranulf (1964) who argued that the vindictive responses that we see are formed as a result of "moral indignation" forged through envy and resentment. Ranulf located resentment within the context of restraint and self-discipline; we resent others because they do not show the same levels of restraint and self-discipline. However, this is complicated in the case of ICSOAC where there is a deep rooted and visceral anger directed at those who have committed offences against a particularly vulnerable group. This results in a process of essentialization, othering and censure. This resentment promotes further marginalization of, and violence towards, targeted groups by enabling us to "act temporarily outside of our human instincts because we are dealing with those who are acting inhumanely" (Young 2003: 400).

Even in the past 20 years where society has become increasingly aware of child sexual exploitation, ambivalent and contradictory responses to the societal construction of sexual desire and attraction remain evident. As Jewkes (2013) has argued, hypersexualised depictions of children and adolescents feature regularly within the mainstream media, alongside other arenas including fashion and art, with a particular focus upon the female body. For instance, in 1999 17-year-old Britney Spears' early performances depicted her as a schoolgirl in *Hit Me Baby One More Time.* Shortly after this, in the UK in 2002, 16-year-old Charlotte Church was awarded "Rear

of the Year" and we were encouraged in 2006 to follow 17-year-old Hayden Panattiere portraying a schoolgirl "Cheerleader" in the US television series Heroes. Later a reworking of St Trinians debuted in 2007 again depicting sexualised schoolgirls. More recently, Daenerys Targaeryan, one of the protagonists in the literary version of George RR Martin's Game of Thrones anthology is 13-years-old when she is introduced to the audience, and soon after is engaged in intercourse with Khal Drogo. This is glossed over in the sexualisation of the character in the HBO serialisation where the character was "aged up" to be 17 years-old. Most recently Netflix has attracted controversy after using sexualised images of children to advertise the 2020 film "Cuties" to UK and US audiences which centres around a young girl joining a dance squad. Such depictions are pervasive across the media and indicate a wider carnal obsession for young, particularly female, bodies.

Simultaneously, people who act on the desires promoted throughout mainstream societal and media discourses and commit sexual offences are subject to a "punitive and dehumanised monster narrative" (Harper 2018: 143). This reinforces the belief that ICSO are "a separate species, a breed apart" (Jewkes 2013: 124) with the worst excesses of societal vitriol reserved for those who engage in offending against minors (e.g. child sex offending and viewing or sharing images of sexually explicit images of children). Vindictiveness towards ICSOAC has been evident recently in media-based assertions over who is or is not a "deserving" or "undeserving" recipient of a COVID-19 vaccination in these times of pandemic. Cain (2021) for instance reported on the reception of British musician Paul Gadd's (better known as Gary Glitter) COVID-19 vaccination considering his previous convictions for sex offences. Gadd, is currently serving a 16-year sentence for attempted rape, indecent assault and sexual intercourse with a child. Appearing as a panellist on BBC Radio 5's *Jeremy Vine* show, presenter Nicola McLean reportedly remarked that, "I'd give him a lethal injection before I'd give him a Covid vaccine [...] I don't care if he dies of COVID. I think I would like to see him die a slow, painful death" (Cain 2021). Similarly vindictive sentiments have also been expressed in response to the release of Colin Pitchfork in the UK. In 1988, Pitchfork was found guilty of the rape and murder of two 15-year-old girls and was subsequently sentenced to life imprisonment, then in 2021 the parole board granted Pitchfork release on licence. In response to this news the sister of one of Colin Pitchfork's victims called for him to be castrated and have the word "nonce" tattooed on his forehead (Sales 2021).

We witness the simultaneous embracing of and revulsion towards attractions throughout society whereby the desirability and attractiveness of youth is celebrated on a cultural level, while those who act on such desires are structurally excluded through the application of censures and sanctions. One of the consequences of censure and vindictiveness is that it presents

risk and risk management as the only paradigm available by which 'the paedophile' can be managed. In response, Lianos and Douglas (2000) have argued that the social process of "dangerization" means that people with certain social identities are subject to strategies of exclusion and avoidance. Meanwhile, in certain Westernised societies the word "risk" has come to signify "danger" (Douglas 2003). In the context of ICSO and ICSOAC we can apply this to see how a rational assessment of probabilistic risk is ignored when the alarm bells of "danger" begin to ring, triggering this process of "dangerization" (Douglas 2003: 267) which leads people to continually assess the world around them in terms of the level of potential threat to themselves and their families. Developing this point further, Furedi (2015: 201) asserts that, "the paedophile" is presented as the face of evil in contemporary society. In the popular imagination "stranger danger" becomes an ongoing omnipresent background threat to the safety of children. This creates a culture of censoriousness whereby anyone suggesting anything other than a retributivist stance against ICSOAC is "demonized as an appeaser of the child predator" (Furedi 2015: 202).

The emotional intensity of responses to ICSOAC is thought by Garland (2008: 17) to be connected to, "unconscious guilt about negligent parenting and widespread ambivalence about the sexualisation of modern culture." Another explanation as to why ICSOAC are treated with particular vitriol has been suggested by John Pratt (2020: 152) who has argued that children have become imbued with "greater emotional value in the absence of […] other personal relationships" while children have simultaneously become scarcer. The growing precarity and breakdown in traditional bonds within neoliberal society between people and work, place, and each other has combined with growing fear and distrust of strangers. This means that any deemed to be a stranger or outsider within a community or society runs the is at risk of suspicion and becoming the target of ill thought through responses to the challenges a community faces. This can lead to considerable unease: something that populist groups and politicians are often adept at identifying with such breakdowns manifest themselves in a variety of ways including, for example, the "Brexit" vote in the UK. In this instance economic migrants and outside political actors were cast as convenient, politically expedient enemies with a view to uniting people around the Vote Leave cause (see Mahoney and Kearon 2018). In a similar vein sexual offending against children can then "be one of the few ways in which it is now possible to mobilise communities and bring temporary cohesion" (Pratt 2020: 154). In such a context the perceived failure of the state to provide security in the face of unrealistic societal expectations mean that these censures are increasingly applied and acted upon. However, there are further negative unintended consequences which are bound with notions of risk avoidance. For Furedi (2015: 209), the perpetual moral crusade has,

"helped to create a world where many adults regard intergenerational relations as an inconvenience from which they would rather be exempt". Anecdotally, this may prevent people from volunteering in young persons' sports and social clubs for fear of being perceived as being a "closet paedophile".

Language as symbolic violence

The language which we use can amount to symbolic violence whereby "social interaction, language and symbols itself reproduces structures of domination and hierarchy" (Morgan, Björkert 2006: 445). Morgan and Björkert (2006) argue that symbolic violence is characterised by processes and mechanisms through which symbolic interactions, behaviour and modes of conducts sustain and nurture structured inequalities in our everyday lives and interpersonal attitudes (Bourdieu 1992; 2002). This is evident in responses to ICSOAC, which amount to stigmatisation, censure and condemnation. It is important to consider the language people use to denote already stigmatised individuals; negative labelling (of groups) has a strong, negative effect on people's emotional reactions to an individual belonging, or perceived as belonging, to that group (Angermeyer, Matschinger 2003). This feeds a vicious circle of fear, hatred and anger and constructs a barrier to understanding and empathy. Derogatory labels and continual societal condemnation and censures mean that that a ICSOAC is subject to ongoing experiences of symbolic and structural violence which carry significant ramifications and reinforce the marginalisation and exclusion of anyone targeted.

To this end while we are all too aware of the wider language and stigmatizing discourses applied to ICSOAC the authors of this paper have consciously sought to ensure that the language used embodies principles of social justice, thus working towards the elimination of systems of oppression, inequality, or exploitation (Vera, Speight 2003). In practical terms, one of the ways in which this occurs is through critiquing the censure and vindictiveness behind commonly accepted terms, and through the *considered* use of language. As such, with the exception of the examples used to outline some of the stigmatizing portrayals of ICSOAC in wider society, language/labels such as "sex offender" have been purposefully avoided here, in favour of person-first language. This was on the considered premise that there could be a "ripple effect" (Jacobs, Sevier, Teo 1998) in terms of language choice of the researchers being mirrored by those who come into contact with this work.

Moving beyond the confines of this article, the desirability for promoting destigmatising language, and moving away from homogenous clustering of ICSOAC, is well founded in the literature. Arguably, any kind of mass labelling of a deemed "collective", means that *individuals* struggle

in overcoming their prescribed "master status" (Becker 1963), namely the most dominant status which overrides all other statuses. Willis (2018: 738) states that "whether intentional or not, labelling persons who have sexually offended by what they have done communicates the expectation they will do so again". This can undermine the agency of the individual and is an affront to the strengths-based nature of current treatment programmes – Kaizen and Horizon – which work on the principle of clients being "intent to change" (Carter, Mann 2016; Ramsay, Carter, Walton 2020). In this way, programme deve lopers recognise that people often want to be the best versions of themselves but need the skills to live a safe and healthy life (Walton et al. 2017).

As noted earlier the populist nature of debates around crime, deviance and victimisation mean that, whilst there has been a steady movement since the 1970s to move away from stigmatising or labelling language, particularly in relation to disabilities and health conditions, "the use of person-first language has been slower to come in the world of criminal justice but has gained increasing traction" (Cox 2020: 3). The term "offender", in some more progressive contexts has been replaced with offerings of more neutral descriptors such as "formerly incarcerated person" (Law, Roth 2015). These linguistic shifts are long overdue, and the impact of such changes are readily apparent. Recognising an individual for who they are – a person first and foremost – and then the social identities *they* identify with after, aligns with the literature on the relational context of desistance (Weaver 2012; Weaver, McNeill 2015). Recognition of being a "normal guy", a "good provider", and the "provider man" (Weaver 2012), has founded utility whereas usage of terms such as "sex offender" undo efforts to work towards change. For some, however, the political, social and psychological impacts of using the label "sex offender" are less well known and thus not necessarily a consideration in everyday vernacular, however, it often is used to scald and stigmatise. This, combined with the political expedience of maintaining such distinctions in a populist landscape, is to a small extent why the use of the "sex offender" label and associated censures remains widespread, and further reinforces the negative mainstream public perception people with sexual convictions have (Lowe, Willis 2020). Individuals who know and work with ICSOAC have a moral duty of care to use and promote language which sees the person first and simultaneously counter toxic dominant and overly risk-centric discourses surrounding sexual crime. Such discourses often centre around "blame" and the related oppositional notions of "innocence"/"good" and "guilt"/"evil" which inform "populist notions of the victim/offender divide by reinforcing the sanctity of childhood and the profanity of the offender" (McAlinden 2014: 189).

Until recently the use of terms such as "individual convicted of a sexual offence" were used among small circles of academics and practitioners who work closely with individuals who have committed an offence. However, this terminology is slowly becoming mandated, for example, the editorial board of the journal *Sexual Abuse* has called for person-centred language in the description of people engaged in sexual harm (Willis, Letourneau 2018). Indeed, there is now the following statement on the journal's website:

> Authors are encouraged to be thoughtful about the connotations of language used in their manuscripts to describe persons or groups. Person-first language […] is generally preferred because it is often more accurate and less pejorative than terms like 'sex offender'. Terms like 'sex offender' imply an ongoing tendency to commit sex offenses, which is inaccurate for many persons who have been convicted for sex offenses given current sexual recidivism base rates. Similarly, the term suggests a homogeneous group defined and stigmatized on the basis of criminal behaviors that may have taken place infrequently or many years in the past.

This is an important step in signalling to society and the wider academic and practitioner community the importance of language and labels. However, as we have seen, one of the greatest barriers to a parity in language between those who are convicted of sexual crime and those of non-sexual crime is a disparity in reporting in mainstream media outlets, that serve to perpetuate the dehumanising narrative that "sex offenders" are not human beings (Blagden et al. 2017). This narrative (and their own actions in committing a sexual offence) create high levels of shame and stigma in individuals (Blagden et al. 2011), creating a barrier to reintegration post-release from prison (Malinen, Willis, Johnston 2014).

The presence of barriers to reintegration is particularly problematic, especially in considering that the established narrative is that for re-entry to be successful, a sustained, positive change – or what Stone (2016: 957) refers to as "identity reconstruction" – is required. This is a narrative perpetuated in prison with the onus being placed upon problematising aspects of identity (linked to their offending behaviour) being "in need of repair". This problematisation of identity, even for intended rehabilitative purposes can be counter-intuitive, especially considering the treatment of such individuals even after having gone through the formalised processes deemed necessary to reduce their risk of recidivism in the future. Moreover, even where it is possible to overcome these barriers, symbolic violence only presents one hurdle, with structural violence providing additional significant challenges to be overcome.

Structural violence

Structural violence describes social structures – economic, political, legal, religious and cultural – that stop individuals and collectives (groups and societies) from reaching their potential (Galtung 1969). For Galtung (1993), violence is the avoidable impairment of fundamental human needs, which lowers the degree to which an individual can meet their needs. Structural violence is often embedded in longstanding ubiquitous social structures and normalised via stable institutions and regularity of experience (Gilligan 1997) so that as they appear banal and "ordinary" in our ways of understanding the world. Disparate access to resources, political power, education, health care, and legal standing are just a few examples. The idea of structural violence is closely linked to social injustice and the social machinery of oppression (Farmer 2004). For men with sexual convictions, structural barriers to re-entry include a lack of access to appropriate housing and barriers to employment which can be understood as forms of structural violence. Winters et al. (2017) report that participants self-reported gaining social support, finding hobbies and practicing religion to be important to remain crime-free in the community. However, legislative barriers such as punitive licence conditions are often obstacles men with sexual convictions face in the community (Bennett 2008; Mann et al. 2019), and thus an affront to the desistance process. Indeed, in the USA, Megan's Law which was introduced in 1996 requires every US state to develop processes to inform communities when a ICSO is to be released from prison (Pratt 2007). As Pratt notes, upon signing the law into effect, then President Bill Clinton stated that parental rights to protect their child override all others the fact that most ICSO against a child are often known to, if not related to, the child (Jewkes 2013). Thus, populist positioning and the further embedding of public censure mean that a ICSO's is continually stigmatisation and censured in the community, preventing opportunities for anonymity or to start a new desistant life.

Meanwhile, in the UK, men convicted of sexual offences residing in the community are typically subject to licence conditions (which include no association restrictions) and registration to the Violent and Sex Offender Register (ViSOR) under the Sexual Offences Act 2003 (Notification Requirements) (England and Wales) Regulations 2012. These stipulations arise from the dominance of the community (or public) protection model (C/PPM) for responding to violent and sexual offenders in England and Wales and has strong associations with "risk penology" (Kemshall, Maguire 2001) and populist concerns around how to protect the community from unseen and hidden risks. Echoing Furedi's (2015) argument regarding the pervasive risk-oriented discourses surrounding ICSOAC, within the C/PPM, the containment and management of risk supersedes rehabilitation,

which has attracted criticism from prevention advocates. Laws (2000) criticises the C/PPM approach for excluding the public in responding to people who have committed a crime, providing an ineffective public education of sexual crime (and its drivers), focusing too heavily on incapacitation, and for doing little work on prevention and to reduce offending. Work in the field of *prevention* of sexual crime offers some "solutions", with work being conducted by the German Dunkelfeld Project (Beier 2019) and in the UK through the Lucy Faithfull Foundation (Bailey, Squire, Thornhill 2018) and by the Safer Living Foundation (Aurora Project) (Hocken 2018). "Prevention is better than a cure" (Allardyce 2019: 19) as a mantra for the field aligns itself with understandings of desistance (including, protective and risk factors for offending) (Göbbels, Ward, Willis 2012). Whilst prevention work can be controversial for some (Blagden and Winder 2019), it offers holistic support for those who need it and is a direct contrast to the punitive and vindictive approach offered by mainstream society.

The dominance of the C/PPM means that there are often limited employment prospects for individuals with convictions (Cherney, Fitzgerald 2016). This is exacerbated for men convicted of sexual crime, whereby there are "considerable barriers to gaining employment for sex offenders, and few opportunities", underpinned by a visceral disdain for offenders of sexual crime (Brown, Spencer, Deakin 2007: 41; Tovey, Winder, Blagden forthcoming), resulting in a resigned helplessness that finding work would be unachievable with a sexual conviction (Farmer McAlinden, Maruna 2015). The exclusion of men with sexual convictions from organisations such as Timpsons, who are renowned for having an "inclusive recruitment strategy" (Pandeli, O'Regan 2019: 1) serves to further stigmatise such excluded individuals. Further compounding this are work restrictions and punitive licence restrictions which are regarded as obstacles to desistance (Padfield, Maruna 2006; Bennett 2008). These can have "long term negative consequences" including a fostering of low self-esteem and feeling of worthlessness which could lead to future offending (Robbers 2009: 22). This is important as employment and meaningful relationships comprise of a "respectability package" (Giordano, Cernkovich, Rudolph 2002) and have a cumulative effect upon an individual's prospects for desistance (Johnson, Giordano 2020). Desistance theorists including Farrall (2002), Bottoms et al. (2004), and Maruna and Farrall (2004) have found that adopting pro-social roles, and exhibiting pro-social behaviour, can itself lead to a shift in an individual's identity. Work and relationships are then central to subsuming pro-social roles and desisting identities, and thus structural barriers to acquiring such are perverse upon any promotion of desistance.

Presently, neoliberalism's view of social inclusion is narrow and limited to the advancement of human capital through enhancing labour force skills to foster economic development, thereby enabling the economy to respond to global competition (Gidley et al. 2010). Put simply, "neoliberalism confines itself to a selective view on how the individual can achieve personal prosperity and fulfilment" (Mikelatou, Arvanitis 2018: 502). Such narrow conceptions of inclusion and inclusivity impede the most vulnerable in societies, particularly those falling outside the confines of protected characteristics as understood by The Equality Act 2010 (c.15). The possession of a criminal record is not a protected characteristic in the Act. As such, "the problem remains that 'moral censure' applies to criminal records whereas it does not for other characteristics such as age, disability, gender or sexual orientation which are protected characteristics" (Henley 2014). This is problematic in and of itself, given that "*full* access to employment, housing, financial services and greater civic participation are critical to a positive identity-shift" (Henley 2014, emphasis added). Civic participation in particular lends itself to the creation of both bonding and bridging social capital. "Bonding" social capital is good for "getting by". In comparison, "bridging social capital can generate broader identities and reciprocity, whereas bonding social capital bolsters our narrower selves" (Putnam 2000: 23). Fostering both forms of social capital for all through greater integration into communities, including individuals with convictions, not least promises profound health and wellbeing impacts (Putnam 2000).

The value of social connection is well accounted for in the strength-based rehabilitation framework the Good Lives Model for offender rehabilitation, forming two primary goods in the model – friendship and community (Ward, Stewart 2003; Ward, Marshall 2004; Ward, Gannon 2006). Conversely, social isolation is a known risk factor for sexual offending (Ward, Keenan, Hudson 2000; Marshall 2010). Therefore, criminal justice agencies, and society more broadly, should seek to strengthen an individual's pro-social resources and activities. However, echoing Douglas' (2003) dangerization thesis, licence conditions can often impinge upon the formation of relationships and signal that individuals with sexual convictions – regardless of risk level – are dangerous and risky (Digard 2014). For men with sexual convictions seeking to "knife off" (Maruna, Roy 2007) from previous criminogenic environments and companions, pro-social connection can emerge from employment (Brown, Spencer and Deakin 2007), and for example from a religious/ spiritual community (Winder, Blagden and Livesely 2018, Blagden, Winder and Livesly 2020). Presently, however, "there is a tension in the legislative and policy approach to ICSO with government legislation, such as sex offender registration and a range of preventative orders, appearing to have resulted

in higher levels of restriction placed on sex offenders" (Brown, Spencer, Deakin 2007: 32). This can lead to issues with finding "appropriate" housing for men with sexual convictions (Saunders 2020), and even when housed problems can arise if, for example, a neighbour has a baby which can jeopardise the tenure for the ex-prisoner if they have a "no contact with under 16s" licence condition. This issue can also arise and be problematic when attending places of worship (Dum et al. 2020). As such, licence conditions can be detrimental in preventing individuals forming communities of place and/or identity, and ultimately censure individuals with sexual convictions.

Conclusions and responses

Throughout this article we have sought to problematise and critique the construction of individuals convicted of a sexual offence against a child within contemporary, populist society. We have underpinned our critique with Colin Sumner's (1990; 1994) work on censure, and Jock Young's (2003; 2007) theorisation of the "sociology of vindictiveness" to draw attention to the derogatory, stigmatising portrayals of ICSOAC. Our intention has been to outline the contradictory bulimic responses toward sexual attraction to minors, and the wider ramifications of the censures applied. Developing our analysis, we have drawn attention to the symbolic and structural violence that ICSOAC are routinely subjected to and their banal, invisible and "ordinary" manifestations. Following this we have considered some tentative, socially "just" alternatives intended to foster a conversation around how we can better support the desistance narratives of those who have committed such offences.

The challenge for us going forward is to engage with society in a manner which retains the condemnation of acts committed by adults against children, but to create an environment whereby ICSO, and particularly ICSOAC, have the opportunity to seek help, reintegrate, and go on to make a positive contribution to society without the negative label of their offending becoming their master status. To assist in creating space for this, the next step is to try and work towards engendering a less censorious and vindictive culture and for criminal justice practitioners and academics to try and influence the media to use the more helpful and productive terms alluded to above. Following Garland (2021) this strategy can be part of a wider process of reinserting criminological expertise back into the conversation and engaging with the public. At first glance this may seem fanciful if not utopian – trying to influence a tabloid newspaper to avoid sensationalist headlines concerning ICSO is easier said than done;

sensationalism and soundbites sell. However, both criminal justice practitioners and academics appear on TV programmes to pass informed comment on issues relating to "sex offenders" and can "manage upwards" by choosing their words carefully when speaking to newspapers. Gradually, perhaps in intergenerational terms, words like "paedo" may become obsolete even in tabloid newspapers because the level of cultural norming has moved on in the same way as the word "coloured" is no longer considered appropriate when newspapers cover issues relating to persons from Black, Asian and Minority Ethnic communities. Language is a form of social practice which can be controlled and is an important starting point to change ideologies and the way in which we deal with ICSO in society.

Concerningly, anecdotal *evidence* suggests that there is a greater need for an exploration and understanding of the wider consequences of the condemnation and censure of ICSO, including those who may be reticent to working/volunteering with children and young people. Going forward, to overcome symbolic violence and structural barriers at macro, meso, micro levels we need to (i) encourage person focused language in education, employment and social/leisure settings; (ii) challenge populist terms/narratives perpetuated by politicians and the mainstream media, encouraging those in positions of power to engage with a more progressive and inclusive agenda; (iii) provide meaningful support to communities, and families/friends of ICSO; (iv) promote strengths-based, holistic responses to sexual offending, and the prevention of; and (v) advocate for policy changes which foster inclusivity, and mitigate against exclusionary practices. The first of these points has been picked up by one of the authors (see Winder et al. 2021) who has made some initial progress here in developing the use of appropriate person-focused language when working with people with convictions, together with more detailed exposition of harms of not using person-centred language. Looking to the future, there are difficult but important conversations to be had at an academic, practitioner and societal level; as Saunders (2020: 18) states, "the solutions to reduce sexual reoffending...rests, unpopular and unpalatable as this may seem, not solely with the individual...but with the institutions of the state, practitioners in the criminal justice system, employers, and the wider community".

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The compensatory appeal in the face of political populism

Skargi o odszkodowanie w obliczu populizmu politycznego

Abstract: The Romanian prison system faces several systemic problems such as overcrowding, inadequate conditions of detention, a shortage of staff, especially medical and holding unit guards, and the high frequency of deaths. In many cases, prisoners have complained about infringement of their rights to the European Court of Human Rights, which has repeatedly ordered the Romanian State to pay them compensation. Compensation was significant, and the amounts paid by the Romanian state in the period 2013–2017 total around 5 million euros. Given that the implementation of substantial reforms to help improve detention conditions kept being postponed, in 2017 the ECHR issued a pilot decision (*Rezmiveş et al. vs. Romania*) suspending prosecution of approximately 8,000 outstanding cases concerning detention conditions, calling on the state to take measures to reduce overcrowding and improve detention conditions. In this respect, a period of six months was granted, during which the Romanian government was to present a plan for the implementation of measures aimed at achieving these objectives. In the short term, the Ministry of Justice and the National Administration of Penitentiaries introduced a compensatory measure which consisted of reducing the total sentence by 6 days for each 30 days executed under improper conditions, the aim being to speed up the process of releasing of prisoners and, therefore, to reduce overcrowding. The law by which the compensatory measure was introduced became the subject of heated debates in Romanian society, with print and online media campaigns being triggered, where this measure was presented as one that "keeps offenders out of prison", often highlighting cases

of former prisoners who had benefited from the provisions of this law and then reoffended. Nevertheless, the non-existent post-detention support given to former prisoners by the Romanian State needs to be taken into consideration. The reaction of the political class was to repeal the normative act, without any alternative measures being implemented. The article aims to carry out an analysis of the realism of these measures, of the context

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that caused these measures to be taken, and of the debates that existed in society and among the political class, underlining the specific elements of penal populism. The impact of these measures on the prison system will also be analysed.

Keywords: prisons overcrowding, compensatory remedy, European Court of Human Rights, pilot decision

Abstrakt: Rumuński system więziennictwa boryka się z wieloma problemami takimi jak: przeludnienie, nieodpowiednie warunki detencji, brak personelu zwłaszcza medycznego oraz strażników więziennych, a także wysoka liczba zgonów. Więźniowie wielokrotnie skarżyli się na naruszanie ich praw do Europejskiego Trybunału Praw Człowieka, który często nakazywał Rumunii wypłatę im odszkodowania. Kwota wypłaconego odszkodowania była znaczna – w latach 2013–2017 wyniosła łącznie około 5 milionów euro. Biorąc pod uwagę, że wdrożenie istotnych reform mających poprawić warunki pobytu więźniów, było dotychczas przez państwo rumuńskie odkładane, w 2017 roku ETPCz wydał pilotażową decyzję (*Rezmiveş i in. przeciwko Rumunii*), zawieszając orzekanie w około 8000 niezakończonych sprawach przed nim zawisłych dotyczących warunków pobytu w izolacji. Rząd rumuński otrzymał sześć miesięcy na przedstawienie planu wdrożenia środków pozwalających na osiągnięcie tego celu. W krótkim czasie Ministerstwo Sprawiedliwości i Krajowa Administracja Więziennictwa wprowadziły środek kompensacyjny polegający na skróceniu łącznej kary o 6 dni za każde 30 dni wykonane w niewłaściwych warunkach, w celu przyspieszenia procesu zwalniania skazanych z izolacji więziennej, a tym samym zmniejszenia przeludnienia. Ustawa, na mocy której wprowadzono ten środek kompensacyjny, stała się przedmiotem gorących debat w społeczeństwie rumuńskim, a także kampanii prowadzonych w mediach (prasie i intrenecie), w których środek kompensacyjny był przedstawiany jako „utrzymujący przestępców z dala od więzienia", a przy tym często eksponowano przypadki byłych więźniów, którzy skorzystali z przepisów tej ustawy, a następnie ponownie popełnili przestępstwo. Niemniej jednak należy podkreślić, że zwalnianym więźniom państwo rumuńskie nie udziela żadnego wsparcia. W konsekwencji toczących się debat i prowadzonych kampanii, politycy uchylili przepisy dotyczące środka kompensacyjnego, nie proponując jednak w zamian żadnych środków alternatywnych. Artykuł ma na celu dokonanie analizy wprowadzonych środków, kontekstu, w jakim zostały one wprowadzone oraz debat, jakie toczyły się w społeczeństwie i wśród polityków, podkreślając specyficzne elementy populizmu penalnego. Przeanalizowany zostanie również wpływ wprowadzonych środków na system więziennictwa.

Słowa kluczowe: przeludnienie w więzieniach, środek kompensacyjny, Europejski Trybunał Praw
Człowieka, decyzja pilotażowa

Introduction

In June 2020, the COVID-19 pandemic was pushed into the background for a few days, with the Romanian media shifting their attention to Ion Turnagiu, who had set fire to a 17-year-old girl. We know relatively little about his life. Born in 1975, he was abandoned by his mother at the age of 11, and raised by his maternal grandparents. His childhood and adolescence are periods marked by vagrancy, theft to ensure subsistence, and gambling. In 1993, shortly after his 18th birthday, he managed to get hired by a family in order to help them with household chores.
Finding out that there was a large amount of money stored in a closet, he tried to steal it, but the theft was witnessed by a member of that family, a pregnant woman. Killing with an axe, he took the money and fled to Bucharest. Here he took shelter with an elderly family, whom he also killed, taking money and jewellery from their home. After a transient relationship with a ballerina, in whose company he will spend the stolen money, he attempted suicide. Leaving Bucharest, he took shelter in a train station and met a former childhood friend. Believing the latter had money on him, he got him drunk and stabbed him to death.

He was ultimately apprehended and sentenced to life for five crimes. Under the Criminal Code, a person sentenced to life imprisonment may be released on parole after the execution of 20 years of detention, if they are persistent in their work, disciplined and give good evidence of rectification, considering their criminal history (art. 551 para. 1 Criminal Code 1968).

He was released on parole on 10 May 2019, after a number of applications for conditional release were rejected, the court reasoned that during the execution of his sentence the convict had consistently participated in the educational programmes carried out in the penitentiary, had been involved in the pursuit of lucrative activities, and had been rewarded on numerous occasions. The application for conditional release had previously been rejected by the first instance court, with the explanation that although the execution of the sentence had begun on 27.11.1993, the convicted person had not been concerned with standing out consistently until 2014. Thus, the court considered that the rewards awarded up to this point do not prove a true rectification of the convict, but are a simulacrum for obtaining parole more quickly.

Ion Turnagiu's release went unnoticed in the press, though the Romanian press usually reports when people convicted of similar crimes are released. After his release, he settled in Drobeta Turnu Severin (a town in south-western Romania), where he would go on to commit his final crime. Information about the period he spent following release is lacking Nor is the information he posted on his Facebook profile (created in November 2019) likely to shed more light, given he limited himself to posting photos of friends, family members, and various motivational quotes. Also, his relationship with the injured party is a rather unclear one. Shortly after the attack, the press presented her as his partner, but then went on mention that the two had met online shortly before the attack. A week before she was set on fire, she had filed a complaint with the police, accusing Ion Turnagiu of raping her, but since the forensic report had not been drawn up, no preventive measures were ordered against him. On 11 June 2020, the day before the attack, Turnagiu posted a 30-second video on Facebook thanking everyone who was there for him, ending his post with "I love you all! Be healthy! Goodbye!". It is worth noting that the state that accompanied that post was "feeling defeated" and in the text related to it, Turangiu wrote in capital letters "GOOD-BYE, MY DARLINGS, THANK YOU ALL FOR BEING THERE FOR ME!!".

On 12 June, he carried out the arson, was apprehended, and his pre-trial detention was soon ordered. We do not have information from the criminal investigation, so the motivation for his action is unclear. Placed in custody, Turnagiu committed suicide on 30 June 2020, choosing to hang himself. In addition to the accounts of Ion Turnagiu's criminal past, the media triggered the usual identification of "service suspects" in these cases, starting with the prison release commission that had proposed his parole, and then the court that granted it; the police bodies who have not taken any action when the victim lodged a criminal complaint concerning rape, and the probation services which, under certain conditions, have the task of supervising persons on conditional release. This incident was another occasion for the re-issue of Law No. 169/2017 (meanwhile repealed after this incident) which aimed to reduce the phenomenon of overcrowding in Romanian prisons by establishing a mechanism of compensatory appeal.

Social media and publishing forums became places where the public expressed their hatred of Turnagiu's gesture, with (habitual) appeals for the reintroduction of the death penalty or other acts of torture. Neither the magistrates, nor the police, nor the politicians escaped the public's opprobrium. The latter reacted almost immediately, promoting a bill in parliament on 16 June which severely limited the possibility of conditional release of prisoners convicted of crimes deemed to have an increased degree of social danger. The bill was in fact a form of manifestation of political populism in criminal matters, which was later declared unconstitutional.

Moreover, it was a reaction generated by the political class's desire to present itself to voters as concerned with ensuring the "safety of citizens", especially since parliamentary elections were expected to be held in the autumn of 2020, depending on the pandemic situation. This was also the final stage of debates that had begun in 2015, on the problems facing the prison system, which often fell under the same populism.

1. Prison overcrowding face to face with penal populism

Prison overcrowding is one of the biggest challenges for correctional systems. Thus, the Council of Europe, which annually monitors the evolution of the prison population in the Member States, through the SPACE I report (Aebi, Tiago 2021), pointed out that the overcrowding of prisons was a problem in several jurisdictions. For example, for 100 holding places, Belgium reported 121 prisoners for 2020, France 115 prisoners, Italy 120 prisoners, Cyprus 115 prisoners and Hungary 115 prisoners. Turkey, a country that is not a member of the European Union, had 127 prisoners. As far as Romania is concerned, it had 113 prisoners for 100 holding places. If we report globally, overcrowding is a problem affecting 118 countries and territories that reported a higher occupancy rate of 100%, while in 11 of them occupancy exceeded 250% (Global Prison 2021).

The causes of this phenomenon are multiple and not necessarily related to an increase in criminality. Most of the time, high rates of incarceration are predominantly linked to repressive criminal policies that states adopt, with a focus on the imposition of custodial sanctions (Hough, Allen, Solomon 2008).

It is a phenomenon which, in turn, is a manifestation of political and penal populism, with governments unwilling to be perceived by public opinion as lenient on crime (Roberts et al. 2002). As such, it becomes a vicious circle, and the more determined politicians are to be perceived as fighting crime, the greater the pressure they put on the prison system, expressed by high rates of incarceration.

In addition, overcrowding of prisons is explained by insufficient development of community measures and sanctions, the existence of provisions which makes conditional release difficult, inadequacy of the resources of the prison system in relation to the dynamics of the criminal phenomenon, the existence of bureaucratic procedures that make it difficult to transfer prisoners, etc. In these circumstances, prison systems are often unable to comply with the recommendation of a single inmate per cell, in cases recommended by the Council of Europe or the United Nations or

those serving life sentences, long-term, or in the case of persons remanded in custody.

The overcrowding of prisons makes them into toxic environments for both detainees and staff (Farrington, Nuttall 1980; Pitts, Griffin III, Johnson 2014; Bernd, Loftus-Farren, Mitra 2017; MacDonald 2018).

As regards prisoners, the negative effects of overcrowding translate into high rates of suicide or self-harm, aggression between prisoners, impairment of physical or mental health, insufficient involvement in recreational activities or educational rehabilitation programs, limitation of the right to visits, etc. For their part, staff in prison units face high levels of occupational stress because of the risks they face or the need to manage a significant number of incidents. In these circumstances, overcrowding is likely to undermine the task that prison systems have undertaken, that is, to contribute to the rehabilitation of prisoners and to reduce their risk of recidivism. One should also take into consideration that in some cases, to limit the effects of overcrowding, spaces assigned for rehabilitation or educational programmes are converted into detention facilities.

Moreover, the COVID-19 pandemic was an additional challenge for the states, which started to identify short-term solutions to limit the phenomenon of overcrowding. At first the solutions identified were initially to limit the number of transfers between prisons, to limit the interaction between staff and prisoners, but also to limit the number of visits, solutions which, as I have already shown, are more likely to contribute aggravating problems. On reflection, authorities have focused on identifying more sustainable measures, such as delaying the execution of sentences or more widely applying alternative measures and sanctions (Dutheil, Bouillon-Minois, Clinchamps 2020; Nowotny et al. 2020; Simpson, Butler 2020).

Generally, it is for the states to identify solutions to the problem of prison overcrowding. Globally, there are several minimum standards developed under the aegis of the United Nations (Mandela Rules), which are aimed at regulating the treatment of prisoners and at drawing up guidelines for the states for the treatment of persons deprived of their liberty. However, these standards have only the value of recommendations, and there are no mechanisms in place to penalise states that violate these recommendations.

At a European level, the Council of Europe, through a number of institutions such as the Committee for the Prevention of Torture and the European Court of Human Rights, has established a series of procedures whereby Member States can be penalised for violating the rights of prisoners, their rights being subsumed to those guaranteed under the European Convention on Human Rights.

In the specific case of the problem of prison overcrowding, the Court consistently ruled that holding detainees in improper spaces violated the

rights provided for in Article 3 concerning the prohibition of torture or degrading treatment, Article 5 on the right to freedom and security, and Article 8 on the right to respect for private and family life. In this respect, the Court's case-law is a relevant one, which obliges (under the provisions of Article 41 of the Convention) the Member States to pay compensation to prisoners whose rights had been infringed.

In the cases of structural problems for some States, which constantly arise in the case-law of the Court, the pilot judgment procedure was established with the role of enabling States to take action to address the causes which led to the problems. First applied in 2004 in the case of *Broniowski vs. Poland*, through this procedure the Court may decide to suspend the resolution of similar human rights infringement cases, giving a state the opportunity to identify remedies to these problems.

In the specific case of the problem of prison overcrowding, pilot decisions were handed down against Bulgaria (*Neshkov and Others vs. Bulgaria* 2015), Hungary (*Varga and Others vs. Hungary* 2015), Italy (*Torreggiani and Others vs. Italy* 2013), Poland (*Orchowski vs. Poland* 2009; *Norbert Sikorski vs. Poland* 2009), Romania (*Rezmiveş et al. vs. Romania* 2017), Russia (*Ananyev and Others vs. Russia* 2012) and Ukraine (*Sukachov vs. Ukraine* 2020).

As regards the way in which the Member States have related to these decisions, we will give a brief overview of the measures taken by them in the application of the pilot decisions, as well as the dynamics of the prison population in the period following the imposition of those decisions.

Poland (targeted by two pilot decisions in 2009) introduced a series of reforms aimed at introducing electronic monitoring by replacing the execution of a prison sentence with electronic monitoring under certain conditions, adopting a new penal code (2015) which provided for the possibility of applying the conditional suspension of the execution of the prison sentence on a wider scale, and a comprehensive process of modernisation of the prison system, with a focus on increasing the opportunities offered to prisoners in the field of education, professional qualification, treatment programmes and infrastructure modernisation (including the construction of new holding spaces) etc. Poland's progress was highlighted during the 2017 visits of the Committee for the Prevention of Torture (Report to the Polish Government 2018). The data provided by the SPACE I report also confirm Poland's resolution to the problem of prison overcrowding. In 2010 the density of prison population reported for 100 places was 99.4, in 2020 it had fallen to 88.2.

As regards the situation of Russia, against which a pilot decision was given in 2012, it is quite difficult to capture the existence of any genuine progress for improving the conditions of detention. Firstly, in analysis concerning Russia, we must consider the socio-political peculiarities of that

state. Described as an autocratic rather than democratic state (Roberts et al. 2002; Treisman 2018), Russia's relations with the Council of Europe are marked by unilateralism, especially after 2017, when the Russian Constitutional Court decided that only those ECHR decisions that did not contravene Russia's constitution were to be respected by Russia. No concrete steps have been identified within the Russian prison system regarding action to improve detention conditions (i.e strategies to enhance prison conditions or to reduce the number of prisoners). As has already been noted (Dikaeva 2020), the criminal system in Russia is further characterised by a repressive criminal policy, lack of transparency and insufficient application of community sanctions. Given that 523,928 prisoners were incarcerated within the Russian prison system on 1 January 2020, it is clear that genuine reform aimed at improving detention conditions would be a complex process, and under current conditions in Russia is unlikely to be carried out.

In the pilot decision delivered in 2013 against Italy in the case of *Torreggiani et al. vs. Italy*, the ECHR applicants complained about the conditions of detention and, in particular, overcrowding, and previously the Court had dealt with "several hundred of such requests" concerning the conditions of detention in several Italian prisons, so that it considered that overcrowding was a systemic problem.

In this case, too, the Court granted Italy a grace period in which it proposed a series of measures to resolve the problems, while suspending the resolution of other similar requests. The solutions identified by the Italian Government consisted, inter alia, of reducing the period of execution of the sentence for persons still incarcerated (1 day for every 10 days spent under conditions contrary to the provisions of Article 3 of the Convention) or offering material compensation of 8 Euro/day for prisoners who were in pre-trial detention or who had in the meantime been released. The Court considered that those solutions provided reasonable compensation for the damage suffered by the prisoners, although in practice a number of problems related to the mechanisms for the effective award of compensation were raised. On the one hand, the proceedings were quite complicated, which was likely to discourage prisoners from seeking compensation for damage, and on the other hand, the judges were quite reluctant to grant financial compensation (Graziani 2018). However, the problem of overcrowding remains an acute one for the Italian prison system, with a new upward trend in the prison population as of 2016, so that in 2020 Italy reported 120 prisoners for 100 places.

In these circumstances, in their report on the 2019 visit (Report to the Italian Government 2020), the Committee on the Prevention of Torture recommended that the Italian authorities take the necessary measures to

reduce the number of prisoners, both by including alternative measures for pre-trial detention and by speeding up the process of release of prisoners.

Hungary's reporting on the implementation of the pilot decision handed down in 2015 presents a number of peculiarities specific to a populist approach. A compensatory system was initially developed through a series of amendments to the Code of Punishment. The compensatory scheme introduced concerned, in essence, a grant compensating for the period spent by a prisoner under conditions of overcrowding, which was underpinned by financial compensation amounting to approximately 3.9–5.2 Euro/day of holding. It was a smaller amount compared to that which had been offered by the ECHR in previous cases regarding the conditions of detention (approximately EUR 9.7). The proposed compensation system was also subject to criticism (Communication 2017) concerning the excessive bureaucratic procedures which had to be carried out by prisoners in order to obtain compensation and which, in most cases, had a deterrent effect. The proposals that were formulated were aimed, among other goals, at rethinking the sanctioning system in order to reduce the influx of prisoners, but also at allocating material and human resources capable of managing compensation claims under appropriate conditions.

In 2020, amid political developments in Hungary which were characterised by an appeal to authoritarianism from the government led by Viktor Orban, and the state of emergency invoked as a result of the COVID-19 pandemic, the granting of compensation was suspended. Clearly, the pandemic was a pretext for the Budapest government, as the Orban government's intention to suspend payment of compensation had been announced as early as January (Guest Post 2020). This referred to the fact that, in reality, the compensation scheme was in fact the business of some "smart lawyers", while at the same time minimising the seriousness of the problem of inhumane conditions of detention. In these circumstances according to the SPACE 1 report, in 2015 Hungary had a ratio of 129.4 prisoners / 100 holding places, while in 2020 the density was 113.2 prisoners / 100 holding places.

As regards Ukraine, given that the pilot decision was handed down in 2020, we consider that carrying out an analysis of the situation would be a premature step. The above-mentioned examples of how pilot decisions are implemented give us the opportunity to draw a number of conclusions. Firstly, the identification of compensatory measures is a challenge for governments that need to identify practical ways of implementing pilot decisions. Although the Court makes a number of recommendations in the pilot decisions on the measures that states are to implement, their responsibility to identify the best solutions appropriate to the local context is underlined.

The challenge stems from the fact that compensatory measures are often to be applied in a context where populist discourse by the political class prevails, regarding the need to reduce crime and to implement "tough measures" against those who break the law. In these circumstances, discussions on improving the conditions of detention and eliminating prison overcrowding can have a "boomerang effect" so that the application of pilot decisions constitutes a genuine test on issues such as the reality of the commitments made by governments with regard to respect for human rights or the existence of the rule of law.

2. Compensation appeal in Romania – between the realities of the prison system and penal populism

On 25 April 2017 the European Court of Human Rights handed down a pilot decision against Romania in the case of *Rezimveş et al. vs. Romania*. The Court found that the problem of inadequate conditions in the Romanian detention facilities was systemic, with the steps taken up to that point by the Romanian State with a view to improving them proving to be ineffective.

Thus, the first decision of the Court against Romania was to be given in the case of *Bragadireanu vs. Romania*, in order to subsequently issue 93 judgments, between 2007 and 2012, against the Romanian State for violations of Article 3 of the Convention. These judgments concerned issues such as overcrowding in detention facilities or poor conditions in pre-trial detention centres or prisons, characterised, inter alia, by lack of hygiene, insufficient ventilation and natural light, problems with sanitary facilities, the presence of rats, reduced hours of outdoor activities, improper transport conditions for prisoners, etc.

In view of this influx of applications concerning the situation in the Romanian prison system, the Court addressed for the first time Article 46 of the European Convention on Human Rights, in the case of *Iacov Stanciu vs. Romania*, taking the view at the time that there was no need to resort to the pilot procedure. In that sentence, the Court found that the issue concerning this case was already specific to the Romanian prison system, noting that it was necessary to establish an appropriate remedial system, namely the award of damages in accordance with the Court's current practice. Furthermore, the Judges of the Court mentioned that the subsequent legislation to be drawn up in Romania should reflect the existence of a presumption that, during the execution of the sentence, the prisoners had suffered moral damage.

In other words, convicted persons were entitled to receive reparations from the Romanian State, without the need to prove the existence of injury. The Court also pointed out that the Romanian Government had an important role to play in regulating the situation in detention facilities. The Judges of the Court made this statement by virtue of the fact that, for a long time, the only institution that was seen to be responsible for the conditions existing in the detention facilities was the National Administration of Penitentiaries. Given that it was under the Ministry of Justice and the funds at its disposal came largely from the state budget, it was obvious that the Romanian Government had, after all, a responsibility with regard to the situation in detention facilities.

With regard to the amount of compensation, the Court determined that it should not be unreasonable, establishing as a reporting criteria the fair remedies granted by the Court in similar cases. Looking at the Court's case-law in the cases concerning Romania, we will note that these sums generally were of the order of thousands of Euros. Moreover, the provision of significantly lower compensation or even failure to provide any was required to be well-reasoned.

The precariousness of the conditions in holding premises in Romania has not been highlighted only in the case-law of the ECHR. As Romania ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, it accepted that premises of persons deprived of their liberty should be subject to inspection by the Committee for the Prevention of Torture (CPT).

The reports drawn up during the inspections highlighted the inadequate conditions in the detention facilities under the supervision of the General Inspectorate of Police or the National Administration of Penitentiaries. For example, in the report drawn up during the 2018 visit (Report to the Romanian Government 2019), the members of the Committee highlighted the existence of progress and the intentions of the Romanian authorities to renovate existing facilities or build new ones, but stressed the persistence of old problems such as poor material conditions, inadequate medical care, lack of adequate ventilation, the absence of fruits and vegetables from the diet of prisoners, etc. This information was also provided by other bodies, for example the Association for the Defence of Human Rights – the Helsinki Committee, which has also made a number of visits to detention facilities over the years, and later by the Ombudsman.

However, Romania's conviction in the case of *Iacov Stanciu vs. Romania* did not bring about significant changes, which was also the reason for the pilot decision in the case of *Rezimveş et al. vs. Romania*. When providing reasons for its decision, the Court noted that the measures taken by the Romanian Government did not have a visible result, namely, the improvement of the conditions of detention and the avoidance of

overcrowding, noting, for example, that at the level of October 2015 the occupancy of Romanian prisons was 150, 68%. In those circumstances, within the pilot decision, the Court also made a number of recommendations to the Romanian State on the measures it could envisage, namely a reform at the level of the Criminal Code to allow the application of non-custodial sanctions on a larger scale, the strengthening of the probation system and, in particular, reviewing the conditional release procedure.

Moreover, the court noted that the solution to the problems of the Romanian prison system did not necessarily consist of the construction of new penitentiary units, but also of the renovation of existing prison facilities. Additionally, the solution identified in the case of *Jacob Stanciu vs. Romania*, namely the granting of compensation by the supervisory judge of deprivation of liberty and by the courts, was reiterated.

Important from the perspective of our approach is the fact that the decision refers to the existence of a legislative initiative of November 2016 aimed at drafting a law project aimed at establishing a compensatory measure that allowed convicted persons in conditions of chronic overcrowding to have their sentence reduced by 3 days for each 30-day period executed in an inadequate space (compensatory appeal procedure).

Thus, the Court decided that, within six months of the final retention of the judgment, the Romanian State had to draw up a clear timetable for the implementation of general measures to solve the problems of overcrowding and poor conditions in the places of detention. It also postponed the examination of all similar claims against Romania. Although at the time of the drafting of this article it is four years after the pilot decision was issued, the progress of the Romanian State in achieving the objectives set by the Court has been minimal. As we shall point out, the main reason for the failure was that the strategies to be implemented in applying the decision were diverted from finality under the spectre of specific manifestations of, though not only, penal populism.

Initially, we consider that a number of clarifications are required concerning the political context which governed the debates to which we will refer in this article. In December 2016 parliamentary elections were held in Romania, and were won by the Social Democratic Party, led at the time by Liviu Dragnea. In 2016 he had been sentenced to a two-year prison sentence with a conditional suspension of the execution of the sentence, for committing electoral fraud during a referendum in 2012. He was also tried in a criminal case, the object of which was a series of fictitious employments which he had carried out during his time as the President of the Teleorman County Council, the persons employed in a social assistance directorate under the authority of the Council carrying out their work within the local branch of the Social Democratic Party. These employments had

been carried out by Liviu Dragnea during his time in the conditional period, so that if his guilt was established, the suspension of the execution of the sentence would be revoked and he would serve a custodial sentence.

Moreover, Liviu Dragnea was not the only dignitary of the Social Democratic Party who had problems with the criminal law, so the electoral victory of this party aroused a number of concerns among both the political class and civil society. Taking advantage of their relatively comfortable parliamentary majority, a number of amendments to the criminal law were made in order to avoid criminal liability for these dignitaries. It should also be noted that they were not the only persons interested in amending the criminal law. In the context of the intensive fight against corruption carried out in previous years by the National Anti-Corruption Directorate, a number of employers or persons with key roles in media trusts (especially in the area of television and the written press) were under investigation and some of them had been convicted. In these circumstances, in the period 2015–2016 the conditions of detention in Romanian prisons suddenly became a subject of concern for these trusts. Reports were presented, debates were held in which the precarious conditions of detention in Romanian prisons were presented, the problem of overcrowding was highlighted and also the need to adopt a law on amnesty and pardon was launched in the public space. As expected, debates about the desirability of amnesty and pardon created unrest among detainees, so that in several prisons a series of riots took place during the summer of 2016. The riots were also based on a distorted media account of the statements of the Minister of Justice at the time, Raluca Pruna, who had referred in an interview to the fact that she was considering launching a debate on the desirability of a pardon law as a possible solution to the problem of overcrowding, stressing, however, that it was not necessarily a solution to the problem, recalling in the interview the example of Turkey whose prisons had returned to their original level of occupation only 11 months after the adoption of such a law (Ministrul Justitiei 2016).

What was expressed as an intention was later reported by the media as a certainty. It also pointed out that Romania must take a number of concrete steps towards avoiding overcrowding as it risked receiving a pilot decision from the ECHR, with Romania obliged to pay compensation of around 80 million Euros/ year. It was also pointed out in that interview that although the ECHR decision in the case of *Jacob Stanciu vs. Romania* should have motivated the authorities to take action, this had not happened with the main responsibility lying with Parliament. The debates were to continue in the autumn and winter of 2016, with the aforementioned media trusts increasing the pressure on policy makers.

A draft law on amnesty and pardon also appeared in the public space, which was submitted to the Ministry of Justice by "a group of NGOs". The

full text of the project was published in full by a single website, the title of the article in which it was presented being suggestive to describe the tension that characterized the moment: "Genocide in prisons – Here is the amnesty project submitted to the Ministry of Justice by a group of NGOs" (Genocidul 2016).

Shortly after the installation of the government resulting from the November 2016 elections, the new government resumed the topic of amnesty and pardon in January 2017. A meeting between the Minister of Justice Florin Iordache and the head of the National Prison Administration took place on 9 January 2017, with the director of this institution declaring at the end of the meeting that "any exit would help", including amnesty and pardon. However, this position was to be challenged, including by prison unions, who stressed that this solution would only lead to a temporary resolution of the problem of overcrowding. Soon the Minister of Justice undertook a series of visits to prisons, reiterating that for 28,000 prisoners, the minimum detention conditions were not being met.

Also in January 2017 a bill on pardoning punishments was underway. Its foundation note reproduces the themes that had already been promoted in the public space, namely overcrowding, the inadequacy of the detention facilities and their age, the fact that the Romanian State was previously obliged to pay compensation by the ECHR for the conditions of detention, the imperative to respect human dignity, the passivity of the authorities after the decision of *Iacov Stanciu vs. Romania* had previously been pronounced, the imminence of a pilot decision from the ECHR (Notă de Fundamentare n.d.), etc.

Although acts of corruption were formally exempted from the pardon, the public perception was that there was, in reality, a different goal than the one announced by the originators. In this respect, when the bill was discussed on newspaper forums, many comments referred to the fact that, in reality, the bill was nothing more than an attempt to solve the criminal problems of some politicians.

Comments such as "the substrate of pardon is not prison overcrowding, as it is circulated, but precisely a masked amnesty. It is inadmissible to wipe away such crimes" were common, as were mentions of the names of politicians who stood to benefit from the provisions of this bill.

Furthermore, the view that the draft Ordinance was actually a pretext for circumventing criminal liability, and was not based on a desire to actually resolve the problems of the prison system, also lies in the fact that the pardon would also apply to convictions for the payment of criminal fines, to suspended prison sentences, and even to those who would be convicted in the future where their files were pending at the time of January 18 2017. Furthermore, other beneficiaries of the pardon included those who were sentenced to imprisonment up to 5 years, who were repeat offenders

and who committed offences other than those expressly listed in the draft project. In these circumstances, the beneficiaries also included those convicted of abuse of office, crimes related to corruption, or serious forms of tax evasion. The draft also granted a pardon with half the penalty imposed on those over the age of 60, pregnant women and dependent children up to 5 years of age, with only one condition, namely that they not be repeat offenders – so it would not matter if they had been convicted of serious crimes.

Almost simultaneously, a draft law (Traicu 2017) was under public debate, which, under the façade of aligning some provisions of the Penal Code with a series of decisions of the Constitutional Court, was aimed at decriminalising serious crimes. This regulatory act provided, inter alia, for the decriminalisation of the abuse of office if the damage was less than 200,000 lei (approximately 50,000 Euros) and if it exceeded that amount, it could only be investigated if the victim had made a prior complaint. It also eliminated the offence of negligence in service, as well as the offence of conflict of interest if a benefit was due, which completely changed the purpose of the criminalization of that offence.

Given the repercussions these bills would have had on the criminal justice system, civil society mobilised, and Bucharest became the scene of massive protests, with their scale and the international reaction causing the government to take a step back. However, the effect of these attempts were long-lasting, affecting public confidence in good faith governance when the need for reforms of the criminal justice system were discussed.

Thus, the period 2017–2019 was marked by a series of attempts by the government coalition to amend criminal legislation and the laws of judicial organization, often with accusations about the press or civil society stating that, in reality, their goal was to undermine anti-corruption efforts and facilitate the avoidance of criminal liability of politicians. In these circumstances, this state of affairs was also reflected in reforms concerning the prison system, the problems which it faced being current.

In April 2017, ECHR issued its pilot decision in the case of *Rezmiveş et al. vs. Romania*, with the Bucharest authorities this time being in a position to identify short-term solutions to the problems related to the holding conditions, but the memory of the events of January 2017 dramatically limited the available options.

Generally, the Romanian press often reported in objective terms on the provisions of the framework decision, avoiding references to the previous failed efforts to promote a number of other changes under the pretext of solving problems in prisons. The exception was, of course, the press trusts, which as mentioned previously, had a direct interest in promoting rapid change. In their case, the decision was used as an opportunity to highlight once again the disastrous conditions in prisons, further advocating for the

swift adoption of measures, and in particular promoting the idea of adopting a pardon law.

Although as previously mentioned, the ECHR had given the Bucharest authorities a six-month period in which to come up with a plan for measures to eliminate overcrowding, the decision was seen by the government as an opportunity to speed up the process of prisoner releases. Decision-makers, including Liviu Dragnea, began to refer to fines of the order of 80 million euros that Romania would pay to the ECHR if it did not solve the problem of overcrowding. This was clearly misinformation, designed to justify the haste with which measures were later implemented. The Court did not have the power to impose fines, the amounts being seen at most as compensation for prisoners who had served their sentence under improper conditions, in the event that the Romanian State opted for that method of compensation.

In those circumstances, the first (and in fact the only) measure adopted by the Romanian authorities in the application of the pilot decision aimed at speeding up the process of release of prisoners. As mentioned in the explanatory memorandum accompanying the draft law (Expunere n.d.), reducing the duration of sentencing was a solution which, beyond Italy, had also been implemented by other European states in similar situations (e.g. Hungary). This was likely to provide a number of short-term results, given that the expansion of holding spaces through the construction of new prisons was not a solution in line with the Court's vision, nor could it be achieved on a schedule in line with the urgency required by the provisions of the decision.

In these circumstances, Law no. 169/2017 was adopted, which for the execution of the sentence under improper conditions provided as a compensatory measure a reduction in sentence of 6 days for each 30-day period served under improper conditions. The law was published on 18.07.2017 in the Official Monitor, not even three months after the ECHR delivered the pilot decision, although as I previously mentioned, it had granted the Romanian authorities a period of six months to submit a plan of measures.

For "executing a sentence under improper conditions", the law defined as criteria accommodation in a space of less than 4m2/inmate, lack of access to activities in open space, lack of access to natural light or sufficient air, failure to maintain adequate temperature in the rooms, existence of leaks, grease and mould in the walls of the detention rooms, and the lack of the possibility to use the toilet in private and to comply with basic sanitary rules. It should be noted that although the bill initially provided an additional 3 days considered to have been executed for a period of 30 days, in the context of the debates occasioned by the adoption of the law, this amount was later increased to 6.

In practice, all prisoners benefited from the conditions of the law, regardless of the penitentiary where they were serving the sentence, the law specifically exempting from the calculation of the compensatory period those times in which prisoners were in transit or admitted to the infirmaries at places of detention, in hospitals within the health network of the National Administration of Penitentiaries, the Ministry of Internal Affairs or the public health network. Prisoners were also exempted and had been compensated for improper conditions of detention, by final decisions of the national courts or the European Court of Human Rights, for the period for which compensation was awarded and transferred or moved to a detention area with inadequate conditions. The law began be applied for the period executed starting with 24 July 2012, the date on which the ECHR's decision was handed down in the case of *Iacov Stanciu vs. Romania*.

With the law adopted shortly after the events of January 2017, and with the ruling party being involved in a wide-ranging process of revising regulatory frameworks, particularly the one aimed at fighting corruption, the issue of compensatory appeal was massively politicized. Thus, both the opposition, civic activists and part of the mass media used the law to protest, once again, about the ruling coalition's determination to fight the rule of law, to undermine the justice system at the cost of endangering the safety of the community. Shortly after the law was passed, Romania was shaken by a series of murders committed in Caracal, where two teenage girls were kidnapped, raped, killed, and then their bodies cremated. Beyond the seriousness of the crime, the scandal was amplified by the delayed reaction of the police forces, who, although alerted by one of the victims through the 112 emergency system, had failed to act promptly.

Shortly after, the President of Romania, who was in open conflict with the governing coalition, convened the Country's Superior Defence Council at the end of a meeting, giving a press statement in which he also mentioned that "changes to the laws of justice [...] the compensatory appeal, all this has created serious vulnerabilities to national security, with some of the most dramatic effects for people's safety" (National Security 2019). This took place even though the compensatory appeal procedure had not yet taken effect.

Thus, the problem of prison overcrowding was seen as a secondary motivation, with the compensatory appeal being presented as a way of more quickly releasing those who were sentenced to custodial sentences as a result of the commission of corruption offences, creating a privileged situation for the President of the Social Democratic Party, Liviu Dragnea (although he had not yet been definitively convicted in the second criminal case). All this at the cost of endangering the safety of citizens, as dangerous criminals would be released as well, with a repeated refrain throughout the discourse that rapists, criminals, robbers and drug traffickers would also be

released. Or as mentioned in a blog "a maroon haunts Romania – the prisoners released by the Social Democratic Party and Tudorel Toader (Minister of Justice) commit crimes after crimes, with thousands of victims" (Justiția 2018). Under those circumstances, the media began keeping a record of persons released as a result the law, each time pointing out the fact that when they reoffended, they were at large on the basis of the compensatory appeal.

Headlines such as "More than 500 convicts released on compensatory appeal have committed new violent crimes" (Date 2019), "Criminals, thieves, rapists escaped from prison" (Mihai 2020), "The beneficiaries of the compensatory appeal: 5,000 criminals and robbers and 1,000 rapists" (Sirbu 2019) were common in the media between 2017–2019.

In turn, social media had plenty of memes portraying, for example, the Minister of Justice dressed in blood-stained butcher's clothes, or underworld leaders thanking the President of the Social Democratic Party for passing the law. Additionally, prison conditions were compared with those in hospitals or student dormitories ("Why do prison conditions have to be aligned with European standards and those in hospitals do not?"). A number of civic groups started signature-gathering initiatives with a view to repealing the compensatory appeal under the heading "Safety of citizens at risk!".

Moreover, the opposition leaders relied intensively on the theme of compensatory appeal in political debates. "You haven't built a single one of those eight regional hospitals for which Romanians had hopes and voted you for in 2016. You promised 2,500 nurseries and kindergartens and there are barely 45. Instead, you managed to free more than 22,000 criminals, many of them rapists and violent people, who have since reoffended and caused the dramas that terrify Romania today" (Dan Barna 2019) was to claim in a political statement Dan Barna, the leader of an opposition party at the time, the Save Romania Union. In turn, Ludovic Orban, the leader of the opposition, declared that: the first thing we should hear from Viorica Dancilă (prime minister) is that she will urgently stop the release from prison of dangerous offenders and criminals. What she had to do was very simple: repeal the law on compensatory appeal, the one that has released and continues to release criminals who commit the most violent acts and who are reoffending, as we have already seen in the many cases which were made public. (Ludovic Orban 2019)

In May 2019, the president of the Social Democratic Party, Liviu Dragnea, was sentenced to three and a half years in prison. His disappearance from the leadership of the party and the results obtained by the opposition parties in the European Parliament elections in the spring of that year led to a series of reconfigurations of the political scene in Romania. Thus, in October 2019, following a no-confidence motion, the

Social Democratic government was ousted, with power being taken over by a coalition made up of parties that had been in opposition.

The repeal of Law no. 169/2017 was a priority for the new government, and took place in December 2019 following the adoption of Law no. 240/2019. As far as the authors are concerned, we appreciate that Romania's experience applying the appeal has been a failure, with several factors contributing to this. The most important factor that contributed to the failure of the initiative was the lack of public trust in part of the political class, the media, and in the good faith of those who promoted the introduction of this remedial measure. As already mentioned, although the reform was based on a real problem, namely the pilot decision of the ECHR, it came at a time when decision-makers were perceived to be more concerned with changing the criminal justice system in order to undermine the fight against corruption. In these circumstances, it was relatively easy to bring up in debates the fact that the law of compensatory appeal, far from seeking to resolve problems with regard to conditions of detention, was instead a means by which persons convicted of committing corruption offences could be released more quickly from the execution of custodial sentences. Or, as it has been repeatedly pointed out (Ruuskanen et al. 2009), public confidence has a determined role in the successful implementation of certain criminal policies, all the more so since their transformation into "targets" of penal populism is a relatively easy step.

The second factor identified was the speed with which the law was promoted. Although the Romanian Government had a period of six months to propose a series of reforms to bring the situation into line with the requirements of the ECHR, the law on compensatory appeal was promoted as a matter of urgency (only three months after the Court adopted the decision in the case of *Rezmiveş et al. vs. Romania*). Basically, although it was a decision with important consequences, it was taken without any real debate beforehand.

A number of action plans had been adopted over time at the level of the Ministry of Justice – for example, timetables for measures aimed at improving the conditions of detention were created, but they were rather technical in nature. In our approach we could not identify any concrete evidence that they had been the subject of debates with even minimal resonance among professionals or public opinion. In these circumstances, the introduction of the theme "the release of dangerous offenders from prisons" could easily be achieved. Moreover, the initiators of the law have failed to communicate an important message, namely that the law of compensatory appeal merely created the opportunity for a person to be proposed for parole, and does not automatically lead to their release from prison. A mechanism governed by the Criminal Code and Law no.

254/2013 establishes that conditional release is proposed by a prison committee, a proposal which can then be approved or rejected by the court.

Thirdly, the law did not create a mechanism to ensure the community supervision of persons released on the basis of compensatory appeal, in particular those convicted of crimes with a high degree of social danger, nor had it provided for a number of facilities offered to such persons to benefit the process of social reintegration.

Basically, after being released, individuals were put in a position of identifying their own strategies for adapting to post-detention life. This happened in the context where the recidivism rate of former prisoners was already high, ranging from 46.3% to 38.4% between 2008 and 2018 (Raport Anual 2019). As has already been demonstrated (Durnescu, Istrate 2020), these figures are mainly explained by the fact that former prisoners do not make up a category for which the public services provide specialised interventions (shelter, finding a job, treating health problems, etc.). In practice, this undifferentiated treatment in relation to other citizens only exacerbates the problems they face after release. The stigma attached to ex-prisoners also creates difficulties in finding a job, with no framework to motivate potential employers to reintegrate them professionally. Thus, most of the time the only resources they can access during the reintegration process are their family or social support network.

In 2018, in the context of debates on the situation of the persons released from prison, a bill was drafted which provided for a number of facilities for former prisoners such as the provision of footwear, clothing, medicines, temporary accommodation in a centre for the homeless, meals granted at social canteens or a free food allowance, and tickets on urban and interurban public transport. These facilities were to be granted for a period of three months after the time of release. However, the draft was not adopted, and one of the reasons for reticence in promoting it was that there was a clear tendency public for opinion to be in opposition to such approaches.

Although the media generally presented the proposed law objectively, the comments posted by readers to these articles are relevant to the perception existing among the public (“In this country there are given alms to all kinds of social categories”; “It will only lead to the escalation of crime. So prison is at a discount, with compensation for days and money for difficult conditions and now, in addition, with all kinds of aids after release”; “I propose that those who vote for this, take one (former prisoner) at a time. Bonus!”, “They only care for the good of the prisons!!!!”; “An honest citizen who comes from disadvantaged categories does not receive this state aid.”, etc.).

There were also situations when the press, sometimes subtly, and sometimes directly, would place this approach in the realm of populism. For example, although the news was reported objectively, the legislative

initiative was accompanied by photographs depicting members of the underworld or, alternatively, articles took on a polemic register from the outset.[27]

As for any mechanisms of supervision in the community for conditionally released persons, they are inadequate. Although the Penal Code, which has been in force since 1.02.2014, provides for the possibility of electronic surveillance of conditionally released persons, the system has not been implemented to date. This is despite the fact that, on several occasions, at the level of judicial bodies, electronic monitoring was perceived as effective in ensuring effective supervision of persons in conflict with criminal law (Oancea, Durnescu 2018). As regards interventions by probation services, they have a number of competences in relation to certain conditionally released persons, but the probation system currently faces a number of difficulties arising from the high volume of activity, the lack of material and human resources and the relatively limited opportunities in communities to provide adequate support to former prisoners. In these circumstances, the authorities lacked any argument with which they could have countered the emerging image of the persons released from prison: that they were not subject to any supervision and, in particular, that former prisoners had all been convicted of serious offences.

A fourth factor that caused the failure was the far too rapid pace of prisoner release. Linked to the lack of supervision and support after leaving the prison, and considering the number of persons released, obviously the number of those who would go on to reoffend would be significant. According to data from the National Administration of Penitentiaries, during the period of the law's enforcement, 22,917 prisoners were released (ANP 2019).

The objective of the law seemed to have been achieved, with a significant reduction in the prison population recorded during this period. On 31.12.2016 the number of prisoners was 27.455, and at 31.12.2018 it was 20.792, which means a reduction in occupancy of 24.26%.

The repeal of the law of compensatory appeal was not accompanied by the provision of other remedial measures. The Ministry of Justice drew up a new action plan for the period 2020–2025, in which the solutions identified were this time aimed at making investments to increase holding capacity and improve the hygienic-sanitary conditions in prisons, linked to an increase in the institutional capacity of the probation system.

[27] See in this respect the title of the article "For inmates – mum, for orphans – plague. Social reintegration – comparison between prisoners and orphans who have reached the age of majority" (Ghica 2018).

Conclusions

For a reform process to be successful, the one who initiates it must take into account a multitude of factors, such as setting clear objectives; ensuring consistent political support to underpin the approach; consultation with all those who have an interest in the process in question, who may facilitate it or, on the contrary, have the capacity to undermine it; the assessment of similar experiences or the adoption of multilateral approaches.

From this perspective, in retrospect, the approach initiated under Law no. 169/2017 was doomed to failure from the start. It was an initiative in an area where criminal populism could fully manifest itself. In all jurisdictions, actions such as amnesty, pardon or other similar means by which a significant number of prisoners are released in a short period of time, are likely to fuel the sensationalism of the media, but also to cause concern and uncertainty among the public. In these circumstances, these processes naturally require the development of strategies from which unilateralism, ambiguities or notions which create a perception of lack of control must be absent.

To achieve the short-term objective of reducing the prison population, the Bucharest authorities embarked on the process without taking into account that it would evidently lead to a series of negative reactions from part of the political class, the media, some professional organisations within the justice system and, consequently, in what we generically call public opinion.

The release of a large number of prisoners in a short period of time without adequate surveillance mechanisms and without mechanisms to facilitate social reintegration, inevitably led to high recidivism rates. Given these circumstances, the media was able to easily introduce the narrative of "criminals, robbers and rapists who walk freely on the streets" to the public space. Also, the credibility of the initiators was already compromised in part of the public opinion but, above all, with civic activists who would then view the action on compensatory appeal against a succession of legislative initiatives aimed at revising the regulatory framework on the fight against corruption. The fact that the law was aimed at solving a problem for which the ECHR had delivered a pilot decision against Romania would take a second place to the perception that, in reality, this law was another subterfuge whereby, at the cost of sacrificing public safety, the authorities sought to more quickly release those convicted of corruption from prison.

The law was repealed after two years, but it still continues to trigger reactions in the public space. "For this atrocity, no one is scandalized? The compensatory remedy was needed for this monster with so many rights!", was a journalist's comment on social media in June 2020 to a news story about Ion Turnagiu's recidivism.

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Elite punitive populism and youth justice reform in Chile: Legitimizing a new political order

Populizm penalny elit a reforma wymiaru sprawiedliwości dla nieletnich w Chile: legitymizacja nowego porządku politycznego

Abstract: Chilean youth justice went through a drastic reform process during the 2000s, it was the second radical youth justice reform movement in the country since the creation of the Law of Minors in 1928. The decision to reform took place as Chile transitioned and stabilized into democracy after the authoritarian regime of the 1970s and 1980s. Superficially, it seems this is just one more way of embracing democracy and Human Rights. However, after in depth documental analysis of both the reform and the socio-political context, this paper offers a different insight and an explanation for the sudden relevance of youth justice, as a tool used by authoritarian political elites that then filtered into the political elite of the new democracy. In this context, populism played a key role in spreading concerns about youth offending and the need for a new youth justice which worked to strengthen the legitimacy of authoritarian practices in the new Chilean democratic order. It was an elite-driven populism that transformed youth justice into a key social and political concern.

Keywords: Chilean Youth Justice, punitive populism, authoritarianism, democratization, Latin America

Abstrakt: W 2000 roku chilijski wymiar sprawiedliwości dla nieletnich został poddany drastycznemu procesowi reform. Od czasu powstania prawa o dzieciach w 1928 roku był to drugi radykalny ruch na rzecz reformy wymiaru sprawiedliwości dla nieletnich w tym kraju. Decyzję o reformie podjęto, gdy po reżimie autorytarnym lat 70. i 80. XX wieku, Chile zmieniało ustrój polityczny i stabilizowało się jako republika demokratyczna. Pozornie wydawać by się mogło, że reforma była tylko kolejnym sposobem na wprowadzenie ustroju demokratycznego i praw człowieka. Niniejszy artykuł, w oparciu o pogłębioną analizę dokumentacyjną reformy, jak i kontekst społeczno-polityczy, w którym ona **Dr Daniela Rodriguez Gutierrez**, University College Dublin, Ireland, daniela.rodriguezgutierrez@ucd.ie, ORCID 0000-0001-6068-5628

zaszła, wyjaśnia nagłe zainteresowanie autorytarnych elit politycznych wymiarem sprawiedliwości dla nieletnich jako narzędziem, które pozwoliło im przeniknąć do elit politycznych nowej demokracji. W tym kontekście populizm odegrał kluczową rolę w szerzeniu obaw dotyczących przestępczości nieletnich oraz w rozbudzaniu potrzeby budowy nowego wymiaru sprawiedliwości dla nieletnich. Proces ten miał jednak na celu wzmocnienie legitymacji autorytarnych praktyk w nowym chilijskim porządku demokratycznym. To populizm napędzany przez elity przekształcił wymiar sprawiedliwości dla nieletnich w kluczowy problem społeczny i polityczny.

Słowa kluczowe: chilijski wymiar sprawiedliwości dla nieletnich, populizm penalny, autorytaryzm, demokratyzacja, Ameryka Łacińska

Introduction

Chilean youth justice operated under the same principles, institutions, and procedure from its creation in 1928 until 2005, when it was radically reformed. The country went from a tutelary system with high levels of discretion, no separation between protection and offending cases, and indefinite institutionalization measures, to a responsibility system. This change attempted to guarantee due process to young people suspected of having presented offending behaviour as described in the national penal code. It created institutions in charge of ensuring the protection of rights and legal defence of juveniles, and it challenged discretion by pre-defining a range of possible penalties and their minimum and maximum possible extents. It also separated all cases of children's rights protection, which became the responsibility of the Family Court.

Discussions of such a big reform started in the early 1990s, after the ratification of the UN Convention on the Rights of the Child [UNCRC]. The document assumed an important role in all Latin American constitutions, and led to youth justice reforms throughout the 1990s and 2000s, starting with Brazil in 1990. There was a broad agreement on the need to modify the old tutelary systems that had dominated the region and move towards responsibility systems, which were widely supported by

UNICEF (Beloff 2006). However, the implementation of the UNCRC and statutes in line with it have failed to be properly implemented (Morlachetti 2010). Instead, responses to youth offending mixed new approaches towards children's rights with previous repressive measures and the widespread fear of youth violence, remaining predominantly focused on vulnerable sectors of the population. In consequence, what prevailed was the continuation of authoritarian policing and the spread of zero tolerance approaches (Ungar 2009), which led to imprisonment rates increasing in most countries (Carranza 2013; Hathazy 2015; Fonseca 2018).

Chile ratified the UN convention in 1991. The document, as the country exited a violent dictatorship, was a good way of stating the allegiance of the new government to Human Rights. This was a time in which Human Rights were at the centre of what democracy meant (Cillero 1998; Peruzzotti 2017), and was an important line of argument by experts and some politicians regarding the need to adjust Chilean youth justice (Congreso Nacional 2005; Cillero 2006; De Ferrari 2006; Reyes-Quilodrán, LaBrenz, Donoso-Morales 2018). In consequence, the first pre-projects of the LRPA in the mid-1990s were written by some of the few youth justice experts in the country, in coordination with UNICEF. As such, those drafts had a strong focus on the UNCRC (García-Méndez, Beloff 1998). Following this line, once the law draft started its legislation in 2002, there was a relatively strong presence of mentions of the UN Convention and concerns over the need to improve youth justice and guarantee due process, as Ricardo Lagos stated in the campaign for presidency that won him the position for the following six years: "We protect the rights of children and youth by adapting our legislation to the UN Convention on the Rights of the Child" (1999: 13).

Nevertheless, as the decade progressed the presence of discourses around crime, security and youth offending increased dramatically. It went from a small mention by President Frei in the mid-1990s to one of Chileans' greatest concerns and an important element of elections and government programmes by 1999. Likewise, as discussions about the new youth justice moved forward in the legislative stages, it was progressively stripped of measures in line with the UNCRC. Instead, new rules were included which increased the length of imprisonment, added a minimum term to such measures, and reduced and limited diversion measures.

Therefore, it seems that despite the discursive strength of human and children's rights, the support for reform by international organizations such as UNICEF, and even though there was indeed a radical change of the institutions, principles, procedure and staff dealing with young people who displayed offending behaviour, the change was from one punitive system to another. Furthermore, Chilean developments in terms of crime control and justice do seem to mirror aspects of the "punitive turn" in youth justice

described in the global north, and under a similar time frame, despite the relevant historical, cultural, geographical, and socioeconomic differences between regions and countries (see for example Bottoms 1995; Muncie 2005; Goldson, Hughes 2010; Chaney 2015). Youth justice in those countries, as in other Latin American examples (Bonner 2018), has been described as following a populist punitive trend. Populist punitiveness (Bottoms 1995) refers to the promotion by political leaders of public opinion that favours harsher approaches in crime control and justice as a mean to gain electoral support. This is usually done through rhetoric that divides society in two groups, "us", as the citizens, and "them", as the alien criminal, appealing to citizens' fears and insecurities (Bonner 2018).

This article attempts to address the interaction between populism and the reform of the Chilean youth justice system. In doing so, it offers an explanation as to how youth offending, which had not been part of citizens or politicians' areas of interests, came at the centre of national concerns over the 1990s and early 2000s. At the same time, it refers as to how this dynamic displaced children's rights discourses while privileging punitive and authoritarian approaches. As we will see, the role politicians gave to youth justice in their race towards power and in their quest towards legitimizing their position as the new elite was key. Therefore, the Chilean case provides an interesting example of elite punitive populism.

1. Methodology

To understand the salience of youth justice in the political context of the 1990s and early 2000s, the surging reform efforts, and the role of populism in this process, this research relied on document analysis. The documents considered included transcriptions of the annual presidential speeches of public accountability, which take place in May every year. The speeches cover the period from 1994, the first year of President Frei's government, as it was during his rule that political talk about a new youth justice started; until 2007, the year the reform was officially implemented. This included three presidential terms: Frei [1994–2000], Lagos [2000–2006] and Bachelet [2006–2010]. All three belonged to the same centre-left coalition, the Concertación. The government projects of presidential candidates in the 1999 and 2005 presidential elections were also considered. Other key documents analysed include the transcription of legislative discussion in the Chilean Congress in both the Deputies and Senators' Chambers, which can be found in the "history of the law 20,081" and the "history of the law 20,191", these documents are produced by the National Congress for every law. All the documents are of a public nature and can be found in the official

website of the Chilean National Congress, and via repositories that keep records of presidential public speeches

and the public government programmes of presidents and presidential candidates.

The decision to analyse these documents was taken with the understanding that they provide insight into the discourses and approaches framing political decisions and policy making (which views are being privileged and which ones discarded), while also reflecting the wider context of their time (Garland 1985; Chaney 2015). The analysis of these documents was made through adaptive theory (Layder 1998; Bottoms 2008). This means the texts were coded in a back-and-forth process of discussion with the literature in the field, understanding that the selection of the research topic already involves some background knowledge. Therefore, the first coding stage is informed, and then contrasted with the literature, to then continue to another stage of coding, increasing abstraction of concepts and reviewing new elements that become relevant from the data. This was done using NVIVO 11 to facilitate the connection of topics, and the discussion between theory and data. The documents were also analysed under a sociological history approach (Skocpol 1984; Garland 1985; Ariño 1995) as the purpose was to understand a long-standing process of social and political change. Therefore, the results will include quotes from the different documents to illustrate and summarise the official narrative of the political discussion at the time. It is also worth commenting that the documents are originally published in Spanish, the translation of the quotes was carried out the author of this paper and was proofread by an English native who also speaks Spanish.

2. Populism, crime control and security

Most of the literature on populist punitiveness and concepts that refer to the interaction between politics and the spread of punitive crime control approaches (such as penal populism, see Pratt 2007) comes from the Unites States and the United Kingdom. The term has been used when citizens' fears, anxieties and misinformation regarding crime control and justice issues are used to gain electoral support. In this context, punishment is also instrumentalized to divert the attention of voters towards personal security and away from other troubling areas (Roberts et al. 2002). This has resulted in the implementation of harsher laws, longer sentences, mandatory minimum sentences, and the increase of control and exclusion of marginalized population (Müller 2012).

Thus, punitive penal policies are not necessarily a reaction to increasing crime rates or the predominance of a punitive approach in citizens, but the result of political strategy, without serious considerations of their consequences and impact (Roberts et al. 2002). As such, crime control populism takes a more central role at times of elections, in which different actors claim to speak on behalf of wider populations whose fears are being ignored or neglected by the ruling elite (Dobrynina 2017).

This has resulted in policies that might gather great levels of electoral support, but could also be counterproductive, useless, or even totally unrepresentative of what the public want and request. Moreover, penal policy is more at risk of populist approaches, as it is a topic that generates fear and concern in the general population, where there is little knowledge as to how crime control or the justice system works, and the underlying aspects of offending (Roberts et al. 2002).

This trend of appealing to fear of crime during political campaigns has been described as stronger in countries with sharp inequality levels, low government willingness or ability to provide social services, and where major offices are contested for elections. As the state is limited to satisfy citizens in other areas, it becomes tempting to resort to directing their fear towards an internal enemy. In doing so, "anti-politics" politicians, usually posing as "strong man" leaders present themselves as a better option compared to the other institutions, politicians and experts, who are presented as too weak to deal with crime (Chevigny 2003).

In late modern times, some authors highlight a convergence in this punitive trend in western countries (Wacquant 1999; Muncie 2005; Brandariz-García 2018), which in youth justice has translated into the predominance of individual responsibility (Goldson 2013), and in further marginalization of already vulnerable young people (McAra, McVie 2005). Nevertheless, authors such as Dario Melossi (2004, 2011) highlight the need to keep in mind the differences between jurisdictions, which lead to divergent results, and thus it is worth to analyse different realities, such as Latin America, and in this article, Chile.

When it comes to punitive populism in Latin America, several authors have highlighted its increasing presence (Dammert, Malone 2006; Pinheiro 2007; Becket, Godoy 2008; Iturralde 2010; Müller 2012; Hathazy 2015; Sozzo 2016). This has led to policies that strengthen the police, expand the attributions of crime control institutions and the justice system, and increase the number of actions considered a legal offense and the penalties associated to such behaviours. It also involves a tendency to privilege imprisonment over other options (Bonner 2018). However, most of this literature has covered imprisonment and adult penal policy, instead of youth justice developments.

3. Context: The right-wing and the crime and security narrative

The 1990s were times of great changes in Chile. After 17 years of a violent extreme-right military dictatorship with strong censorship laws, economic crises, human rights violations, and a national turn towards neoliberalism; the transition to a centre-left electoral democracy offered a completely different scenario. Citizens now had to live in a suddenly modernized and globalized society following radical political, social, and economic changes, with a lack of employment and financial stability (Constable, Valenzuela 1993; Lawson 2005). Chileans were living under high levels of financial, health and stability struggles. In this context, crime control and youth offending were not among citizens' main concerns, as they had more pressing worries, and the only security matters talked about in the authoritarian regime had to do with "national security" and "enemy" leftist ideas (Constable and Valenzuela 1993; Oppenheim 1993; Valdivia 2001).

Another key contextual element to keep in mind is that the Chilean authoritarian regime ended through a referendum, which led to presidential elections that resulted in 20 years of rule by the same centre-left coalition, the Concertación. Because of this method of transitioning from authoritarianism to electoral democracy, the authoritarian right-wing was not discredited. Quite the contrary, in the early 1990s they still had about 40% of support from citizens who wanted the authoritarian regime to continue (Oppenheim 1993).

Moreover, the newly elected authorities had to adapt to and work under a series of institutions and rules left by the dictatorship, such as the neutralization of previous civic culture and participation, leaving the country with few NGOs or social institutions that could unite or inform citizens beyond the government and the media, while those few organizations that still existed were more dedicated to fighting the poverty levels of the regime (Weyland 1999; Dammert 2005; Borzutsky 2017). These conditions had been also secured through the "authoritarian enclaves", the agreements imposed by the military regime to transition towards a new democratic order. These involved, for example, the continuation of the national constitution of 1980, which was written by the authoritarian government and ratified in a corrupt referendum (Garreton 1982; Constable, Valenzuela 1993; Hilbink 2007).

Similarly, the enclaves guaranteed the permanence of authoritarian rightwing figures in political life. This was accomplished through implementing a new electoral system which favoured the formation of two majoritarian groups (the centre-left in the government and the opposing right-wing). This system guaranteed that the losses of the Concertación were the gains of the right-wing. Another strategy to keep key figures in

power was by appointing Senators, most of whom were ex-members of the Armed Forces. As a result, after the first parliamentary democratic elections, the right-wing dominated the Senators' chamber, even though the centre-left governing coalition gained the most elected seats. Similarly, the military government had appointed all Mayors before the transition, and they remained in place until the 1992 Mayoral elections (Constable, Valenzuela 1993; Oppenheim 1993; Lawson 2005; Álvarez 2014; Borzutsky 2017; Kennedy 2017).

As a consequence, the authoritarian right-wing have retained their economic, social, and political privileges to this day (though there is a constitutional reform being discussed at the moment) and remained as a strong opposition. However, there were a series of topics that weakened the political presence of the right-wing. For example, mentions of Human Rights, criticisms of their neoliberal model or the faulty functioning of the institutions they left were out of discussion. The right-wing and the military openly resisted and criticized all efforts to clarify their actions and violence during the dictatorship, claiming their actions were needed to protect the country (Oppenheim 1993; Lawson 2005; Hilbink 2007). In consequence, even though there were two reports regarding Human Rights' violations, these did not provide information on the perpetrators, did not manage to clarify the amount and identity of all people murdered, tortured and/or disappeared, and brought legal consequences for few of the perpetrators, leaving most in impunity (Borzutsky 2017).

Nevertheless, despite the unity of the authoritarian elite on this matter, after losing in the 1988 referendum and the following presidential elections of 1989, the right-wing was fragmented and facing internal conflicts (Oppenheim 1993; Álvarez 2014). Therefore, they needed to find a new topic for political competition in which they could thrive.

In 1991, Jaime Guzmán, a pro-dictatorship civilian who was key in strengthening and giving powerful legal tools to authoritarianism, such as the 1980 national constitution, was murdered. That same year, the son of the owner of *El Mercurio*, a right-wing newspaper who played a key role supporting the dictatorship and supports right-wing ideology up to this day, was kidnapped. According to Alejandro Tsukame (2016), these events made the right-wing feel insecure in ways they had not since before Pinochet's regime, while other authors highlight that these events opened the topic of security for political use by the right-wing across the 1990s (López 2000; Candina 2005).

In the Mayoral election of 1992, the right-wing took the issue of security as part of their proposals becoming successful in opinion polls and elections thanks to this. For example, Mayor Lavín in Las Condes, one of the richest and most strongly right-wing municipalities of the country, put extra protection measures through as subsidies for erecting fences and having

municipal guards watching the streets. The strategy proved effective, allowing the right-wing to gain a stronger political presence and recover their political position by the following Mayoral election in 1996 (Álvarez 2014).

4. Results: Populism and youth justice in Chile

President Frei's government started in 1994. He was the second President from the Concertación, and the first one to mention youth offending as different from adult offending in an official political discourse.[28] Under his lead a series of crime control measures were developed, and some offences increased their penalties, such as receiving stolen property through the Law 19,413 of 1995, or rape through the Law 19,617 of 1999. Other measures taken by President Frei involved a programme to strengthen the police in 1995; a project to build more prisons in 1997 and the creation of a national plan to divide the areas guarded by the police so they could become closer to the community. Under this government the Chilean penal system was also radically reformed, together with measures to increase resources and staff in both the armed and civil police (López 2000; Dammert, Lunecke 2002; Candina 2005; Morales 2012).

He was the President that inaugurated the approach of the governing coalition towards the crime control rhetoric presented by the right-wing, and added the need to protect citizens from crime to Concertación's political speeches (De Ferrari 2006), as this quote from 1995 evidences: "Crime, terrorism and drug trafficking are a threat for national coexistence that the government has fought; and will keep fighting with firmness, energy and responsibility" (Frei 1995: 27).

These reforms were widely supported by the right-wing opposition (López 2000; Duce 2004; Morales 2012). Therefore, despite most crime control actions over the 1990s still being focused predominantly on adult justice, it was an area that did not offer enough political advantages at the time, and thus the reforming zeal and narratives permeated down to youth justice, where they took on greater political, populist and punitive strength, as we will see below.

[28] "[…] to study a reform of the Law of Minors in order to update it both in family and penal matters to the constitutional principles and international treaties ratified by Chile" (President Frei 1994: 16).

4.1. A crime control race

In the 1990s, the predominating discourse around crime control and justice became about the need of an "iron fist" towards crime and to stop the "revolving door" of the justice system (Tsukame 2016). Though the discussion still oscillated between the need to make it harsher, changing perceptions of impunity (Couso 2009), such as President Lagos's comments in his 2000 public speech: "We will achieve more efficient punishment against offenders, including a life sentence that is in fact a life sentence" (Lagos 2000: 16); and the need to make reforms that helped rehabilitation processes and stopped prisons from being *crime schools* (Frei 1999: 54).

However, punitive approaches won a priority role over other concerns in 1999's presidential elections and through the early 2000s. In the presidential elections of 1999, crime control, security and youth offending took centre stage. The right-wing presidential candidate Lavín, previously mentioned in his role as Mayor, put a special emphasis on the failures of the justice system: "people lose trust because they know that for every 100 criminal cases of robbery and rape, only four reach a sentence" (Lavín 1999: 30). He also mentioned the need to strengthen crime control, to end "the offenders' party", and to "send clear signs against crime" (Lavín 1999: 4). In this process, he portrayed himself as an ally who could offer the solutions the general population needed: "Chile needs a change! It needs a fast and efficient justice that works for all. We need to perfect the system to make it more modern and increase its hedge, reaching all people" (Lavín 1999: 30). The strategy was successful, making Lavín the strongest right-wing candidate since the turn to electoral democracy in 1989. He was only defeated after the second round by the third Concertación President, Ricardo Lagos, with a difference of less than three per cent. Lagos, the Concertación candidate who eventually won, also put crime at the centre of his candidacy. For example, he stated in his government programme that his regime would "[…] fully assume the legitimate distress of families regarding the size and seriousness of the crime phenomenon and to have among its priority tasks the protection of the security to live and the goods of people through the integral fight against crime" (Lagos 1999: 19). Once elected, he promised to build more prisons and to increase the use of incarceration (Lagos 2000; Dammert, Díaz 2006; Morales 2012).

Following from Lavín's strategy, Lagos also presented himself as a citizens' ally by criticizing the elite in their privileged situation, despite the fact he belonged to this elite:

> We Chileans know that when the state is weak, the strongest rule. Only those who have the means to defend themselves and buy their health, buy the education of their children, housing, insurance and even security for their family will remain standing. The rest will

> remain condemned to save themselves as they can with their scarce resources. (Lagos 1999: 2)

By President Lagos' rule, security had been fully redefined from state security to security from crime. This is visible, for example, in Lagos' 2001 national speech: "The expansion of personal freedom must go hand in hand with greater security for the family and community. That is why we have transformed the fight against crime into a national priority and everyone's responsibility" (Lagos 2001: 4).

Similarly, human rights protection was reduced to the protection of citizen's rights as consumers:

> […] the creation of the Citizen's Defendant, who should veil for the rights of the users of public services and will have the power to canalize complaints and investigate cases of bad service (Lagos 2000: 8) and from crime:
>
> A democracy is based in the effective protection of the rights of all citizens. That is why the Concertación's governments have promoted a wide legal reform, starting with the reform of the penal procedure […]. Today, poor and humble people can also aspire to transparent oral trials and in fair time. (Lagos 2002: 9)

This scenario was repeated in the subsequent Presidential elections of 2005. This time, the main candidates were Sebastián Piñera, initially representing the right-wing party National Renovation, Joaquín Lavín, who had already run for President in 1999 under the right-wing National Democratic Union, and Michelle Bachelet as the Concertación candidate. These candidates engaged in open confrontations over who had the most punitive approach towards crime and security. For example, Piñera explicitly supported "zero tolerance" and "three strikes" policies in his government programme (Piñera 2005). He also highlighted the need to strengthen the police, which was also proposed in Bachelet's programme, who offered to expand prisons as well (Bachelet 2005).

Following from this, Piñera and Bachelet became the strongest candidates in the first round and continued to the second. The right-wing joined into the coalition Chile's Alliance to support Piñera in the final race, however Bachelet still won the elections. As promised, President Bachelet (2006–2010) built even more prisons and made crime and security even more central to all social and political matters: "We will actively work to protect citizens and attack the deep causes of violence and crime. Citizens' security is essential in the social protection system we are going to build" (Bachelet 2005: 64). Moreover, in her government, the project for a short-term policy against crime [*Agenda corta anti-delincuencia*] was submitted to the Congress and approved, which gave more powers to the police and

increased the severity of the justice system (Morales 2012). The policy was the result of populist crime control, and damaged potential reforms to improve the situation of the prison population (Ross, Barraza Uribe 2020).

Across this period, youth offending and security were not only being used as a strategy to win votes, but also because it allowed the opposition to highlight the 'failures' of the government. For example, Deputy Cardemil openly criticized President Lagos' rule in the legislative discussion of law 20,191, which modified the LRPA before its implementation, in 2007:

> The issue is that the Concertación is considering each time more legitimate the use and abuse of all the resources of the State, as if they were property of the ruling coalition, with the purpose of perpetuating their power. This started taking shape in the government of Ricardo Lagos and involves communicational abuse […]. Nothing was fulfilled. That's why the government of Mr. Ricardo Lagos has ended being like a Hollywood's decoration, where the only real thing is the façade of the places, but there's nothing behind. (Congreso Nacional 2007: 71)

4.2. Public opinion and crime

As time progressed and crime control and security became more visible, public opinion, or at least what surveys and the media portrayed as public opinion, and thus what politicians understood it to be, started being directly referenced as a demand, a permanent concern which conveyed a sense of urgency to be satisfied. The general notion was of a public that required answers from politicians regarding youth offending and punishment as shown by the words of Deputy Hales in the legislative debate: "The people ask for punishment for offenders; this project propose penalties for adolescents who commit offences" (Congreso Nacional 2005: 1038).

Moreover, by the end of the 1990s security was positioned amongst the top concerns of citizens, offending was in the top three, and fear of crime was more important than economic stability and job insecurity in opinion polls, offering support to politicians' claims (López 2000; Dammert, Lunecke 2002; Duce 2004; Dammert 2005).

Therefore, over the course of a decade, youth justice went from no one's concern to "A problem that, lately, has revealed in an extremely harsh way and which seriously concerns our society" (Senator Novoa in Congreso Nacional 2005: 507). There were, of course, some voices that complained against the populist use of this topic, such as Deputy Burgos who claimed: "The closer the elections are; there is a real fight to present and accept initiatives related to citizens' security" (Congreso Nacional 2005: 348).

Yet, this was not enough to stop the tide, and the populist politization of youth justice gained increasing presence.

In this context, the media played a key role. This, because the media acts as one of the main sources of information about crime for citizens (Roberts et al. 2002; Fortete, Cesano 2009), but also for politicians over the legislative debate. This is visible, for example, in the arguments of the parliamentary discussion regarding the need of a new youth justice: "Yesterday we could see on a TV show the case of a minor of under 14 years of age who has been detained 23 times for different offences, and he is still free" (Deputy Uriarte in Congreso Nacional 2005: 1098).

This was amplified by the lack of expertise in Latin America regarding the topic (Beloff, Langer 2015). For example, Ana María Morales (2012) highlights the scarcity of sources when it comes to crime data. This last point is particularly relevant, as in Chile there is a lack of access to reliable sources of information, with most statistics maintained only by a couple of institutions, which recorded information differently. Additionally, prior to the 1990s, records were poorly kept, rarely analysed, and the government was marked by a lack of transparency and manipulation of records (Lawson 2005). Similarly, there were no studies regarding what citizens really knew or what they felt towards youth offending and crime control, though research in other contexts suggests that when asked directly and offering some context, the general population is not really punitive (Indermauer, Hough 2002; Hough, Roberts 2012).

This left plenty of space to legitimize politicians' personal views or make opportunistic use of poor understanding of international realities due to the lack of knowledge. This was problematic as it collided directly with research, evidence and expertise build in other contexts but also by the few Chilean experts on the field (Congreso Nacional 2005), yet those personal opinions took a more predominant role. A good example of this is the argument raised by the Surrogate Minister of Justice Arellano in the legislative discussion of the new youth justice: "It is much better to invest public policy money in adolescents' penal responsibility than in any other mechanism to fight crime" (Congreso Nacional 2005: 1041), which resulted in a focus over responsibility instead of prevention, restorative, or rehabilitative measures.

Furthermore, the media is considered to represent the opinion of the wider population and positions itself as their voice (Dobrynina 2016), despite who they rely on to support their stories – usually politicians or state institutions – how these stories are framed, and how they also shape public opinion (Bonner 2018). Therefore, the interaction between politicians and public opinion is dynamic, as politicians, even as they attempt to follow public opinion, may be guiding it (Roberts et al. 2002).

The role of media becomes even more problematic when taking into consideration that in Latin America it is very common for the media to act as an extension of the conservative right-wing, with control concentrated in a few hands (Santander 2010). For example, in the Chilean case, one of the most important newspapers is the right-wing *El Mercurio* (Bonner 2018). Therefore, it is not surprising the authoritarian right-wing voices that started talking about security and crime control had a privileged space to spread their views and set the trend of how to approach the topic. They used this rhetoric as support for their decisions, despite the lack of other sources in line with their views, and also to validate their authoritarian ways, promoting more control and less freedom, especially as most, though not all, politicians who actively promoted these punitive measures as representative of the objectively unknown view of the population, were members of the right-wing, the Independent Democratic Union, or National Renovation (Congreso Nacional 2005; 2007).

The effect of their narrative was strengthened by the echoing opinion coming from *Paz Ciudadana*, a foundation created by the owner of *El Mercurio* to support security policies, which came to have a strong influence both in the government and in the youth justice reform, as the words of President Lagos evidence: "Some private entities, such as Paz Ciudadana have made great contributions" (2000: 11), being the only institution mentioned in this regards in his speech.

Moreover, as international research has shown, when it comes to crime, the media tends to promote fear and insecurity, together with a distorted image of young people. It also has a key role when talking about populism and crime (Hall 1978; Garland 2001; Nash 2006; Jewkes 2011; Hough, Roberts 2012). Chile also followed this trend and adolescents started being portrayed as the "greatest danger against people's security" (Deputy Saa 2004: 253). Thus, it was unsurprising that this notion of young people and the need for more punitive measures to deal with youth offending permeated public opinion. Even if such a punitive approach had not spread into the audience, who at least in Chile do not have the opportunity to directly communicate their interests and concerns to the political elite (Rodríguez Gutiérrez 2020), the media still functions as the representative voice of citizens for politicians, and public opinion becomes what the media portrays it to be (Green 2009).

In consequence, the public seems to become another strategic tool for the political elite to validate and legitimize their role and position. Therefore, politicians in Chile seem to have used security concerns and youth justice reform to be keep citizen attention focused on a topic that accommodated them better, and which provided a tool to attack the opposition. At the same time, politicians used this sentiment to present themselves as representing the views of the wider population: "In this

project there is a future public policy, in the sense that, as a society, we are going to explicitly express we are not going to play dumb with what is going on with young offenders or law-breakers" (Deputy Burgos in Congreso Nacional 2005: 1034), which allowed them to pose as both needed and useful.

As a result, a populist approach predominated in the discussion over a new youth justice, which in turn promoted harsh measures that made politicians seem concerned and active, instead of being effective. This approach has been identified in other societies that have turned to populist approaches in crime control (Sparks 2003; Dammert, Malone 2006; Müller 2012; Sozzo 2016). For example, Barry Goldson (2002) has already mentioned how political priorities have more weight over new policies than expertise. Therefore, the new youth justice system, which was intended to guarantee and protect children's rights and bring responsibility, education and rehabilitation, became more about surveillance, reduced diversion, reinforced imprisonment, and in general concerned with punishment.

4.3. Populist punitiveness and the Chilean youth justice reform

Politicians added crime control and security as a central feature to their speeches and proposals at times of elections. They claimed those were aspects that seriously troubled citizens and were supported by the media and opinion polls. This directly impacted the reform, as youth justice went from a punitive tutelary system, through drafts of a new youth justice under the guidelines of the UN Convention on the Rights of the Child [UNCRC] and UNICEF, finally becoming a punitive responsibility system.

For context, in terms of data on offending in the 1990s and 2000s, institutions directly linked to the political right-wing of the country reported dramatic increases. For example, *Libertad y Desarrollo*, an authoritarian right-wing think tank, reported that robbery increased by 120% between 1977 and 1996 (López 2000), while *Paz Ciudadana*, another right-wing linked institution, claimed an increase in robbery cases of 39% between 1990 and 2000, with robbery with violence rising in over 200% (Folch 2002). However, when looking in greater detail, other researchers question the rising crime levels, describing crime rates as an unstable trend of ups and downs (López 2000; Dammert, Lunecke 2002), while Ana María Morales (2012) highlights an increase in crime reports instead.

Therefore, there is little to back up to the notion of dramatic increases in youth offending. However, in the landscape of the early 2000s, crime control was already politicized. This had its own impact on the need to reform, as some politicians identified the urgency to change the previous tutelary system, not because it collided with the UNCRC, because it was an ineffective and abusive system, nor the fact that despite an update in 1967,

it had retained the same principles of the law of minors from 1928. The urgency came about because the current system was "inefficient to reach the prevention and punishment goals required" (Ministry of Justice Bates in Congreso Nacional 2005: 241).

From that point, as discussions progressed, the focus on rights and the UNCRC recommendations diminished until most discussion was about security for citizens and using punishment to make young people responsible. For example, in the words of Deputy Forni: "It should be specifically mentioned that a key element of this project is the responsibility for the offences committed" (Congreso Nacional 2005: 345). This rhetoric became even more dominant after the law draft went into the second legislative stage in the Senators' chamber in 2005 (Congreso Nacional 2005). It is worth remembering that this was the year of presidential, senators and deputies' elections during which youth crime control had a central role, and Bachelet won the presidential seat.

Other key concepts that had a prevailing influence over youth justice reform, displacing children's rights concerns, were security,[29] ending impunity,[30] and punishment.[31] This is particularly relevant as it evidences the influence of punitive discourses, which can be considered a continuation of authoritarian views towards control, while altering the meaning of concepts such as impunity from crimes against humanity towards offending, security from state violence towards security from crime, and rights from the protection of human rights and the commitment of the state to guarantee them, to rights as against subsections of the population, and rights distorted into duties and responsibilities citizens needed to satisfy: "Today, we make them not only subjects of rights, but also of duties" (Deputy Soto in Congreso Nacional 2005: 262).

This does not mean that there were no opposing voices. Some parliamentarians maintained strong support for children's rights (For example: "It pains me that youth offending is treated not like a children's problem, but as an object of political debate, as if through this the government or the opposition could win" (Senator Esquide in Congreso Nacional 2005: 513)), but their voices did not carry through the discussion (Congreso Nacional 2005). In consequence, the focus on children's rights and crime control was reduced to a new youth justice system, as the words

[29] "This project is a great step in the fight to have more citizens' security" (Deputy Burgos in Congreso Nacional 2005: 1096).

[30] "It is precise that there is clarity regarding the ending of impunity" (Senator Coloma in Congreso Nacional 2005: 972).

[31] "It is assumed that adolescents have responsibility, which makes possible the imposition of penal punishments" (Minister of Justice Bates in Congreso Nacional 2005: 240).

of Surrogate Minister of Justice Arellano evidence: "It is much better to invest public policy money in adolescents' penal responsibility than in any other mechanism to fight crime" (Congreso Nacional 2005: 1041).

These discussions show how the emphasis made by politicians replaced children's rights concerns and privileged punitive approaches. In consequence, the parliamentary discussion of the 2005 law, with a modification in 2007 under the law 20,191, before the LRPA was implemented, led the reform from one punitive system to another. The initial drafts of the new youth justice in 2002 proposed a specialized system with no minimum imprisonment term and a maximum of three and five years depending on the age of the young person, elements from restorative justice and a series of diversion measures (Congreso Nacional 2005; 2007). By 2007, the system being implemented had no real specialization in practice, as the same staff worked with young people and adults, leading to no meaningful differentiation between them (Santibáñez, Alarcón 2009; Werth 2013). A minimum of one year was added to imprisonment sentences and the maximum was raised to five and ten years accordingly, a series of diversion measures effectively disappeared, institutionalization was added as a possible sentence option for more offenses, the elements of restorative justice were removed, and the age to be considered as penally liable for offending behaviour was set at 14 years of age (Congreso Nacional 2005; 2007). As a result, the number of young people in custody increased, even during times when detentions decreased, and imprisonment has been widely used despite other measures being available (Langer, Lillo 2014; Radiszcz et al. 2018).

5. Discussion

Populism has been described as both a possible threat or a corrective to democracy (Mudde, Rovira Kaltwasser 2012). In the Chilean case, it acted as a diversion of what democracy required. The right-wing was not willing to accept their past mistakes, and the government was also at fault, as the impunity of the Armed Forces, the lack of justice for the Human Rights violations and the legacy of the dictatorship continued under their rule (Hilbink 2007; Borzutsky 2017). Therefore, there was particular interest in diverting attention away from all outstanding issues from the past, both to avoid criticisms, and to return themselves to the centre of the political landscape as the main actors.

The Chilean political elite needed to find new ways to engage the citizenship and gather electoral support. This need became even more prominent after two radical political changes in such a short span of time

(from democracy to dictatorship and then again to a new electoral democracy), as citizens had lost trust in political participation. There was a distance from political life in the new democratic order, where Chile before the dictatorship had been characterised by high levels of civic participation, there was now barely any participation (Constable, Valenzuela 1993; Huneeus 2000). In consequence, the right-wing needed to legitimize their position as a valid democratic opposition, distant from their previous violent practices. Similarly, the governing coalition had most of the support, but around 40% of the electorate had voted for the authoritarian regime to continue. They needed to prove they could rule, and that democracy was a better option. Perhaps this last element sounds obvious, but the authoritarian regime had permanently criticized both democracy and politicians, pointing them as unable to rule the country (Constable, Valenzuela 1993; Lawson 2005).

The result was a discursive reduction of the social, economic, political and moral debts left by the dictatorship and the resulting uncertainty, instability and increased concerns over daily life in a new democratic order, towards crime in general and youth offending specifically. What is more, the expansion of a punitive populism at times of transitions from authoritarian regimes has been previously described in Latin America (Bonner 2018). A story in which fear of crime, security concerns and worries about youth crime are created by the right-wing elite, and quickly adopted by the government can be also found in what Máximo Sozzo (2016) has described as populism "from above", when talking about similar issues in Argentina, where concerns started not from the people, but from the authorities in their efforts to legitimize their position.

Youth justice reform provided the political elite with a powerful topic to criticise the government or the opposition and to win votes (Álvarez 2014). At the same time, it allowed them to state their support towards the protection of human rights in general, by granting due process and the rule of law to those who presented offending behaviour. It also gave strength to statements of commitments towards the protection of citizens and their rights, and towards more modern and efficient ways of crime control, different from those applied under authoritarianism. As such, both Concertación and the opposition tried to appeal to the general population by presenting themselves as protectors, as ready to address citizens' concerns while implying the current authorities had failed to do so.

In this context, resorting to an elite form of punitive populism spread by the media makes sense, as it makes it harder to identify who is in fact leading the political discussion, which voices are being heard, and who is benefited by it (Andrade 2020). It becomes even more ambiguous when considering that the populists are the ones defining "the people", who the

enemy is, and what demands exist to overcome the situation (Mudde, Rovira Kaltwasser 2012).

This populist punitiveness becomes more evident as a political tool when keeping in mind that none of the actors had the intention of altering the status quo or changing the establishment, as the political elite has remained mostly the same until recent years, and the latter changes have little to do with crime control and youth offending but with the legacies of the dictatorship. Chilean politicians only used it to position and validate themselves as a better option than those already in the government. However, citizens were never really seen as an active part of the political order. References to "the people" were only used to give weight to otherwise weightless claims. Therefore, what predominated at the end were the controlling, "responsibilizing", individualizing, and punitive approaches of the authoritarian past. This dragged the lack of commitment to human rights into modern times and led to a new and more modern punitive youth justice.

As a result, the legacies of the dictatorship in terms of political system and elite, social and institutional burdens from the past, and through the influence of authoritarian logics such as the widespread focus on control and efficiency (Fortete, Cesado 2009) heavily impacted this reform process. These effects were hard to counter, as new penal logics, research, and the development of new approaches to deal with crime control and justice had been not permitted in the past, leaving the country with a wide gap in those topics and the normalization of practices such as assigning individual responsibility. And thus, Chile followed the punitive turn described in many other countries from Latin America and the global north (Newburn, Sparks 2004; Dammert, Malone 2006; Pinheiro 2007; Becket, Godoy 2008; Muncie, Goldson, 2012; Chaney 2015).

Conclusion

This article has shown how youth offending attained an unprecedented political position from the mid-1990s onwards in Chile, and how this position was the result of a political strategy that favoured punitive populism. It has also stated how the reform took a more punitive direction by following politicians' heightened claims, supported by statistics of right-wing think tanks based on "data" from a country with no reliable measurement system prior to the 1990s, and a media heavily permeated by right-wing ownership and ideas.

The Chilean case allows to it to be seen, in practical terms, how the dynamics of elite-driven penal populism use the voice of the people in order to maintain the status quo, for example, by reducing all social issues to one single aspect. Moreover, it evidences how the populist strategy is not necessarily concerned with democracy, with representing the those left

unheard, or with challenging the establishment. Instead, it can be used to support a vicious circle of ever-increasing control and violence against citizens, and while acting under their names, it in fact silences them. The marginalized population becomes even more excluded, and the elite retains unchanged privilege. It is then worth including in the analysis of penal populism that the democratic and authoritarian dynamics of a given locality, as a lack of commitment towards democratic practice may lead to use the voice of the people as a tool to legitimize authoritarian practices and extend them to other aspects of social policy, thus normalizing such practices. In this sense, the strengths and weaknesses of democratic order should also be considered, in which elements such as accountability, space for civic participation by the general population, and ways for citizens to express their views and to be aware of how local institutions work, become essential. Chile lacked these elements, and as a result, the discursive commitment to children's rights in practice eventually became further exclusion and control, while the fears and needs of both the general population and young people remain unaddressed.

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(Penal) populism and experts in the age of the digital crowd wisdom

(Penalny) populizm i eksperci w czasach cyfrowej mądrości zbiorowej

Abstract: Disregard for scientific facts and knowledge holders has usually been identified as a distinguishing feature of the politics of penal populists. But is penal populism always anti-intellectual? In this article, I provide some deeper insight into the role of expertise in (penal) populist activity, especially in the context of the currently observed redefinition of expertise (some call it "the death of expertise") and the rapid development of new technologies that enable easy aggregation of citizens' collective wisdom. Will "crowdlaw" platforms prevent (penal) populism? Or will they strengthen it, by facilitating justification of radical and unnecessary changes in (criminal) law? Is there a place for traditionally conceived experts and established knowledge in the crowdsourced law-making process, and if so, what should be their role?

Keywords: crowdlaw, crowdsourcing, penal populism, e-participation, law-making

Abstrakt: Lekceważenie wiedzy eksperckiej oraz jej posiadaczy jest zwykle identyfikowane jako wyróżniająca cecha penalnopopulistycznej polityki. Czy jednak w istocie populizm penalny jest jednoznacznie antyintelektualny? Artykuł jest próbą zaprezentowania roli ekspertyz w działalności populistów (penalnych) w kontekście obserwowanej obecnie jej redefinicji i szybkiego rozwoju nowych technologii, które umożliwiają łatwe agregowanie zbiorowej mądrości obywateli. Czy platformy crowdsourcingowe będą przeciwdziałać (penalnemu) populizmowi? A może raczej

wzmocnią go, ułatwiając uzasadnianie radykalnych i niepotrzebnych zmian w prawie (karnym)? Czy crowdsourcing w tworzeniu prawa pozostawia miejsce dla tradycyjnie rozumianych ekspertów i wiedzy naukowej, a jeśli tak, to jaka powinna być ich rola?

Słowa kluczowe: crowdlaw, crowdsourcing, populizm penalny, e-partycypacja, tworzenie prawa

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(Penal) populism and experts: A closer look

Disregard for scientific facts and knowledge holders has usually been identified as a distinguishing feature of populist policy. When analyzing various types of populism, and what, if anything, they have in common, Canovan (1981) points to two essential aspects shared by the majority: the exaltation of "the people", and anti-elitism, manifested as a distrust of professional politicians, disgust with representative democratic institutions and the very idea of representation, as well as anti-intellectualism. For Wiles (1969), anti-intellectualism and hostility towards science (contrasted with the confidence in the common-sense wisdom of ordinary people and their ability to govern) are essential elements of what he calls the populist syndrome. According to Taggart (2002: 76), disregard for experts is typical of the populist "politics of simplicity", which should, in theory, reflect common-sense folk wisdom. Populist rhetoric relies on transparent and simple messages (both with regard to their form and content), as opposed to complicated, and therefore suspicious, elitist jargon and expert newspeak. As Canovan (1999: 6) puts it, "Populists love transparency and distrust mystification: they denounce backroom deals, shady compromises, complicated procedures, secret treaties, and technicalities that only experts can understand". The fact that populists invite distrust (to say the least) of expert knowledge and distance themselves from it is also emphasized in attempts to define penal populism (Roberts et al. 2003: 88; Pratt 2007: 12–20). As Pratt & Miao (2017: 2) have aptly put it, "Slamming the door in the face of reason, penal populism undermines the very kernel on which modern punishment had been built: the way in which, from the time of the Enlightenment, science, rationality and expert knowledge were expected to outweigh emotive, uninformed common-sense, thereby ensuring that reason outweighed anti-reason in the development of penal policy".

Indeed, penal populism often manifests itself by discrediting those who, while making or applying criminal law, go beyond simply satisfying the public sense of justice, citing humanitarian, scientific, or pragmatic considerations. Penal populist criticism is therefore often targeted not only at the perpetrators of crime, but also at those who do not respect the victims'

right to retaliate and the society's right to live without fear. It is aimed at those academics and practitioners of justice who advocate a criminal policy relying on scientific evidence rather than resentments. "When populism goes on the warpath, among those they wish to strike are the 'overeducated', those who are 'too clever', 'the highbrows', the 'longhairs', the 'eggheads', whose education has led them away from the simple wisdom and virtue of the people" (Shils 1956: 100). Scientific integrity or inquisitiveness in rationalizing the solutions proposed in the justice system or criminal policy is often presented as a sign of excessive meticulousness and over-intellectualization. Marginalization of expert knowledge in the criminal law-making process can take various forms, including:

- a decision not to appoint expert teams to draft criminal law acts,
- a decision not to submit draft legal acts to experts for an opinion, or consulting a biased selection of entities for their opinions,
- disregarding submitted expert opinions or considering them in a selective manner, for instance by focusing on scientific data which only serves to support the assertions made, ignoring those that prove them false; complete lack of or a superficial reaction to critical comments or suggestions included in expert opinions as to the content of legal regulations (by treating them in a perfunctory manner or completely ignoring them),
- omitting scientific evidence in the rationale attached to proposed draft amendments, which would justify the need for or choice of the solutions suggested for adoption, including doctrine analyses, results of empirical studies, statistical data relating to, for example, the current state of affairs or trends in the area to be regulated, effectiveness of the proposed methods, and so forth (Szafrańska 2015: 153–154).

These and other forms of downplaying the role of experts and expertise in the law-making process can be seen both in relation to the diagnosis of the factual and legal background that would justify the postulated amendments to existing laws, and in terms of the proposed remedies (interventions). Obviously, local legislation sets limits to a certain extent here, as it can legally secure specific forms of mandatory participation of experts in the law-making process. Nevertheless, cases of more or less ostentatious circumvention of these legal barriers are not at all uncommon. For instance, over recent years in Poland, a whole spectrum of methods to blatantly disregard the law and good legislative practice have been witnessed: controversial draft amendments were submitted as parliamentary rather than governmental proposals in order to avoid using a more restrictive legislative path; regulations on fundamental issues relating to the state system or sensitive from the perspective of citizens' rights and freedoms were passed late at night within a time frame precluding any reflection and debate (not only among experts) on the changes to be

introduced; time and again, only those experts who supported uestionable amendments were consulted, while critical voices were dismissed without comment. As a result of frequent application of separate procedures and, as Jaroslaw Kaczynski bluntly put it, simply "without any procedure" (Polish: *bez żadnego trybu*), public consultations were abandoned altogether; for example, in the last year of the government's first term of office (2018–2019), the lower house of the Polish parliament consulted the public on less than two-thirds of the draft laws in progress), and the average duration of such consultations was less than 12 days. In the course of work on the amendments to the Penal Code (in June 2019), a peculiar and unprecedented situation occurred when the Minister of Justice threatened to sue the experts who had issued a critical opinion on the draft law presented during the parliamentary session (*Ustawa* 2019; in English see also: *The constitutional* 2016; Jońśki, Rogowski 2020).[32]

Aversion to experts is also recognized as one of the key features of (penal) populist political discourse (Canovan 1981; Taggart 2000; Mudde 2004; Pratt 2007; Wodak 2015). A typical populist rhetoric serves to create a simplified and, at least superficially, coherent vision of social reality in the citizens' minds. Populists offer the illusion of a shared world in need of repair, and maintain the impression that their actions are taken in the public interest. They usually present a highly pessimistic diagnosis of the state of democracy and public security, and at the same time propose optimum remedies in line with public expectations. So far, the researchers' considerations have lead to the conclusion that the penal populist style of communication originates primarily from Manichaean optics, introducing a division into two dichotomous groups: (1) the fundamentally evil, cynical, cruel criminals versus the oppressed, fearful people, and (2) the over-intellectualized political and scientific elites insensitive to human tragedy versus the people, as the holders of wisdom enabling them to distinguish between justice and injustice in the most reliable way. Examples of downplaying the importance of experts and expertise, which manifest at the level of language use, include: various methods to discredit and insult experts in the field of combating and preventing crime, undermining their role in penal policy-making, as well as downgrading the relevance or credibility of the outcomes of scientific research and statistical data; grandiloquent dramatization and emotionalization of the discourse on crime and punishment, which casts doubt on the need to consider rational arguments when they are at odds with emotive arguments; or, finally, the

[32] Although Poland can be seen as slipping into authoritarianism rather than populism (while the boundaries of the latter term are extremely blurred) the outcome of disregarding experts in the law-making process does not have to differ significantly within these two political styles.

reference to "facts we all know" while disregarding scientific evidence on the state of security, fear of crime, social expectations, and so forth, which is a reference to the so-called apparent obviousness (Szafrańska 2015: 45–67).

But is penal populism always and unequivocally anti-intellectual? While many activities characterized as penal populist undoubtedly have this quality, it doesn't seem to be constitutive of penal populism (or populism in general). Despite a frequently declared aversion to the intellectual establishment, many (penal) populists use expertise to legitimize their decisions, for instance by involving "real" experts in law-making processes, using their own expert support and, quoting research results and statistical data, with greater or lesser accuracy. Populists (including penal populists) appear to display an opportunistic rather than a clearly hostile attitude toward experts and scientific research. Therefore, they are not opposed to intellectuals and the outcomes of their work a priori, but eagerly include counter-expert arguments as a tool when scientific knowledge turns out to be an obstacle to the projects they strive to push forward. They exhibit an opportunistic approach to expert studies, using scientific evidence only to corroborate their hypotheses and not to actually verify them.[33] They are also eager to partner with all sorts of quasi-experts or just their own experts (properly ideologically oriented but not necessarily evidence-oriented) who use scientific jargon to justify controversial legislative actions taken by politicians. To reinforce their prestige or credibility, they readily resort to references to more or less precise empirical evidence or alleged statements

[33] This attitude to facts and research evidence is actually rather common for modern politics as such, not only for (penal) populism. The problem becomes even more complicated when it is noted that many contemporary applied research (including those meeting all methodological rigors) is more or less involved in the political and cultural "wars of ideas" (Rich 2004). It is perfectly illustrated by the contemporary scientific discussion on the "blurred nature" of think tanks. Although most of these organizations are defined as being apolitical or neutral in terms of worldview, research reveals how often they are driven by an ideological agenda or simply involved in a relationship with a research sponsor that can itself influence the freedom to conduct research. It is argued that think tanks, with a great and ever-growing influence on implemented public policies should not be "no longer be seen as legally independent, scholarly-like, autonomous free-thinking bodies "(Stone 2013). At least some of them differ little from advocacy organizations promoting specific points of view and preordained policy prescriptions (Rich 2004; on bias in think-tank research see also: Kavanagh, Rich 2018; Bland 2020). These problems will not be raised further in the text: due to their complexity, they certainly deserve a separate comprehensive study. However, while reading further considerations, one should not forget about the complex nature of the relationship between research and policy making institutions.

of doctrine (Czapska 2008; Turner 2014).[34] Taken out of context and selectively presented, or given a biased interpretation, they become the key argument for controversial legislative projects.[35] What we might be confronted with here is the fabrication of complete source information by way of: abridgement or selective presentation of certain useful fragments, while omitting inconvenient information; embellishment of source information in order to "dilute" unfavorable facts; addition of comments which distort or undermine the content of such information or question the credibility of its sources, and so forth. This type of rhetorical activity should certainly be deemed a manifestation of *argumentum ad verecundiam* – an unreliable appeal to authority, involving a reference to unspecified sources which may automatically instill trust. It serves to lend respectability to the statements being made and, at the same time, to weaken critical arguments from the audience, challenging the position of the opponents, who then find it more difficult to contradict such apparently reliable expertise or statistical data.

[34] Empirical analysis of the law-making discourse presented in other works published by the author of this article has made it possible to draw such conclusions for a certain part of the Polish political reality (Szafrańska 2013; Szafrańska 2015).

[35] A special role is played here by quantitative opinion surveys on attitudes toward crime and punishment, fear of crime, or victimization experiences, which in some countries have gone as far as to become part of the institutionalized practice of reinforcing the punitive nature of the justice system (Turner 2014).

The question of populists' ambivalent attitude toward expertise is nowadays becoming even more complicated. The key slogan of all sorts of populists has always been that politics has escaped popular control and that popular control, as the essence of the democratic system, must be restored (Canovan 2002: 27). This objective was to be achieved by ensuring that, to the greatest extent possible, the will of the represented is binding on their representatives, or by providing procedural mechanisms for much broader, and above all decisive, public participation in the exercise of power (for instance, in the form of binding referendums, plebiscites, a wider scope of citizens' legislative initiatives, mandatory and binding public consultations). Such slogans, although they allow politicians to gain popularity among citizens who are convinced of their own powerlessness, do not usually go beyond mere declarations. In the case of criminal policy, these actions may amount to simply or even superficially satisfying the 'populist punitiveness' of citizens (Bottoms 1995: 40), encouraging punitive laws and decisions in response to more or less reliable indicators of public expectations in this area. Time and again, politicians tend to respond to stereotypes, resentments, alleged or even artificially created needs (postulates) rather than to the actual and empirically verified expectations of citizens. However, politicians also happen to be "led by extraparliamentary forces which claim to speak on behalf of the public at large. In these respects, various lobby and pressure groups, usually coalescing around single issue politics and drawing on grass roots support, while deliberately eschewing advice from academics or penal officials, represent something more substantive than mere ethereal sentiment or mood" (Pratt, Clark 2005: 304). Pratt (2007) believes that the essence of penal populism precisely comes down to this change in the forms of communication between authorities and citizens, whose representative bodies are encouraged to make their voice heard and actively participate in penal policy-making. While this was indeed a milestone in realizing the populists' slogans of restoring grass-roots sovereignty (and at the same time a millstone around the neck of evidence-based criminal policy), it was in many cases still a far cry from the ideals of plebiscitary democracy so cherished by populists.

Over the last decade, we have seen a breakthrough in this area, driven by the rapid development of new technologies that make it considerably easier to aggregate and share "the will of the people" and use it in law-making processes. Recently developed nationwide or local crowdsourcing and crowdlaw-making platforms offer unprecedented opportunities for the direct individual involvement of citizens in the law-making process. Moreover, these rapid and constantly evolving technological developments are accompanied by the currently observed redefinition of expertise (some even call it "the death of expertise") and democratization of knowledge or,

as some pessimistically see it, a prevalent "narcissistic and misguided intellectual egalitarianism" (Nichols 2017). Amateur messages are increasingly treated as equivalent to expert messages, or perhaps even more valuable, as they are not proclaimed ex cathedra, but rather established by way of agreement and discussion, derived from real life experience and not from abstract analyses. Proponents of the idea of involving amateurs in the generation of "collective intelligence" claim that the internet breaks the monopoly of scientists as the source of reliable and credible information, as groups of passionate non-professionals are equally capable of creating messages of similar informational value (Szpunar 2012: 50). However, skeptics describe the products of such activities as "massive ignorance" and point out that "amateurism, rather than expertise, is celebrated, even revered" on the internet, while "what defines 'the very best minds' available, whether they are cultural critics or scientific experts, is their ability to go beyond the 'wisdom' of the crowd and mainstream public opinion (…)" (Keen 2007: 45, 37, 44). Regardless of where we stand on the involvement of laypeople in the process of generating social knowledge, it is now a fact and is increasingly gaining in importance, including in the areas of political decision-making and law-making processes. This means that the traditional populist division between on the one hand, an over-educated, privileged intellectual elite detached from everyday life and holding absolute knowledge, and on the other, a common-sense, simple people, is becoming blurred. As a result, both (penal) populists and those who are closer to rational (penal) policy face a new challenge, and the manner in which we address that challenge may be crucial to how (if at all) the current model of political involvement of citizens in political and law-making processes, which calls for changes, will evolve. Are we witnessing a significant change that brings us closer towards the ideal of democracy and more aware citizens' involvement in (criminal) policy decision-making? Or is it just a direct-democratic window-dressing, implemented here and there to create the illusion of participation?[36] Will it prevent

[36] Although the development of crowd law platforms and other e-democracy initiatives over recent years is well documented (see the sources cited later in the text), the real sovereign influence over the law through crowdsourcing can be very diverse. It depends on many factors, ranging from the functionality of a given platform, how politicians are bound by the decisions made by citizens, the degree to which the political culture is conducive to participation, the rules governing who and under what conditions can decide on subjects for civic deliberation, and finally organizational and financial possibilities, which affect the "processing capacity" and the quality of the platform's operation (some of these issues will be discussed in more detail below). Equally important is the interest in participation from the citizens themselves, and this - at least so far - can be observed in a rather small percentage of the population. Thus, although the trend of citizens' political activity moving to the virtual space is clearly visible (see below for considerations on

(penal) populism? Or will it instead strengthen it, making it even easier to justify radical and unnecessary changes in (criminal) law thanks to online tools enabling participation in the law-making processes? Is there a place in this model for traditionally understood experts and established knowledge, and if so, what should be their role and what will be the relevance of crowdsourced knowledge?

Crowdsourcing in law making: Goals and tools

CrowdLaw is intended as an alternative to traditional law-making procedures, which primarily involve politicians and legislators. This umbrella term covers various manifestations of the application of new technologies to collect and potentially use the knowledge and opinions of citizens. It is an open call for anyone to participate in an online task in the lawmaking process (Simon et al. 2017). The idea is to improve the quality of adopted regulations, their social legitimization and, consequently, also the effectiveness of the law. The ambition of the advocates of this form of social participation is to create norms which are "more effective because they bring in more diverse ideas, more legitimate because they are done with broader participation [and] more accountable because the lawmaking process becomes subject to greater scrutiny" (Root 2015). Naturally, academic discussion on the principles of effective law-making discourse and the various methods of increasing public participation in the law-making or, more broadly, public decisionmaking processes is nothing new, and has been ongoing for a long time. In the CrowdLaw model, however, deliberation is intended to mitigate the weaknesses associated with existing forms of participation. To start with, they mostly rely on direct and personal involvement of relatively small groups of citizens. This often means that the views of all those affected by the regulation being discussed are not truly represented, while the financial and organizational costs are sometimes disproportionate to the benefits gained. The distinguishing feature of the forms of participation such as CrowdLaw is that it is scaled up to the masses: usually there is no limit on the number of people encouraged to make their voice heard. By using widely available technologies and social media concepts well known to internet users, citizen engagement is meant to be open, asynchronous and depersonalized. Free access open to anyone interested in the process is also seen as an opportunity to give voice to different social and interest groups, and to paint a more nuanced picture of the regulated sphere of social life. Moreover, once the optimum infrastructure and procedures are in place, the costs of engaging large groups of citizens in the debate will become relatively small.

"networked citizenship"), currently it is still relatively rarely reflected in quite demanding forms such as CrowdLaw.

Secondly, even if the traditional policy-making or law-making process allowed for the involvement of citizens on a larger scale (regional or national), it was mostly limited to taking a position for or against the proposed solutions or variants thereof (popular initiatives, referendums), or to make non-binding comments (public consultations). Deliberative portals such as CrowdLaw usually combine several functionalities, enabling the engagement of citizens in various types of activity at different stages of the legislative process:

- issue framing, namely pointing to problems to be regulated and to the directions of such regulations (for instance, internet petitions, online voting – primarily at the local level or in the case of initiatives of political parties),
- sharing ideas, namely offering ideas for new, optimized solutions, usually by drawing on practical knowledge or on personal or professional experience associated with the subject of regulation; what counts here is not only the creative contribution of laypeople, but also ideas submitted by citizens who are specialists, drawing on their in-depth knowledge of a given business sector or expertise gained abroad,
- providing information/technical expertise via portals dedicated to sharing and aggregating scientific data and expert knowledge, as well as announcing the requisition of such knowledge,
- formulating opinions on proposed regulations, for instance via websites and applications which support online discussions, exchange of arguments (discussion forums, applications such as Deliberatorium, Consider.it, Regulation Room, online transmissions allowing to add comments or hold discussions in real time),
- drafting bills, namely creating, developing and adjusting the content of draft legislation with the use of programs supporting remote collaborative work on the text,
- decision-making through binding or non-binding online voting and online referenda,
- monitoring implementation and evaluation.

Such numerous and diverse opportunities for participation in political decision-making seem to greatly foster the political activation of citizens and the development of civil society. However, it should be emphasized that this is not the main objective behind the CrowdLaw idea. As emphasized by Alsina & Martí (2018), "The main focus is in the quality of the law and decisions made. It emphasizes the institutional design needed to digest all collected knowledge and put at the service of better decisions, not merely the design needed for individuals to participate. Thus, it is participation for the sake of a greater quality and effectiveness of the law and public decisions, not for participation's sake" (see also Noveck 2018). To sum up, the CrowdLaw model seeks to provide, through electronic tools,

an opportunity for institutionalized, direct citizen participation in important legal and political decisions. It can be implemented on both local and national levels, on the initiative of political parties or state bodies, or entirely at the grass-roots level.

This article does not offer enough space to discuss all major initiatives of this type, so I will only present a brief description of two of them, which are successfully, albeit not without obstacles and disruptions, operating on a nationwide scale and are considered to be among the most advanced tools of that type (Noveck et al. 2020). It should be noted, however, that a lot of tools are currently being developed all over the world, and the empirical evidence presented so far shows their considerable ability to transform the somewhat exclusive existing procedures of law-making and political culture.[37] I hope that this (unavoidably) synthetic description of the chosen initiatives will at least roughly illustrate the multitude of available tools and forms of citizen involvement in the law-making process and, most importantly, provide insight into a new quality in comparison with earlier methods used to stimulate social participation in political decision-making. Currently, the world's most advanced system of tools used for that purpose is probably the vTaiwan platform.[38] It was created in 2014 from the initiative of a group of activists operating under the name g0v, and consistently developed over the next several years with the support of the government – but, importantly, independently of it.[39] vTaiwan is a database

[37] A general, structured description of more than a hundred such ventures was created by researchers and activists from around the world as an initiative of The Governance Lab at New York University and is available online as CrowdLaw Catalog (*CrowdLaw* n.d.). The portal includes brief descriptions of each crowdlaw case and is searchable by four criteria: level of government involved (national, regional and/or local), stage of the law-making or policy-making process (problem identification, solution identification, drafting, decision making, implementation and/or assessment), materials that people are asked to contribute (ideas and proposals, expertise, opinions, evidence and/or actions) and technology used (web, mobile and/or offline). For a more detailed description of several selected examples of crowdsourced law-making from around the world, see the playbook *Crowdlaw for Congress. Strategies for 21st Century Lawmaking* (Noveck et al. 2020).

[38] The portal is available at: https://vtaiwan.tw/ [10.05.2021]. The description (in the English language) of its objectives and activities to date can be found at: https://info.vtaiwan. tw/ [10.05.2021].

[39] In 2014, Taiwanese parliament was occupied by peaceful protesters (later dubbed the Sunflower Movement) in response to a proposed trade deal with China. During the protests, an activist group called g0v created a number of digital tools to help communicate and coordinate the protests. The new government (replacing the previous government which stepped down as a result of protests, among other things) proposed that g0v volunteers use the tools and social capital they had created to develop an online citizen consultation system that would be supported by the government but managed by volunteers.

that compiles all the important information on legislation being passed (for instance, the content of drafts, expert opinions, videos of politicians' speeches, transcripts of past discussions and meetings) and also a discussion forum. In addition, to ensure quick exchange of information and views, the platform has embraced and adapted many widely known internet applications and tools (such as Typeform, SlideShare, Discourse, GitBook, Slido, YouTube), which are employed depending on the form of participation selected by the portal's personnel. These forms differ depending on the current deliberation stage of the project, namely: the proposal stage, opinion stage, reflection stage or legislation stage. Importantly, in order to ensure an exhaustive discussion on the draft regulations under debate, the portal administrators are required to ensure that various viewpoints are represented (by representatives of NGOs and urban movements, citizens, researchers, practitioners, businesses, and so forth). In most cases, the consensus reached by citizens via the portal – 200,000 people have so far taken part in vTaiwan discussions (Horton 2018) – has been respected by the Taiwanese parliament, at least for some time. In 2017, the government's National Development Council created a new, this time entirely state-managed, portal for e-participation – Join. This is a comprehensive platform on which citizens can discuss existing policies, propose new policies through on-line petitions and give feedback directly to the heads of government agencies (Hierlemann, Roch 2020). Nearly five million of Taiwan's 23 million inhabitants are already on the platform (Horton 2018).

The second example is E-Democracia,[40] an internet portal founded in 2009 in Brazil by an initiative of the lower house of Brazilian parliament (Câmara dos Deputados). The objective declared by the portal's creators was to enhance citizens' understanding of the relatively complicated procedure of national law-making, as well as to ensure greater transparency and public participation in the process. To that end, the portal employs three tools: legislative communities (*comunidades legislativas*) – theme-specific discussion spaces devoted to current legislative initiatives (there are usually about twenty of them, including those concerning corruption and cybercrime), offering discussion forums, video conferences with MPs or surveys on specific proposals; the so-called "free space" (*espaço livre*) – an additional discussion space dedicated to all matters that are within the competence of the lower house of parliament, but do not as yet have their own dedicated legislative community; and Wikilegis – a tool for the collective online creation of and commentary on draft legislation. In 2013, the initiative struggled with a lack of interest from both citizens and politicians. A hackathon was therefore organized, bringing together, among

[40]The portal is available at: https://edemocracia.camara.leg.br/.

others, IT specialists, MPs and NGO representatives, in order to brainstorm ideas for improving the functionality of the available IT infrastructure. The event was such a great success that the parliament decided to create a permanent internal unit (LabHacker), which continuously develops new solutions to enhance social participation in the legislative process and its transparency. The portal enjoys considerable interest among citizens: in 2020, it brought together about 37 thousand registered users, who left their mark in the form of 52 million page views, 23 thousand posts and 18 thousand comments in interactive events. Public participation in the law-making process is also expected to be additionally enhanced with a free mobile app *Mudamos* (We Change) released in 2017 – another tool that allows citizens to draft their own bills and lobby for support using electronic signature technologies (Konopacki et al. 2020).

A number of electronic platforms and tools are currently being developed around the world to enhance citizen participation in law-making processes in real terms. And although this trend generally seems to arouse more enthusiasm than objections, the arguments of skeptics should certainly not be ignored. The fact is that e-participation tools, when used in an opportunistic, unreflective or incompetent manner, can transmogrify the concept of democratizing law-making into a caricature of itself. This can be all the more conceivable, given that crowdsourced law-making "is still in its infancy" (CrowdLaw 2018), while the attempts made to implement it are so far still referred to in the literature as experiments. Knowledge of "what works" in crowd-law-making is, for now, very fragmented and local. For this reason, the observations presented in this article will not constitute a summary of the outcomes of numerous in-depth scientific studies, but rather an attempt to collect the critical reflections expressed to date on the (un)successful projects implemented, where possible, in the field of criminal law and criminal policy. Identifying key weak points in the design and functioning of similar projects should help to predict whether, and to what extent, CrowdLaw can serve as an antidote to (penal) populist activity by politicians, and what role by expert knowledge as traditionally understood can play in this respect.

CrowdLaw: New challenges for experts in the law-making process

Proponents of the idea of crowdsourcing in law-making point to the problem of a general shortage of information in the legislative process, in a dual sense. Firstly, law-making institutions lack a broad, interdisciplinary

and dynamic expert background which would allow for thorough and engaged discussion of the regulations to be introduced and for more evidence-based decisions. Of course, in the traditional law-making process, expert opinions are often used at the stage of establishing the assumptions of the regulation contemplated, in the drafting phase or during consultations with specialists, but this process is often not very transparent and leaves plenty of room for potential abuse (from the selection of experts involved, up to the willingness of politicians to consider rational suggestions consistent with existing expertise). The impact of the expertise provided is also usually limited to those closely involved in the drafting process, and it is probably not uncommon for parliamentary majorities to find themselves struggling to understand what they have just voted for or against. Solutions proposed in the spirit of CrowdLaw seem promising both in the context of a general improvement of the quality of law-making processes and potential opposition to (penal) populist initiatives of politicians. These solutions include publicly available platforms or procedures for collaboration between researchers representing various disciplines and lawmakers at large, such as the Congressional Science Policy Initiative (CSPI), which was established in the United States in 2019. It is a platform for collaboration between Congresspeople and their staff and the Federation of American Scientists (FAS) which currently has over 600 members. The goal of FAS is to provide "science-based analysis of and solutions to protect against catastrophic threats to national and international security" (*About FAS* n.d.). Researchers representing various disciplines from across the United States affiliated with the Federation assist Congressspeople in compiling key information useful during Congressional hearings. This stage of law- and policy-making process plays an essential role in the process of formulating opinions on often complex and multifaceted legislative issues. At the same time, it rarely involves researchers, and Congresspeople do not have enough opportunities to prepare in detail, due to work overload and sometimes the lack of competence of their personnel (staffers). Basically, CSPI comes down to "matching supply and demand" on a win-win basis: it "provides access to the collective knowledge of a community of scientists from across the nation who, with the support of the FAS, can provide succinct and objective analysis – 'letting the data talk' – and who can suggest questions they can ask of witnesses at Congressional hearings. For scientists, the CSPI offers structured and timely ways they can influence policymaking, by shaping the discussions held during Congressional hearings" (Noveck et al. 2020: 2). [41] Some expert

[41] FAS staff and affiliates use the website to help Congress staffers collect and organize a variety of electronic scientific data and information (news articles, reports, podcasts, etc.) that may be useful at a hearing on a particular subject. The FAS scientific community

crowdsourcing projects in the field of crime reduction are also implemented by The College of Policing in the UK: the What Works[42] Centre for Crime Reduction, np. Policing and Crime Reduction Research Map, Cross-Government Trial Advice Panel. Similar initiatives aimed at achieving a more informed policy discussion on new legislation thanks to the collective intelligence of the academic community are being developed in various ways in other countries as well.[43] As long as there is free access for researchers and a free exchange of ideas, and politicians are ready

is then asked to provide their expertise and suggestions for questions to be asked during the hearing. Additionally, CSPI crowdsource evidence-based technical assistance on legislation developed by Congressional offices or Committees and organize councils of experts to advise Senators and Representatives. A detailed scope and description of CSPI's policies can be found at: https://fas.org/congressional-science-policy-initiative/ [10.05.2021].

[42] The What Works Network is an initiative aims to improve the way British government and other public sector organisations create, share and use high quality evidence in decisionmaking. It supports more effective and efficient services across the public sector at national and local levels. See: https://www.gov.uk/guidance/what-works-network [10.05.2021]. For more information on What Works Centre for Crime Reduction, see: https://whatworks. college.police.uk/About/Pages/default.aspx [10.05.2021].

[43] In Australia, the Evidence Check Rapid Review Programme is in place under which urgent reviews (a synthesis, summary and analysis of available research) regarding the possibility of regulating a specific problem or other specified issues are commissioned by public entities (Moore et al. 2018). The Evidence Check procedure in the UK Parliament is another interesting example. A government representative who is an owner of a particular legislative initiative is required to answer the following questions: 1) what is the policy about? and 2) on what evidence is the policy based? The government's position is then reviewed and evaluated by the Science and Technology Committee and published online to enable discussion on an internet forum. Both organizations and institutions to which the regulation may apply as well as "ordinary" citizens are invited to participate (Noveck et al. 2020: 156–159).

to use them in an unbiased and not only symbolic way,[44] it seems that they can be conducive to improving the quality of the law-making process and curbing the populist proclivities of politicians.

The aforementioned shortage of information usually affects citizens who are encouraged to participate in legal decision-making to an even greater extent. Better access to information resources, including specialist information, which are growing at an exponential pace, does not translate automatically into better-informed citizens. Information overload (also known as, among others, infobesity, information pollution, infoxication, information violence[45]), observed even before the era of global networking, is now a widespread and pressing problem. It is not only caused by a rapid increase in the volume of available information, the ease of its reproduction and transmission, or the growing number and capacity of distribution channels. It also results from the fragmentation of messages, contradictions and inaccuracy of published information, typical for virtual space, as well as low information awareness of recipients and poor skills for comparing and processing available content (Babik 2014: 89). Under these circumstances, the incidental and minimal involvement of citizens, who are unprepared on the merits, in decision-making processes concerning criminal policy (or any other issue) will have little to do with democratic ideals. The precondition for real participation of citizens in law-making processes is that they have an enlightened understanding about which of the proposed solutions will best serve their interests, what their goals are, and what the possible consequences will be for themselves and for others (Dahl 1989: 182). Penal populists, by engaging in the above-mentioned "politics of simplicity", are trying hard to give the impression that the creation of criminal law is actually a trivial process – it is enough to follow "common sense" (that is, punish perpetrators severely, isolate them from "normal"

[44] On the underutilization of research and different practices of symbolic or biased usage of knowledge in criminal justice policy-making (Johnson et al. 2018). Of course, the use of open call crowdsourcing platforms does not in itself eliminate the various risks associated with the use of scientific knowledge in the process of shaping public policies. The effect of expert consultations always closely relates to what sorts of disciplines and which particular researchers and institutions are included in these systems and what biases they're imbued with (including training, methods, and their limitations). A certain advantage of crowdsourced law-making over the closed-door one is undoubtedly the greater transparency of the process and a wider space for confronting and discussing different positions.

[45] Other terms used to describe the phenomenon include: overabundance, infoglut, data smog, information fatigue, social media fatigue, social media overload, information anxiety, library anxiety, infostress, reading overload, communication overload, cognitive overload, and information assault. The multitude of these terms and research studies on the subject seem to confirm its prominent position among contemporary social problems (Bawden, Robinson 2020).

people, and so forth). Meanwhile, issues related to counteracting crime, like other strategic areas of activity of the state (economy, education, new technologies), require long-term consistent solutions supported by relevant expertise. Building a crime control system requires a thorough understanding of the structure and dynamics of that phenomenon and taking into account its psychological, economic and social determinants. It is also essential to be able to estimate the consequences of the solutions adopted, not only for the legal system or the practice of the judiciary, but also for other dimensions of social life. Citizens' opinions should be one of the elements of that complex decision-making process. However, it is best to create circumstances where they are formed on the basis of the maximum possible comprehensive data on the legal and factual context and the potential consequences of the contemplated regulation.

As proponents of CrowdLaw-type solutions clearly state, the involvement of collective intelligence in the law-making process should not be merely reduced to conducting surveys or aggregating opinions, especially those based on intuitions, widespread myths and false stereotypes. "It requires a collective process of mutual enlightenment and argumentation, one in which citizens and public institutions must interact dialogically, and can be measured by its epistemic merits, its capacity to make correct decisions" (Alsina, Martí 2018). In the pursuit of that "enlightenment", the digital environment offers a plethora of useful tools which can help citizens feel less helpless when confronted with information pollution. The aforementioned expert portals, which are meant to serve as tools for systematizing and exchanging knowledge to enrich discussions on the merits of the planned changes to existing laws and the status of legislative work, can be of some help. However, the involvement of professional legislative gatekeepers, responsible for the screening, verification and organization of digital knowledge resources, will in many cases prove insufficient. For most users, who do not specialize in penal sciences or criminology, even such pre-processed data may be difficult to digest. Citizens, even those with an activist streak, rarely have enough time and competence to critically analyze scientific articles or research reports on their own. Therefore, in order to ensure real and well-informed public participation in law-making activities, it seems necessary to also entrust experts with a relevant background with the role of disseminators of knowledge, including: preparation of illustrative, comprehensive output data presenting the law-making context and the advantages and disadvantages of possible legal and non-legal solutions; describing and explaining problems and doubts in an accessible manner; clear analysis and presentation of data and its contextualization; participation in discussions,

and so forth.[46] Even if not all participants in the debate are willing to become familiar with the content of such materials, some of the knowledge they contain will be revealed and conveyed during the deliberation process. Perhaps the greatest value of crowdsourcing initiatives lies in creating the "learning moments" (Aitamurto et al. 2014). They do not necessarily lead to a change in views on preferred legal solutions, but they undoubtedly lead to a more in-depth and comprehensive evaluation of available options, also by learning about opposing views. The recent example of a citizens' initiative in Taiwan to reinstate caning as a punishment for repeat drunk driving aptly illustrates this point. The initiative originated as a result of a classic moral panic process which usually precedes penal populist initiatives, following the publicity surrounding several fatal road accidents involving drunk drivers. Supporters of the idea proposed it on the government's *Join* public policy e-participation platform, where it gained well over the required 5,000 votes to be put on the agenda for official consideration. To put the idea to a broader public discussion, the *Pol.is* platform was used.[47] Although initially the participants of the e-discussion seemed to support extreme positions that were difficult to reconcile (in favor of caning, against caning, or in favor of introducing much more severe punishments than caning), over time the discussion took an unexpected turn. In the end, the consensus which emerged from the discussion had nothing to do with its original subject, as the focus shifted to methods of preventing drunk driving or more humane forms of punishment (Horton 2018). Legislative proposals included alcohol locks and confiscating drunk drivers' cars, which came into effect as legal regulations as of 2020 (Wei-chi, Chung 2020).

Obviously, the internet, a medium that is entertaining by nature and oriented towards concise, dynamic, colorful and interactive messages, has accustomed its users to a certain form of communication which, if disregarded, may lead to even the most valuable initiatives failing.

[46] Various methods of communication are used here: from simple forms (infographics, popular science articles, multimedia presentations, discussion transcriptions) to more interactive ones (video-reports, chats, video-chats, webinars, live-streaming of expert panel discussions, and so forth).

[47] According to Participedia (yet another product of collective intelligence), *Pol. is* is "an online tool used to gather open-ended feedback from large groups of people. It is well suited to gathering organic, authentic feedback while retaining minority opinions. (…) *Pol. is* overcomes these challenges and produces meaning from open-ended responses. Using the online tool, participants can express their thoughts, and they can also agree and disagree with the comments of others, in real time. As soon as someone writes, others can vote. *Pol.is* runs statistical analysis on these voting patterns, producing opinion groups and identifying the comments that brought each group together, also in real time. It also surfaces comments that found broad consensus among participants." See: https://participedia.net/method/4682 [10.05.2021].

Researchers who are somewhat more skeptical of digital public participation in law-making or, more broadly, online political participation, perceive it as a threat consisting of "the trivialization of democracy" (Loader, Vromen, Xenos 2014: 148) and an even stronger erosion of the weakened authority of experts. The risk should by no means be taken lightly, but at the same time it must be pointed out that the migration of public political activity to the internet (especially among the youngest generations) is a social fact, which cannot be reasonably denied.[48] Whether we like it or not, "networked citizenship"[18] (Bennett, Wells, Frellon 2011; Loader, Vromen, Xenos 2014) is both the present and future of citizens' political engagement, and turning a blind eye to it is more reminiscent of a populist longing for an idealized past rather than a constructive debate on the development of democracy. Therefore, it is vital to provide networked citizens participating in law-making processes with an adequate space for discussion, to equip them with the necessary and comprehensive yet comprehensible knowledge, and to provide expert assistance in organizing and moderating law-making discussions, drafting bills and evaluating laws. It is all the more important as sometimes it is specific groups of citizens that are the most reliable or even the only source of knowledge about the scale and the desired methods of the regulated problem. For example, in 2016 the UK government carried out a Fact Check on sexual harassment in schools. It generated input from well-informed stakeholders – the student victims' experience of harassment – and led to a revision (upward) of the estimated frequency of harassment, with crowdsourced information being included in a subsequent Ministerial Briefing on the matter (Noveck et al. 2020: 158). Moreover, a review of existing initiatives created in the spirit of CrowdLaw shows that making the message more communicative does not necessarily lead to infantilization, and that the diverse range of available forms of communication as well as knowledge and experience sharing provides many opportunities to transmit useful and comprehensive knowledge without overwhelming or intimidating the audience.

Virtual reality also provides an opportunity to carry out suggestive information campaigns, which can not only sharpen citizens' criticism of penal-populist political initiatives and present more reasonable alternatives thereto, but generally promote the idea of civil society, the involvement of citizens in public affairs and the principles of an effective deliberation

[48] The internet, and social media in particular, create a new public sphere of colossal (and sometimes even decisive) importance. Social media have evolved into a basic channel for communication with citizens and self-promotion activities of politicians. In 2020 leaders of 189 countries (98% of all UN member states) had official social media accounts. Heads of state and government of 163 countries have Twitter accounts, while Facebook records 1,089 private or institutional profiles of political leaders from around the world, with a total of

process based on respect for the opponents' views and openness to their arguments. In the era of participatory culture,

620 million followers (*Twiplomacy* 2020: 2). This contemporary agora is also a place where the political activity of citizens can find its outlet, both in terms of exchange of opinions as well as agitation and mobilization in favor of grass-roots social issues. Their pace and impact can lead to political breakthroughs, as well as to breaking social and political taboos around neglected social problems. This demonstrates the increasingly important potential of the internet in setting the directions of political action and resistance, but also in aggregating and generating knowledge. The ever-increasing involvement, especially among young citizens, in the activities of networked social movements, participation in various social protests, happenings or consumer boycotts, as well as online political discussions, heralds an inevitable change in the current model of citizen participation in democratic processes (Loader, Vromen, Xenos 2014).

[18] Networked citizenship means being ready to act through non-hierarchical, horizontal, initiatives or organizations, rather than traditional political organizations. This model is contrasted with the traditional model of dutiful citizenship in which "a person participate in civic life through organized groups (formal public organizations, institutions), and campaigns, from civic clubs to political parties, while becoming informed via the news, and generally engaging in public life out of a sense of personal duty" (Bennett, Wells, Frellon 2011: 838).

it is as important to educate active users of the media, namely those who creatively change their content and interact with other users, as it is to arouse the criticism of the audience. Empirical studies show many limitations related to digital political participation of citizens, proving at the same time that "the use of digital tools to encourage democratic practices is not simply a 'plug and play' device" (Mitozo, Marques 2019: 373). It is known, among other things, that the involvement of citizens in free online discussions usually has several key features which determine their limited usefulness for the legislative process: comments are often very emotional and general, and participants are more aggressive and prone to polemic due to anonymity (Jankowski, van Os 2004; Papacharissi 2004; Chadwick 2009). There is also a tendency for opinions to polarize and for participants to focus on affiliations and group memberships rather than arguments, reinforced even further by the selection of content profiled based on the user's previous interests (Roy 2012; Duggan, Smith 2016; Goyanes, Borah, Zúñiga 2021). Engagement in various online political initiatives itself, while relatively common, is often short-lived, project-oriented (Loader, Vromen, Xenos 2014: 145), and frequently superficial and symbolic. It also appears that in many cases the engagement is mainly entertainment-oriented rather than driven by a sense of civic duty (Bennett, Wells, Frellon 2011) and self-interested rather than altruistic (Simon et al. 2017: 89–90).[49]

[49] Research on people's motivation to engage in volunteering and other forms of political and social participation (such as involvement in political initiatives, social

Moreover, engagement in political discussions in social media does not necessarily lead to eagerness to participate in other forms of political activity, especially more demanding ones, such as public consultations (Kim 2006).

For all these and many other reasons, effective online public participation in law-making processes calls for the involvement of experts specializing in various fields to make it substantively valuable and sustainable. It is not only desirable to provide users with knowledge on the matters being regulated, as already mentioned, but also to develop their communication, law-making and civic skills and provide expert support in this regard. Based on empirical research, the influence of the platform design and organization on the quality of online deliberation is already known, at least to some extent (Jensen 2003; Janssen, Kies 2005; Friess, Eilders 2015). One of its key drivers is proper moderation and support for citizen engagement during online discussions. In general, citizens are more willing to join moderated discussions (Wise, Hamman, Thorson 2006) and their level, bearing in mind the criteria of rationality, inclusiveness, and respect towards other participants, is deemed to be higher than that of unmoderated discussions (Friess, Eilders 2015). What is extremely important, however, is that moderation requires a high level of knowledge, excellent communication skills, and sensitivity, as manifestations of incompetence or bias may permanently discourage a user from participating in this particular initiative or from participating at all. As Janssen and Kies (2005: 321) rightly point out, "The moderator can be a 'censor' – for example, by removing opinions that are at odds with the main ideology of the discussion space – or he can be 'promoter of deliberation' by, for example, implementing a system of synthesis of debate, by giving more visibility to minority opinions, by offering background information related to the topics etc." Professional management of a debate not only contributes to the creation of more valuable content, but also enables its more efficient aggregation and organization, and translation into a form useful for parliamentary work. LabHacker /E-Democracia in Brazil uses 200 volunteer legislative consultants who stimulate and streamline e-discussions and respond to disruptive user behavior, solve problems using

movements, and so forth) points to personal interest, a desire to make a change, life experiences, family background, exposure to civil society and a desire to make connections or new friends as the most important factors. On the other hand, studies on participation in crowdsourcing projects, such as open source software development or innovation challenge prizes, show that the key drivers include the desire to improve their reputation or develop skills, as well as expected reciprocity or future benefits (preferably tangible, immediate and visible to the wider community of participants). The few studies on the drivers behind engagement in various digital democracy initiatives confirm that a purely altruistic engagement is equally rare here (Simon et al. 2017: 89–90).

the platform, and refer to useful information when necessary. Additionally, with their legal background, they serve as "legislative translators" between citizens and policy makers, translating the solutions developed in the discussion process into legalese.

"When designed well, CrowdLaw may enable engagement that is thoughtful, inclusive, informed but also efficient, manageable and sustainable." CrowdLaw Manifesto (n.d.) which is the source of this quote, repeatedly underlines the importance of the optimum design and management of e-participation platforms with a view to ultimately improving the quality of law. This is a massive challenge for at least three reasons. First of all, knowledge on the subject is constantly evolving and, in addition to purely technological problems, issues related to enlarging the reach of the platforms and enhancing the e-participation experience for both the organizers of the project and its participants (users) also require ongoing evaluation and adjustments. Obviously, a prerequisite here is to offer a user-friendly tool (a software product, a website, an app) that is attractive and intuitive, while at the same time tailored to the complex needs connected with various forms of participation (data crowdsourcing, deliberation, decision-making, bill drafting, evaluation, and so forth). It is possible – and recommended good practice – to use existing technological solutions to that end, but optimum selection and adaptation to the needs of a particular initiative also call for the employment of knowledge and experience. It is therefore necessary to keep a watchful eye on the ever-expanding knowledge about the advances of e-democracy tools and initiatives, and to implement continuous innovation at different levels of the system. For example, we can point to several dilemmas that still require in-depth research and may need to be resolved on an ongoing basis to ensure end success of a given initiative as a whole: How to ensure the representativeness of public opinion? How to reduce the effects of digital exclusion? What tasks should the crowd be entrusted with, at what stage of the law-making process and with which digital tools? How to organize the deliberation process (the question of synchronicity, anonymity, feedback, providing ongoing substantive and technical support, etc.)? How can the system be protected against abuse of policy or from motivated interest groups (e.g. by using bots)?

At the same time, there is now no doubt that even the most eye-catching top-quality interface alone cannot guarantee citizen engagement. "Obviously, there are many other ways for people to spend their time online. Therefore, citizens do not only have to learn about the existence of tools but also understand why engaging actually makes a difference to their lives. In this context, public administrations (…) need to take more bold action when it comes to citizenship education and raising awareness of public decision making" (Grazian, Nahr 2020: 47). Comprehensive

outreach and training activities are needed not only in the area of specific e-democracy tools, as well as the goals and principles of particular initiatives, but also towards a better understanding of local and national political decision-making and law-making processes. It is equally important to promote the very idea of e-participation and crowdlaw-making and the individual and collective benefits they offer (Capone, Noveck 2017). However, a question still remains how to do this effectively, which calls for an in-depth scholarly reflection. The need for certain additional incentives for participation should be also reconsidered, given the aforementioned non-altruistic motivations of those engaging in e-democracy initiatives. Certain limited and rather ambiguous conclusions on this subject can be drawn, for example, from research on the engagement of citizens (employees, consumers) in various creative idea-sharing contest and crowdsourcing initiatives. We know, for example, that the type of prize offered (monetary versus non-monetary), prize amount (low versus high), prize structure (winner-takes-it-all versus multiple prizes), award system (for participation or for novelty/creativity) and the manner of evaluating the contribution (objective versus subjective) may be of significance, with noticeable differences as regards their influence on the users' eagerness to participate, and on the quality of the contribution offered, that is the proposed idea or solution (Acar 2018; Kireyev 2020). We also observe a dynamic increase in knowledge about using gamification to foster e-participation, i.e. designing systems, services, and processes in a way that provides positive, engaging experiences similar to those implemented between gamers (Hassan, Hamari 2020). However, this is still an area in urgent need of future research.

Notwithstanding these complexities, which call for further reflection and experimentation, there is no doubt that broad and diversified engagement in online participation will only be possible if a given initiative manages to win public trust. This is in turn inextricably linked to remaining largely independent of institutional politics and partisan interest groups, and becomes problematic for at least two reasons. First, developing and operating a well-functioning crowdlawmaking platform requires massive financial resources. Even if an initiative emerges from the grassroots, and is funded through private sponsorship, crowdfunding or grants, sooner or later, as its reach and functionality expand, it may require large, guaranteed public funding. Secondly, taking into account the area of activity (law-making), closely intertwined with existing state structures and institutions, having a real impact on the law and thus reinforcing citizens' belief in their power to make a difference practically excludes a genuine separation from politics. One of the basic recommendations for developers of digital democracy initiatives is: "Don't engage for engagement's sake" (Simon et al. 2017: 67). To ensure sustainable citizen engagement in law-making

processes and policy decisions, citizens must be reassured that their contribution has at least been acknowledged and taken into consideration, even if the solutions ultimately adopted do not fully meet their expectations. The only way to achieve this is to ensure broad and cross-party engagement of decision-makers who are willing to participate in the ongoing exchange of views with the users at different stages of the law-making process (the earlier, the better[50]) and to welcome their ideas with openness and real interest.[51]

Merging collective intelligence with established knowledge

And at this point, alongside a real chance for the political reengagement of citizens and social legitimization of law, the greatest potential threat emerges, linked to the inexorably growing importance of digital crowdlaw-making. Due to the immature stage of development of the technology, but also due to its high vulnerability to potential abuse, otherwise legitimate ideals aiming at enhancing the quality of law and its social legitimization can easily devolve into blatant populism. Although many initiatives in the area of crowdlaw-making are developing in a very promising direction, the experience of some countries shows that this direction may easily take a turn along with a change of political views. For example, in Brazil under the presidency of Jair Bolsonaro there are already concerns about the

[50] It is recommended that citizens be involved in the legislative process as early as possible. A sense of empowerment (making a difference) and, at the same time, readiness to become involved will be much higher at an early stage when the assumptions of regulations are being formulated, ideas are being shared or the legal text is being drafted, rather than merely giving an opportunity for citizens to express their views on ready-made solutions after they are formulated.

[51] The most intuitive way to empower citizens is to reassure them that their decisions will be binding on the rulers. However, this is not always possible or desirable. Other methods include: engaging citizens at an early stage in the law-making process, providing citizens with clear, easy access to information about the next stages of the crowdlaw-making process and – probably the most important – comprehensive feedback on their proposal. As emphasized in the evaluation report on the crowdsourced off-road traffic law experiment in Finland: "Maybe the main difference between the traditional law-making process and this new one will be that both the idea-generating and the evaluating crowds will receive a reasoned justification from the law-makers as to why their ideas were integrated into the law, or rejected. Public justification is a core ideal of deliberative democracy and we trust that public shared reasoning will ensure transparency in the law-making process. If this part of the experiment is done well, we believe it will keep the people motivated to participate in further crowdsourcing experiments" (Aitamurto et al. 2014: 83).

possibility of instrumental use of the platform for populist purposes (Noveck et al. 2020: 136) and more general concerns that the state is "sliding into techno-authoritarianism" (Kemeny 2020). Similar suggestions – this time under the label of "high-tech populism" – also appear for another CrowdLaw project with a wide reach (over 7.8 million registered users), namely MyGov India (Zain 2019). Solutions so strongly pertaining to the idea of a plebiscitary democracy provide a fertile ground for populist instrumentalization. After all, these initiatives work as per their grand assumptions only for as long as there is the political will to do so, and for as long as thinking in terms of the public interest (and not in terms of partisan or particular interests) prevails among political decision-makers, with the will to implement solutions that are genuinely effective and necessary (and not merely politically profitable). Otherwise, virtually all the populist efforts mentioned in the first part of this article can easily serve to undermine the collective efforts of crowdlaw makers. It is enough to question, for instance, the democratic nature of the process, the security of data collected, or the objectivity of moderators or educational materials. It is therefore extremely important to consider not only the design and management of e-participation tools, areas which currently receive most attention, but also give more thought to the socio-political context of e-participation. It is not sufficient to provide a user-friendly system which works very well under a general pro-democratic consensus, but to make it as stable and resistant to populist abuse as possible.

Therefore, the sustainable success of CrowdLaw-type initiatives depends on building a stable "network of public managers and officials, legal scholars, political theorists, computer scientists, platform and app makers, and activists to design, implement and evaluate new tech-enabled practices of public engagement in law and policymaking is fundamental to coalesce the nascent CrowdLaw community for mutual learning and collaboration and in support of more research in the field" (Alsina, Martí 2018: 347). Ultimately, they should focus on embedding new crowdsourcing, deliberative forms of law-making into existing public structures and state regulations as well as political culture, thus making it "the new normal" (Simon et al. 2017: 91). This is a challenge for society at large, in particular for policy makers, scholars and experts representing various fields of study, and for citizens themselves. The former will be responsible, when the time comes, for "opening up the 'black box' of legislative processes": shaping a new culture of political debate assuming ever-increasing transparency of political processes, a strong emphasis on an open dialogue with citizens, creating a system of public (but at the same time apolitical) support for e-participation platforms, increasing the importance of scientific evidence in the law-making process, and the evaluation of public policies and impact studies for regulatory changes

(Simon et al. 2017: 85). Many initiatives of this type have emerged in response to a political crisis[52] which triggered a more in-depth change across political divides. It is worth ensuring that over time such short-lived trends are replaced by a methodical evolution of the system with a strong emphasis on creation of a new participatory political culture. This should be accompanied by cross-sectoral, interdisciplinary cooperation of governmental agencies, supported by a system of incentives for the officials responsible for implementing and promoting the new methods. It is equally important to create an innovation-friendly atmosphere at law-making institutions, or a "culture of experimentation" (Simon et al. 2017: 91), which, while allowing for inevitable failures and errors with a limited impact in the phase of intensive development, would foster creativity and the search for optimal solutions in specific political-cultural contexts.

The widely anticipated crisis for the current representative democracy model is accompanied by an intriguing trend: the emergence of strong grass-root social movements that can effectively mobilize a great number of citizens (including young people who have so far shunned any political involvement) to engage in favor of specific social problems. Their prevalence and visibility – for example in the form of virtual communities in social media (*The power* 2021), digital grassroots participation tools (Grazian, Nahr 2020), crowdsourcing and crowdfunding initiatives, protests and demonstrations – prove that the main challenge faced by contemporary democracies lies most likely not in the political apathy of citizens, but in finding new forms of harnessing their energy within the system. As Sgueo (2020: I) aptly summarized it, "global demand for participation is alive and kicking". At the same time, however, it is difficult to deny that Nichols (2018: 227) is at least partially right as he states pessimistically: "Laypeople complain about the rule of experts and they demand greater involvement in complicated national questions, but many of them only express their anger and make these demands after abdicating their own important role in the process: namely, to stay informed namely, to stay informed." He is echoed by the voices of concerned criminologist-insulationists, also known as penal elitists (Shammas 2020) who, fearing an undereducated, irrational, capricious and retaliatory crowd, favor leaving penal policymaking only in the hands of professionals – academic experts and criminal justice practitioners.

[52] Interestingly, being a response to crisis is also considered by Taggart (2000: 5) as one of the six components of an ideal type of populism. In his view, populism is not typical of stable, well-structured systems and is usually a symptom of times of radical change. Perhaps this should all the more lead to the conclusion that depending on the quality of their implementation, crowdsourcing law-making initiatives may either turn out to be a valuable alternative to populism, or its ideal emanation.

The complete separation of criminal policy from the influence of public opinion seems, however, a very short-sighted idea, which in the end can only strengthen the punitive and populist attitudes of citizens. It not only reduces the chances of social acceptance of the imposed "elistic" law but also does not provide an opportunity to work through collective frustration caused by crime and thus restore social order. „Instead" – as rightly postulated by Berk (2021: 85) – "we might cast about for organizational arrangements that channel public anger into reasonable, rational politics. The pressing question is not how to keep the public at bay, but how to create the kind of reflective conditions so that reasoned opinion can be brought into state punishment". Well-designed crowdsourcing mechanisms in law-making – along with state support for restorative justice solutions – appear to be the most promising strategy available today to transform public resentment about crime into something constructive. Moreover, they offer ample opportunities to develop a social sensitivity to the meaning of punishment and understanding the values hat it communicates. The severe consequences and negative social significance of penalties require citizens to assume full responsibility for the policies and institutions that enforce them. Punishment in the name of public opinion should be understood and approved by it in a rational, open, on-going and pluralism of values process (Dzur, Mirchandani 2007). Finally, deliberation gives citizens the opportunity to learn alternatives to their own views on punishment and criminal justice, to better understand the limitations that law enforcement may encounter in practice, and to become aware of "wider interests and implications which must be taken into account, weighed-up and accorded to various priorities. if one is to make sound penal policies" (Johnstone 2000: 168). At the same time, responsible citizen engagement in decision-making and law-making processes should evoke a conviction about the resulting serious responsibility of citizens and the need to improve their competence in that area. This is essential in the case of criminal law, as it drastically interferes with human rights and fundamental freedoms.

One last point requires clear highlighting: as penal experts and legislators should not isolate themselves from the public, so the latter should not renounce expert support. Proper transmission of the collective wisdom of citizens will never be achieved without remaining open to "traditional" wisdom derived from scientific evidence and professional experience. This openness should be expected from both policy makers and citizens. At first glance, the idea of crowdsourcing seems to marginalize the importance of classically understood knowledge and experts in favor of "collective wisdom". In reality, whether e-participation platforms actually become a real medium for transferring knowledge and the views of citizens, or just another façade that only feigns their inclusion in decision-making processes, will depend primarily on the level and quality of involvement of

classically understood experts representing various fields of study. Their role should therefore not be limited to commenting on or criticizing ready-made solutions, but should already be in progress at the stage of their design, through implementation, day-to-day operation, and finally the evaluation and introduction of necessary innovations. The challenge of citizens' e-participation in the process of law-making involves researchers and specialists in various disciplines assuming new roles, where reliable performance is the only guarantee of the achieving two of the most important objectives: improving the quality of law and strengthening its social legitimization. As platform designers and managers, they should be involved in creating and improving e-participation infrastructure, along with its integration into existing legal and organizational mechanisms of legal decision-making. Of equal importance is their engagement in moderating particular initiatives, where they, as promoters of deliberation, not only validate such initiatives by promoting a culture of dialogue and enforcing the rules of constructive debate, but can also stimulate democratic nature of the process (by including groups under threat of exclusion) and high quality outcomes (by making sure that positions of various interest groups and points of view are well balanced), and finally can increase the likelihood of their implementation into the legal framework (by involving policy makers and public service employees interested in the issues under debate). Of course, they can also make a great personal contribution as participants of crowdsourcing and crowdlawmaking initiatives, including both those open to the public or dedicated to experts in a given field, by raising the substantive quality of the discussion or enhancing its scientific basis. Incidentally, the same effect can be achieved by assuming the difficult role of knowledge brokers – "the missing link in the evidence to action chain" (Ward, House, Hamer 2009) – who transfer complex research evidence into directives for practical action or translate laypeople's postulates and suggestions into legalese. And finally, in the event of an attempted use of crowdsourcing platforms in an instrumental and biased way, researchers can play the familiar role of whistleblowers and denouncers of (penal) populist actions.

CrowdLaw provides great tools that enable navigating a third way, between penal populism and penal elitism. There will probably be moments and places when it turns out to be another democratic utopian ideal that looks good in theory but fails in practice. However, given the urgent need to find new forms of social participation in the law-making process while maintaining its scientific foundations – to paraphrase a classic – for now, it may be the worst option we have, except for all the others.

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Algorithm-driven populism: An introduction

Populizm oparty na algorytmach. Wprowadzenie

Abstract: This paper introduces the concept of algorithm-driven populism, considering whether it has a consonant or a conflicting relation with liberal democracy. The overall argument is that social media platforms are not just new media used by populists; algorithms have co-constituted a new form of populism. Based on a literature review that connected different fields of research together in order to elucidate the relation between populism and digital media, this article details a few important features of social media platforms, examining how they set up specific affordances that endanger the values of liberal democracy.

Keywords: populism, democracy, technology, algorithms, social media

Abstrakt: Niniejszy artykuł wprowadza pojęcie populizmu opartego na algorytmach, zastanawiając się, czy ma ono związek z liberalną demokracją, czy jest z nią raczej sprzeczne. Generalna teza zakłada, że media społecznościowe to nie tylko nowe media, które wykorzystują populiści. To znacznie więcej, bowiem algorytmy wzięły udział w stworzeniu nowej formy populizmu. Na podstawie przeglądu literatury, który uwzględniał badania przeprowadzone w różnych dziedzinach nauki, by wyjaśnić związek między populizmem a mediami cyfrowymi, artykuł eksponuje kilka istotnych cech platform mediów społecznościowych, jak również analizuje zagadnienie wpływu utworzenia konkretnych afordancji na zagrożenie wartości liberalnej demokracji.

Słowa kluczowe: populizm, demokracja, technologia, algorytmy, media społecznościowe

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The multiple competing concepts of populism derive from divergent approaches. From one (positive) perspective, populism may be understood as an elementary democratic way of life, built through popular engagement in politics (Canovan), as an emancipatory force (Laclau), as an eccentric way of challenging the ruling elites (Peston, Richards), or even as an interactive and participatory populism derived from contemporary social media activism (Gerbaudo's "populism 2.0").

Contrarily, populism may be (negatively) considered inflamed emotion-driven politics that inevitably leads to confrontation (Moffitt, Tormey), a deflection of political pluralism which predicts a time of intolerance (Müller), and it may also be related to artful politics, either as the political mobilization of the masses, a governing strategy based on direct and unmediated support from the "people", or even a kind of "irresponsible" economic policy.

That is the reason why it has been possible for the very same term to have been used to describe very contrasting (both left- and right-wing) political leaders, in different regions across the globe with unique backgrounds. We should add that this malleability is also due to the fact that populism is a catch-all label frequently ascribed to others with a negative connotation – despite the fact that one may find some cases of self-proclamation.

Which concept of populism does this article relate to, and how is it developed here?

- This paper introduces the concept of *algorithm-driven populism*: a discourse structured and conditioned by algorithms.
- Heuristically stated, algorithms are sets of codes used to perform a given task. For the purposes of this study, algorithms are a new kind of knowledge – constitutive of particular subjectivities – that imposes itself as a new form of world.
- The question we consider is whether algorithm-driven populism has a consonant or a conflicting relation with liberal democracy. And, more specifically, what are the features of this new model of populism that may challenge the latter concept.
- To answer the research question, a literature review was conducted, connecting different fields of research together in order to elucidate the relation between populism and digital media. We have specifically limited our study to social media platforms, acknowledging this is just a portion of

the ubiquitous sociotechnical experience and of the influence of algorithms in everyday life.

- The overall argument is that social media platforms are not just new media used by populists; algorithms have co-constituted a new form of populism.
- This argument is structured as follows: in the first section, three essential features of populism are presented; the second section further elaborates on the concept of algorithm-driven populism; then, the article details a few important features of social media platforms, examining how they set up specific affordances that endanger the values of liberal democracy.

1. A note on the perspective employed

Generalizations and assumptions of knowledge are essential aspects of theoretical thinking. Claiming universality, however, without recognizing knowledge is significantly situated and contextual, is bad abstraction, and we are well aware of that (França 2021). Populism is not knowable in the same way and from the same point of view.

Latin American populism is one example. Latin America is the legacy of a historical colonization enterprise, characterized by quasi-ungovernable societies, weak democratic institutions coexisting with strong and violent polices, cultural clashes and the absence of conscience of people and nation. Analyzing in particular the recent Latin American populist experience, Zaffaroni (2017) describes this primitive, crude and vengeful discourse as "popularesco" (a term with no direct English equivalent, but close to the German *Völkisch*). Deeply embedded in the political scene, this "popularesco" discourse is designed to restore a lost societal cohesion – which never actually existed – nourishing and reinforcing the worst prejudices to publicly stimulate the identification of the enemy of the moment. Most Latin American countries have experienced domestic struggles with non-predefined, transitory enemies, who succeed one another without combining (Zaffaroni 2017), standing opposed to the ideal, momentary assumptions of who the "people" are. While there is no expression of sovereignty/the general will of the people, "popularesco" discourses also draw on anger and resentment against confronted others. In this context, the way Latin American populist politicians and movements have found to secure the support of the discontent throughout history is through the idea of generalized lawlessness, and the exacerbation of internal and regional (neighboring countries) rivalries (Tormey 2019). With an attentive focus adjustment, it is clear these countries experience a particular expression of populism.

Though it may not be thoroughly applicable to each and every populist event, and a geo-politically more sensitive theoretical approach is highly recommended (Aas 2012), this essay relies on a general concept of populism, which is based on core coincident elements identified in the most

relevant related literature. In addition, the main issues analyzed here – politics and technology – have evenly impacted different societies, allowing us a reasonable claim of universality. After all, when Thom Yorke sang "they don't speak for us" twenty-five years ago – on an album that appropriated, revealed and denounced the effects of modern technology on individuals – the verse was as truthful as it is today; and, with time, it has gained much more resonance for many different people across the globe.

2. Three essential features of populism

In order to grasp the conceptual multiplicity presented in the introduction, it is more manageable to conceive of populism as a discourse. Based on three core elements coincident in various approaches of populism – (1) the virtuous and homogeneous people or *Volk,* (2) the dangerous elite/others and (3) the general will/popular sovereignty – Mudde & Rovira Kaltwasser (2017) define populism as a *thin-centered ideology* that considers society to be ultimately separated into two monolithic and antagonistic camps, and which argues that politics should be an expression of the sovereignty/general will of the people.[53] Inspired by this definition, we are able to rework the idea of populism, unpacking it to three essential features: the dichotomous social perspective, the emotional appeal and its discursive instrumentalization.

2.1. Two monolithic and antagonistic camps

Hopster (2021) and Engesser et al. (2017) suggest these opposing segments might be connected to the more general dichotomy of "in-group" versus "out-group", which allows this definition to encompass both right and left populisms, with their own representations of "the people", "the common enemy" and the political solutions.

In the rightist perspective, "the people", delineated in terms of national identity, is constructed in opposition to migrants and ethnic and religious minorities – to which we could add criminals as a segment targeted by populist resentment (Pratt 2007) – through an exclusionary/xenophobic discourse (horizontal dimension). In the leftist stance, "the people", in terms of class, is constructed in opposition to an immoral elite (greedy bankers, corrupt politicians) through an exploitation discourse (vertical dimension) – for an illustration of the latter, just think about of the famous Occupy

[53] In the same sense of populism as an ideology, a set of ideas, an ideological orientation, a style of communication, a (digitally) mediatized communicative and discursive relation, respectively: Albertazzi, McDonnell (2008), Gerbaudo (2014), Engesser et al. (2017), KhosraviNik (2018), Maly (2018).

slogan "we are the 99 per cent" against the "1 per cent" (Gerbaudo 2014; Mudde, Rovira Kaltwasser 2017).

An immediate rebuttal would claim these monolithic estates do not conform with late-modern individualism. Yet, they are based on ideal assumptions, not practical ones, in the sense of an abstract totality or near-totality of a collective political identification. In this line, Gerbaudo (2014: 72) explained that populist movements "appeal to an ideal subject that is seen as highly atomised, and thus in need of a process of reintegration in the social body." Later, addressing our main theme here, he (2018: 748) added that "the hyperindividualism dominating social media has led to a condition of atomisation that is ultimately conducive to the populist logic which is centrally concerned with fusing atomised individuals in the collective body of the people." That is exactly what has been happening in some political campaigns: algorithmic constructs of many different individuals, characters and voices are 'datafied' as different target groups that represent "the people" (Maly 2018, on Trump's campaign).

The same can be argued about the opposed group. Engesser et al. (2017) illustrate that the elites attacked by populist actors may substantially vary: political, economic, legal, supranational, or media elites. They also indicate "that the economic elite are preferably attacked by left-wing politicians while media elites are predominantly targeted by right-wing populists" (Engesser et al. 2017: 1122). An identical rationale is applicable for the exclusionary, horizontal dimension, where migrants and minorities also vary substantially.

2.2. Affective-driven politics

One implicit feature that permeates populism is its "commonsensical anti-intellectual nature" (Pratt 2007: 17). Populism represents the defeat of Reason (rationality, science, truth) and its ability to structure and inform the parameters of governance in the modern world (Pratt, Miao 2017). In every possible style, populist discourses draw on anger and resentment to touch the most profound fears and hopes. And the political solution is silly, though sometimes epic and redemptive (Tormey 2019): "I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively. I will build a great great wall on our southern border and I'll have [the others!] pay for that wall."

In this way, populism opposes itself to liberal democratic principles, as it walks over the inherent and indispensable social differences, oversimplifies the intricate social structures, and replaces political pluralism with antagonism (Tormey 2019).

2.3. A discourse at odds with liberal democracy

As a thin-centered ideology, Mudde & Rovira Kaltwasser (2017) explain that populism has a restricted structure, allowing it to be malleable enough to adopt distinctive shapes and to attach to and be assimilated into other thick- or full-centered ideologies – as fascism, liberalism, socialism. We prefer to describe it as a discourse, rather than an ideology. Discourses are specific social and political, contingent and historical, constructions that establish and frame communicative relations between objects and practices (Howarth, Stavrakakis 2000), while ideologies relate to what discourses are filled by, their contents and the concrete demands formulated by agents. Though close and related, the former conveys the impression of something that can be strategically employed rather more conveniently than the latter. In fact, some of those depicted as populists are not submerged in any readily recognizable ideology; they artfully adopt populist rhetoric when it is opportune.

The relation of populism with democracy is quite controversial. The former can have either a positive or a negative impact on the latter. If we consider democracy as an always incomplete and dynamic form of government, populism can work as either a corrective for or a threat to democracy. This rationale becomes further remarkable whenever we differentiate democracy (*sans* adjectives), the combination of popular sovereignty and majority rule, from *liberal* democracy, a political regime that tries to find a harmonious equilibrium between majority rule and minority rights, with independent institutions specializing in the protection of fundamental rights (Mudde, Rovira Kaltwasser 2017). In short, populism is essentially democratic, but at odds with liberal democracy. (This inference is only valid if we consider democracy in its original sense, not as a politically tailored epithet employed by de facto authoritarian politicians).

3. The algorithm-driven populism

Weiser (1991) once wrote that the most profound technologies are those that disappear, weaving themselves into the fabric of everyday life until they are indistinguishable from it. That's what happened to the very complex technique of writing: while we translate our thoughts into a standard system of symbols, the reader, properly trained to cope with this same technology and informed by a common vocabulary, is able to decode meanings from these agglutinated characters according to his or her own experience and expectations – and this communication process has become

quite ordinary. The same could be said about motorized transport and the hundreds of volts coursing through wires in the walls. Algorithms have not been fared differently, and have intensely, but now quite imperceptibly, refashioned our everyday life. Just think about the increasing privatization and automation of cultural decision-making processes – such a significant shift of how we experience and understand culture that some (e.g., Striphas 2015) have described it as the emergence of an "algorithmic culture".

If computer scientists and programmers were asked what an algorithm is, most would likely say that, at the most basic level, algorithms are sets of instructions used to solve a well-defined problem. This is a common definition focused exclusively on the technological features. To be clear and avoid semantical bruits, when we talk about algorithms in this essay, we avoid ontological approaches, where this technique is something objectifiable as codes and instructions. We also avert anthropological or instrumental approaches, i.e. the idea that this technology, as an instrument available to the control of human rationality, necessarily derives from and returns to men. In Heideggerian terms, we prefer to see them as a new kind of knowledge. Algorithms – as a technology – are mathematical frameworks, constituted as a system and increasingly more objectively articulated, not as a material apparatus or the social-technical networks that end up forming this themselves, but as the knowledge that allows all this to not only work, but to impose itself as a new and radical form of the world.

Introna (2016) asserts that algorithms are important sociomaterial actors in contemporary society – with which we must agree. Drawing on the Foucauldian notion of governmentality to analyse academic writing practice, he suggested that algorithms are linked to regimes of knowledge and are constitutive of particular subjectivities. Hopster (2021) provides a similar conceptual approach. Using a term commonly employed in technological design studies, he explained how *affordance* describes how a given technological setting invites people to act in specific ways; in other words, and adapting to our argument, in what ways social media ecology offers specific communicative as well as ideological possibilities for populists.

While some understand the relation between algorithms and populism in terms of technological expression or furtherance of prior societal and political predicaments (Bruns 2019a, 2019b); or congruent, though separate phenomena, such as "elective affinities" (Gerbaudo 2018); or as a momentum opportunity, in which technological systems allow affective-driven politics and populism to replicate or perpetuate (Tucker et al. 2017; KhosraviNik 2018; Callihan 2020); we ally ourselves with the idea of a co-constitutive algorithmic-structured populist discourse identified as algorithmic (Maly 2018) or digital (Cesarino 2019, Prior 2019) populism. In a few words: social media platforms are not just new media used by

populists; algorithms have given birth to a new form of populism. *Algorithm-driven populism is a discourse structured and conditioned by algorithms, based on the ideological belief that society is divided into two antagonistic groups and that politics should express the claims of one of them – acknowledged as "the people"*.

4. How the social media architecture hacks liberal democracy

Social-media platforms were established at the turn of the twenty-first century as interactive technologies that allow the production and the exchange of information. In very few years, these apps turned into a mass medium (Gerbaudo 2014) – in December, 2020, Facebook alone reported as having 2.8 billion monthly active users, and 1.84 billion daily active users (Facebook 2021). Ideally, these platforms would resemble a liberal democratic arena where everyone is able to design their own public or semi-public profile, express and share their ideas, inform and be informed, easily interact with and follow other like-minded profiles with similar interests (Boyd, Ellison 2007; Klinger, Svensson 2016), with an architecture that seems to provide a horizontal system of decision making, well suited to superseding discredited institutions such as party politics (Gerbaudo 2014).

Considered as such, one could easily understand how social media became a channel for the populist urge to "represent the unrepresented", providing a voice to a voiceless and a common ground where some may meet affinities. From the Brexit campaign, to the Usonian (2016) and the Brazilian (2018) presidential elections, we have witnessed social media favoring populist discourses against establishment ones, by providing a suitable channel for the former to invoke the support of ordinary people against the latter (Gerbaudo 2018). In his research on online supporters of populist parties and movements, Bartlett (2014a, 2014b: 103) observed they "consistently displayed significantly lower levels of trust in political parties, the justice system, parliament and the media, compared to the typical citizen"; whether they were from the left or right, he added, was immaterial.

These new apparatuses, however, do not have the same nature as other liberal democratic standards (rule of law, political freedom, equality before the law) and praxes (elections, political representation), and they cannot be considered social achievements historically struggled for. From the commercial imperative aspect, social media platforms are essentially products of for-profit companies, designed to data mine both the personal information displayed (solicited or spontaneously updated) and aggregated

past online behavior to best serve the interests of their advertising customers and of other organizations interested in targeting users with information. It is essentially a business model based on ad revenue, and data mining and selling. To this end, their commercial orientation is based on an engagement-driven logical algorithm – which leads us to the technological aspect of these platforms: algorithms set specific affordances that condition how people make use of social media. Designed to generate and promote interaction between users and content, social media algorithms structure and condition discourses that polarize antagonistic groups, endangering the values of liberal democracy, as we detail below. **4.1. Algorithm black boxes**

Most social media algorithmic models are inscrutable. This opacity is manifest in three distinct forms (Burrell 2016). First, one cannot directly inspect them because their inner workings are purposely obscured from public view. This opacity is intentional corporate secrecy as institutional self-protection and concealment. "One common justification is that the algorithm constitutes a 'secret sauce' crucial to their business", writes O'Neil (2017: 29); as intellectual property, "it must be defended, if need be, with legions of lawyers and lobbyists." Second, understanding the source code is complicated. Opacity, in this case, is related to technical illiteracy. Third, algorithms are self-executable, i.e., algorithmic systems can operate automatically without need of human intervention (Introna 2016). This is an opacity that stems from the characteristics of complex machine learning algorithms and the human-scale reasoning required to apply them usefully. To these, we may add another important security-related justification for opacity: it prevents malicious hacking and gaming the system (DeVito 2017).

Critically scrutinizing the metaphor itself, Bucher (2018) argues that algorithms are neither as black nor as boxed as they are sometimes made out to be. From a sociotechnical perspective, she explains, where the social and technical engage in symbiotic relationships, the enactive powers of these assemblages cannot be reduced to constituent parts, as independently separate entities (Bucher 2018: 50). Conceptualizing algorithms in terms of a relational ontology, Bucher asks what algorithms *do*, instead of questioning what they *are*. This focus shift allows us, for instance, to investigate how life takes shape and gains expression through encounters of people with algorithms, or, in her own words, how "people make sense of algorithms despite not knowing exactly what they are or how they work" (Bucher 2018: 63). In this sense, while it is still possible to uphold the inscrutability of algorithmic models, one should not infer the social media experience cannot be researched.

If algorithms are constitutive of particular subjectivities, conditioning how people act within and outside these platforms, and also how a populist discourse may be structured, it is important to note that, due to the troubled role played by social media companies in recent political events (2016 US election, Brexit, genocide in Myanmar etc.), there is an increasing criticism for their opaque nature and a demand for greater accountability from the technology companies. The development of substantial literature in what is called *digital transparency studies* (Gorwa, Ash 2020) confirms this orientation.

4.2. Traditional gatekeepers versus algorithmic filters

In the pre-social media ecology, established media outlets had a major influence on information production and broadcasting. Their filtering process was rooted, as a rule, in journalistic quality standards. Pratt and Miao (2019) remind us that, since the 1980s, mass media restructuring has brought about a much more diverse and pluralistic set of understandings about the world. As an illustration, they allude to talkback radio programs, where "those with grievances about what they saw as the growth of crime, the inadequacies of law enforcement and overly lenient judges could be given a platform to sound their views, spark debate, even become national figures, however detached from the reality of crime and punishment their opinions were" (26), whereas the criminal justice establishment had its influence reduced in, and became unable to control the parameters of, public debates related to such matters (Pratt, Miao 2017, 2019).

Despite being originally designed to connect users and engage them with diverse content, not to report news, social media platforms have become a key source of news information, allowing users to create and distribute information worldwide as active producers of content, circumventing traditional journalistic gatekeepers (DeVito 2017; Engesser et al. 2017; Tucker et al. 2017; KhosraviNik 2018; Pratt, Miao 2019). It could be argued that the *social* aspect of social media refers to users' ability to influence and interact with the content and each other (Klinger, Svensson 2016: 23).

If, on the one hand, this favors a greater diversity of political voices being expressed, on the other, some critique issues emerge. First, in these spaces, there is a widespread conflation of information and knowledge, and these are very different matters (McNeely, Wolverton 2008). Second, by drowning out the traditionally credentialed gatekeepers, information produced on social media platforms by untrained users, though authentic, may lack accuracy, corroboration and reliability. Third, thoughtless opinions may pave the way for more extreme views (Hopster 2021), ranging from hate speech to historical negationism and disproven

conspiracy theories – like those disseminated by the QAnon mass movement in the United States or by the *Olavistas* (a reference to the self-proclaimed-philosopher Olavo de Carvalho's supporters) in Brazil. Finally, personalization features introduced by social media platforms to deal with the increasing amounts of information and simultaneously promote users' engagement lead users to experience a logic in which content is produced reflexively with regard to personalization and attention maximization (Bozdag 2013; Klinger, Svensson 2016). And related to this, there is something noteworthy: this new praxis of user-generated and shared information is not actually unfiltered; their contents are selected and ranked by those black-boxed algorithms, based on the "attention economy". Gatekeeping of both traditional and now algorithmic news sources plays a key role in determining the content and vocabulary of the public conversation (DeVito 2017). At this point, the algorithmic filters of social media are generally favorable both to spreading the contents of populist messages and to the style of populist communication' (Hopster 2021: 557; in the same sense: KhosraviNik 2018).

4.3. False information

A decade ago, the late neuroscientist Iván Izquierdo (2011: 87) enunciated: "It doesn't seem true that, in the information age, when precisely the excess of information constitutes a major problem, this other noise, the echoes of ignorance, exists and it is so prevalent." This was some time before "fake news" featured in Trump's rhetoric (2016) and became Collins Dictionary's Word of the Year (2017). Fake news describes both the deliberate creation of pseudo-journalistic information, and the political instrumentalization of the term to delegitimize the traditional news media (Stark, Stegmann 2020).

The common idea of "fake news" conflates three types of information disorder (Wardle, Derakhshan 2017). Misinformation is false or misleading information, created or disseminated without harmful intent. Disinformation is false or misleading information, deliberately created or disseminated with harmful intent. Mal-information refers to genuine information, shared to inflict harm. This conceptual framework is important to distinguish messages that are true (mal-information) from those that are false (misinformation, disinformation), and messages deliberately created/shared to inflict harm (disinformation, mal-information) from those that are not (misinformation).

False or harmful information is as old as communication itself. And vilifying political adversaries, whether based on true facts or not, is nothing new. However, social media platforms are especially susceptible to rapid and widespread dissemination of these three kinds of disordered information due to their attention-oriented, promoting "emotionally and

ideologically charged stories comprised of misleading information that embodies a certain worldview and attempts to create an alternative reality" (Stark, Stegmann 2020: 32). Tucker et al. (2018) highlight two issues that make social media platforms particularly vulnerable to disinformation campaigns: first, focused on ad revenue, the social media business model has little interest in screening advertisers before registration; second, optimized for engagement, their algorithms often help spread disinformation packaged in emotional news stories with sensational headlines. Spreadability is a very interesting trait here. That is the very reason why Venturini (2019) argues the notion of fake news is misleading: it presumes malicious pieces of news are manufactured, while reliable ones correspond directly to reality. Analyzing how news producers exploit political interests to capture attention, while users consume messages because they are addictive, rather than appreciated, Venturini suggests "viral news" or "junk news" would be more adequate terms.

Stark and Stegmann (2020) explain that false information can destabilize democracy at the individual and societal levels, directly and indirectly. At the individual level, studies on the effects of disinformation of users show no persuasive effects but a confirmation bias: false information is able to confirm and strengthen pre-existing attitudes and worldviews. This undermines the free and self-determined formation of opinion. At a societal level, false information may affect democracy in two ways. Democracies demand a public discourse made up of a diversity of trustworthy and therefore correct information to function properly. Therefore, indirectly, if the prevalence of disinformation reaches a level that distorts the public discourse by essentially replacing and suppressing truthful information, the foundation of democracy becomes unstable. Directly, disinformation campaigns may threaten the integrity of elections, incite polarization on conversely debated issues and undermine trust in democratic processes (e.g., the Brexit disinformation campaigns, Trump's false claims that the presidential election had been stolen, Bolsonaro's insistence on adopting printed ballots as a substitute for the "untrustworthy" electronic voting system). Even if Venturini's (2019) terminological and analytical adjustments – shifting the attention from falsity to diffusion of information – were to be adopted, these problems would persist, and maybe even be aggravated: "junk news" is not necessarily dangerous because it is false (falsity can be debunked), but "because it saturates public debate, leaving little space to other discussions, reducing the richness of public debate and preventing more important stories from being heard."

This account is even more alarming when we observe how the architecture of social media platforms enables investment in bots and "click farms" that create the illusion of engagement and popular support. Bots are software applications that run automated tasks. Click farms are made up of

generally very low-paid individuals, hired to engage with online posts ("like", share etc.). Through fake accounts both mechanisms manipulate the information feeds of platforms by generating artificial reach, ranking posts as more relevant, and therefore more likely to be shown to a larger audience (Stark, Stegmann 2020).

4.4. Filter bubbles and echo chambers

Coined by Pariser (2011), *filter bubbles* are the constant structuring of unique and particular universes of information. Despite the difficulties in accessing the values embedded in black-boxed algorithms, there is a common logic in their equations. Based on the previous actions and data of users, algorithms personalize the information immediately available to them. Algorithmically surrounded by information that corroborates their world view, with little exposure to conflicting information, individuals may experience a state of intellectual isolation, derived from sustained exposure to a false body of evidence (Bartlett 2014b). Pariser did not provide a clear definition for the concept, which remains vague and anecdotal; this has not prevented it from gaining considerable currency in scientific and mainstream societal discourse (Bruns 2019b).

Using a content analysis of Facebook's own patents, press releases, and Securities and Exchange Commission filings to identify a core set of algorithmic values that drive story selection on the Facebook News Feed, DeVito (2017) found a set of nine News Feed values that drive story selection (friend relationships, explicitly expressed user interests, prior user engagement, implicitly expressed user preferences, post age, platform priorities, page relationships, negatively expressed preferences, and content quality). DeVito's analysis, and many others, demonstrate that information delivery in social media platforms through filters heavily weighted towards personally-focused algorithmic values may bake this potential for polarizing personalization directly into their designs.

As with echo chambers (below), filter bubbles affect the exposure diversity. "On a collective level," Bartlett (2014b: 108) says, "there is some evidence that this might increase political polarization and radicalize perspectives" (In the same sense: Klinger, Svensson 2016).

The effect of users largely being exclusively exposed to consonant opinions, constantly reassuring them of their respective ideas, in an online environment with like-minded users, is usually referred to as an *echo chamber*. The echo chamber is also a highly evocative yet unfortunately ill-defined metaphor (Bruns 2019a). The lack of robust definitions of the filter bubble and echo chamber concepts from their original proposers (Eli Pariser and Cass Sunstein, respectively) has led scholars to introduce their

own definitions and also to the use the two terms essentially interchangeably.

Bruns (2019b) employed interesting, minimal definitions: a filter bubble emerges when a group of participants choose to preferentially *communicate* with each other, to the exclusion of outsiders; an echo chamber emerges when a group of participants choose to preferentially *connect* with each other, to the exclusion of outsiders. And he added later (2019a: 5): "using these definitions, the 'echo chamber' metaphor then addresses the structure of Facebook friendship or Twitter follower networks, while the 'filter bubble' metaphor focusses on the actual networks of communication that may or may not follow these connection structures (on both platforms, it remains possible to communicate with other users who are not friends or followers)."

It is interesting to note that the phenomenon does not manifest itself when the topic of discussion is not contentious, but echo chambers have been confirmed in politically contentious topics (Garimella et al. 2018, Bruns 2019a). Uncoupled from the general debate, these parallel, personalized discourses marginalize divergent ideas, affecting the diversity of media content individual members of the audience are eventually exposed to (Stark, Stegmann 2020: 14).

A self-centered *Weltanschauung*, as an individual's limited capacity to reach common understanding on political issues, is unquestionably a peril to modern democracies because healthy political deliberation of dissimilar views is a necessary condition of liberal democratic societies.

Yet, there are three considerations we must present here. First: as Barberá (2020) reminds us, enclave deliberations are not inherently negative. In closed social media groups – say a feminist group restricted to female users, for instance – individuals are offered a safe space to discuss issues of interest, an opportunity that otherwise would be more challenging in the off-line world.

Second: the perception of polarization on social media may derive from a minority of visible users, whose posts and tweets escalate because they are highly active, boosting the attention economy.

And, third: there are compelling arguments on both sides of the debate about whether technologies like web search and social media platforms increase or reduce ideological segregation, and increasing evidence that recent technological changes both increase and decrease various aspects of the partisan divide (for a short review, see Flaxman et al. 2016). In fact, recent research has shown that the actual scope of filter bubbles and echo chambers is widely overestimated (Stark, Stegmann 2020), and that people do not live in digital bubbles, learning about more general political news from other sources (Zuiderveen Borgesius et al. 2018). Bruns (2019a, 2019b) claims both metaphors represent a moral panic that distract us from

confronting far more important matters. Despite demonstrating that articles found via social media or web-search engines are indeed associated with higher ideological segregation when compared to those an individual reads by directly visiting news sites, Flaxman et al. (2016) also found, that these channels are associated with greater exposure to opposing perspectives. Tucker et al. (2018) provide a literature review of empirical studies that demonstrates that, while exposure to political disagreement on social media appears to be high, internet access and social media usage are not correlated with increases in polarization, and misinformation appears to have only limited effects on citizens' levels of political knowledge.

4.5. Microtargeting

Microtargeting is related to a kind of personalized communication based on diverse, individual information collected. Originally a marketing strategy, it soon became a political tool to target potential voters. Using this technique and social media's architecture, political parties and candidates can identify individual voters and deliver messages that suitably match their specific interests and vulnerabilities.

From an optimistic perspective, online political microtargeting may increase interest in politics, as it leads users to become more knowledgeable about certain topics, specially those citizens who ignore traditional media, and thus may raise electoral turnout as consequence. But we should be attentive to the other side of the coin. To begin with, there are privacy concerns related to data collection: online political microtargeting involves massive-scale gathering and combining of personal data about individuals to infer sensitivities and political preferences. Apart from this, there is a threat of manipulation. For instance, a political party may either, misleadingly, present itself as a single-issue party to different individuals, or it may target particular voters with tailored information that maximizes or minimizes voter engagement.

Even though we cannot rule out that "companies that offer microtargeting services to politicians exaggerate how effective microtargeting is" (Zuiderveen Borgesius et al. 2018), we must keep in mind microtargeting enables actors to strategically incite and escalate debates by disseminating manipulated information to susceptible groups, thereby distort the public's climate of opinion (Stark, Stegmann 2020). While "we're kept in the dark about what our neighbors are being fed", O'Neil (2017: 195) writes, this "asymmetry of information prevents the various parties from joining forces – which is precisely the point of a democratic government."

4.6. Polarization

Based on the idea developed here – of algorithm-driven populism as a co-constitutive algorithmic-structured populist ideology – it would be pointless to examine whether societies around the world are becoming increasingly polarized, or whether such polarization is simply becoming more visible – as Bruns (2019b) suggests. Our interest is on how social media algorithms have structured and conditioned political polarization, or, using affordances scheme, how social media architecture offers specific communicative and ideological possibilities for populist polarization.

It has been acknowledged (Stark, Stegmann 2020) that it is the very nature of social media algorithms to reinforce affective polarization, because these platforms' affordances can lead to stereotypical and negative evaluations of out-groups, contributing to the formation of the two ideally monolithic and antagonistic camps which structure populism.

Stark and Stegmann (2020: 45) argue that the "increased accessibility of public debates on social media means, in the case of controversial topics, that polarized and thus more radical opinions and positions are more visible online than in the offline world." This overrepresentation of radical viewpoints and arguments stimulates polarization at the ends of the political spectrum. In fact, a study conducted by Allcott et al. (2020) found that the deactivation of Facebook accounts for the four weeks before the 2018 USA midterm elections reduced political polarization.

A related factor to polarization is a particular algorithmic conditioning of communicative practices. One implicit feature of populism, mentioned above, is its bald, affective-driven communicative style. Social media conditions communicative practices through low-level affordances embedded in the user interface (Hopster 2021). Some platforms incentivize short messages, which restrains elaborate opinions and clears a path for bold, empty claims. For instance, tweets were originally restricted to 140 characters. In 2017, most tweets in English had 34 characters (Rosen, Ihara 2017). A year later, after Twitter doubled the limit to 280, the most common length of a tweet had surprisingly dropped to 33 characters; only three percent of global tweets were over 190 characters, and only one percent of English tweets reached the 280-character limit (Gesenhues 2018). Other platforms stimulate quick information sharing, without any careful analysis of the shared content. In most of them, users are stimulated to interact through specific emotion-driven buttons (Like, Love, Care, Haha, Wow, Sad, Angry). Beneath this interface, algorithms foster a new world of simple language, uncontested information and emotional appeals, which matches the preference of populists for polarized discourses.

Some recent studies state the opposite. Barberá (2015) evidenced that exposure to political diversity on social media, facilitated by social media

platforms, induced political moderation at the individual level and decreased mass political polarization (on German, Spanish, and Usonian users). Bruns (2019a) reasons that social media platforms enrich rather than impoverish their users' information diets.

5. Coda

This essay emerged from a concern about whether algorithm-driven populism, defined here as a discourse conditioned by algorithms, has a consonant or a conflicting relation with liberal democracy. In order to do so, based on a literature review, we examined a few important features of social media platforms, demonstrating how they set up a renewed, contemporary ideological belief that society is divided in two antipathetic groups, endangering liberal democracy values. That said, it is important to mention some challenging factors to our analysis.

First, we have tried to avoid hasty causal-relation conclusions of social media on populism, or even to imply that social media companies deliberately seek to actively game the political system and promote populist agendas (they are in it for the ad revenue and data trading). We must acknowledge social phenomena were important factors to the ascendancy of the new populist politics, materialized as a shock absorber against the seismic events that took place at the turn of the twenty-first century: dramatic economic downturns such as the effects of the 2008 global financial crisis, disclosures of cases of systematic corruption, rising immigration, employment and livelihood insecurity, the general feeling that the political system is unresponsive, a legitimacy crisis for governance due to the decline of deference and trust in politicians and political processes, and the far-reaching revolt against the uncertainty of our present time, inflamed by globalization (Pratt 2007; Mudde, Rovira Kaltwasser 2017; Pratt, Miao 2019), to which we ought to add the COVID-19 global pandemic. From this perspective, human and non-human players are taken into account, as a sociotechnical assemblage (Gillespie 2014; Maly 2018).

Although causality is not our claim (though this is claimed by KhosraviNik 2018 and others), we cannot agree with the idea of a subsidiary role of algorithms. Nor it is our intention to discuss technology misuse – first and foremost, this would suggest "the underlying technology is not inherently harmful in itself" (Polonski 2017), with which we disagree; further, this discussion would lead to matters of individual accountability, a debate more suited to other disciplines. As explained, algorithms impose themselves as a new and radical form of world, and those companies should

be aware and be held accountable for the damage done to democracy (ultimately, they make profit from social engagement).

In a paper arguing that echo chambers and filter bubbles constitute an unfounded moral panic and a distraction from a much more critical problems, Bruns (2019a) resorts to a provocative (populist?) style: "It's Not the Technology, Stupid" says the title. From a Heideggerian theoretical framework, algorithms are a new kind of knowledge that allowed technology to structure and condition, among many things, a renewed, though idiosyncratic, contemporary ideological belief that society is divided in two antagonistic groups and that politics should express the claims of one of them, underpinning what we have called the algorithm-driven populism. Thus: "It's *also* the technology."

Second, we have kept in mind the diversity of social media and its rapidly changing applications. And this is no different when related to social media's constitutional algorithms. Social media platforms are not based on locked formulas; their algorithms are constantly updated, better described as a personalized machine learning model, updating and changing its outputs based on user behaviors (DeVito 2017). Cyberspace and its architecture are by nature transient. However, as Hopster (2021: 554) explains, "even if we acknowledge their transient nature, some properties have also remained fairly stable and uniform, such as the commercial logic underlying their design."

Third, we are aware that algorithms did not materialize from nothing, and that they do contain biases. Since Friedmand's and Nissenbaum's (1996) inaugural discussion – though we might trace it back to Moor's (1985) *invisible programming values* – on bias on computer systems, a robust scholarship has been developed endorsing the claim that algorithms do carry preexisting, technical, and emergent biases. Sometimes these "blind spots" don't matter, says O'Neil (2017); however, she warns that, reflecting the judgements and priorities of their creators, opaque algorithmic models may encode a host of assumptions into software systems that increasingly manage our lives. "In each case, we must ask not only who designed the model but also what that person or company is trying to accomplish" (O'Neil 2017: 21).

Finally, it is also important to clearly state our epistemological position in simple terms: we are neither technological enthusiasts, like those "techno-Utopians" who foresaw the implosion of the knowledge and power monopolies (Tormey 2019), nor nostalgic detractors, willing to force an idealized past, to act retroactively, to protest against the irreversible (Cioran 2010: 32). But we are certainly sceptical about the relation of algorithms and society. In the original draft of this article, we claimed we were not Luddites. One reviewer corrected us: 'Luddites were not anti-technology'. He is right. Hobsbawm (1952) had already pointed out early nineteenth-

century workers were not concerned with technical progress in abstract, but with the practical problems derived from it. "The Luddites", wrote Mueller (2021) more recently, "believed that new machines were undermining their livelihoods and destroying their communities, and that targeting those machines was a valid strategy in their fight against it." While their legacy has been mistakenly related to a kind of technophobia, Luddites were ultimately acting against exploitation through technology. We are probably more Luddite than we had thought.

How should we address algorithm-driven populism, then? Mudde & Rovira Kaltwasser (2017) warn us that a coordinated frontal attack on the populists is a bad approach. By portraying "them" as "evil" and "foolish", emphasizing their irrationality and incivility, simply challenging their negative affective crusade and its constant attacks on institutions and minorities, we might play into the hands of the populists. Worse: by getting into this ideological fight, we might both contribute to the falsely intended image of the elites as "victims" of antidemocratic acts, and make room for the rise of outsider parties and politicians (Tormey 2019). Three alternative strategies seem more helpful.

A long-term, prospective plan of action involves civic education "aimed at socializing the citizenry into the main values of liberal democracy and, although not always openly, warning about the dangers of extremist challengers" (Mudde, Rovira Kaltwasser 2017: 112). Particular to criminal justice matters, criminologists have a relevant role in reinventing knowledge production, influence and visibility (França 2021), from a hermetic discussion restricted to academics to an engaging dialogue with society. Taking this idea further, Tucker et al. (2017) ponder whether it would be considered a new responsibility of citizenship to ask users to fact-check their social ties' posts and tweets; albeit these kinds of steps may give way to "defriendings" and "unfollowings", one can fairly argue that the collaborative environment of social media gives rise to new notions of citizenship and political engagement.

A medium-term, preventive policy, suggested by O'Neil (2017), is explicitly embedding democratic values into algorithms that one way or another govern our lives, creating models that follow primarily ethical leads, not only engagement and profit. In a similar vein, social media platforms could be compelled to insert information-check controls, either by asking users to validate information before sharing it, or through automated notices generated by content analysis on reasonable accuracy and harm hazard – which is what actually materialized around COVID-19 pandemic posts. We are well aware the distinction between true and false is problematic, and this separation has never been straightforward; hence any information-check control should tackle both fact-checking and the digital virality of information (Venturini 2019).

As argued elsewhere (França, Quevedo 2020), this democracy-bound programming strategy meets the idea that the architecture of cyberspace is capable of regulating and controlling the behavior of users and the responsibility of internet companies (Katyal 2001, 2003; Lessig 2006). Lessig (1998) was responsible for highlighting the importance of code in people's interactions within the virtual space. Years later, and in a more detailed way, Lessig (2006) explained that there are two types of codes. The first one denotes technique, as old as the government itself, through which a Congress makes laws; the second type of code is that elaborated by algorithm developers. What Lessig (2006: 72) claims is that the first type of code may affect the second one: like an architectonic structure subjects human behavior, the programmed code, regulated by the legislative code, structures and conditions behaviors, establishes restrictions and permissions, allowing the prevention of unwanted actions. Arguing for the proposition of a digital architecture to control cybercrime, Katyal (2003: 2273), however, points out that, in the same way some urban projects for crime reduction ended up prejudicing communities, architectonic responses to violence in cyberspace must be well planned, or risk creating severe damage in the long term. On this matter, while moderation is an essential and welcome feature of any media outlet to prevent unlawful acts and protect democratic values (and a recent prime example is Trump's ban from Twitter and Facebook for violating these platforms' policies on "civic integrity", i.e. for the perceived inciting of violent and undemocratic acts), it is important to note that, though very appealing, social media platforms' censorship mechanisms do raise legal concerns regarding unwarranted censorship, especially since a fundamental task of law enforcement is transferred to private companies (Stark, Stegmann 2020).

Finally, a more immediate course of action is ostracizing populists through a *cordon sanitaire* around them (Mudde, Rovira Kaltwasser 2017), either excluding any official collaboration, preventing them taking the stage or demonetizing platforms that grant them space. Sleeping Giants' activism is a prime example of the latter: campaigners pressured companies into removing ads from news outlets that propagated mis- or disinformation; hence a similar strategy might be successful in compelling social media companies to both revise their algorithms and remove accounts that promote populist discourse. Rendering populists innocuous is something mainstream political parties, offline and online activists, domestic or supranational institutions specialized in the protection of fundamental rights, and social media platforms are able to do.

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Adventures in populist discourse: Could a solution to penal populism in New Zealand be hiding in plain sight?

Przygody w populistycznym dyskursie: czy rozwiązanie problemu populizmu penalnego w Nowej Zelandii może być ukryte na widoku?

Abstract: Contemporary discussions on the role of populism in criminal justice reform have centred around its potential for more punitive outcomes i.e., longer sentences, less hospitable prison conditions and a lack of meaningful support for integration back into the community. Reflecting on this legislative trend, Julian V. Roberts et al. (2002) opined that a change of posture might be required by proponents of penal reform, going on the offensive and pointing to the negative actions taken by politicians in the name of penal populism. This paper asks whether politicians advocating for less punitive criminal justice reforms in New Zealand could themselves draw from a more populist style of politics. We hypothesise that research participant support for a free-market populist-style argument on decarceration will be higher than for a status quo-style argument. This is examined through a quantitative approach involving the development of an experimental tool that distils the theoretical conceptualisations of populism and tests them on the New Zealand voting-age public. We find through sub-group analysis that a statistically significant number of participants who self-identified as "right" on the political spectrum or voted for either the National party (a major centre-right political party) or the New Zealand First party (a minor conservative political party) in the 2017 New Zealand general election were more inclined

to support arguments for less punitive sentences when pitched using a populist-style argument.

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Keywords: decarceration, penal populism, penal moderation, politics of incarceration, New Zealand politics

Abstrakt: Współczesne dyskusje na temat roli populizmu penalnego w reformie wymiaru sprawiedliwości w sprawach karnych koncentrują się wokół jego wpływu na represyjność kary: dłuższych wyroków, gorszych warunków odbywania kary pozbawienia wolności oraz braku istotnego wsparcia dla integracji ze społeczeństwem po wyjściu z więzienia. Zastanawiając się nad tym trendem legislacyjnym Roberts i in. (2002) uważali, że potrzebna jest zmiana postaw zwolenników reformy prawa karnego, przechodzących w ofensywę i wykazujących negatywne skutki działań polityków prowadzonych pod egidą populizmu penalnego. W artykule postawiono pytanie, czy politycy opowiadający się za mniej represyjnymi reformami wymiaru sprawiedliwości w sprawach karnych w Nowej Zelandii sami mogliby czerpać z bardziej populistycznego stylu polityki. Autorzy artykułu założyli, że w przeprowadzonym badaniu jego uczestnicy chętniej opowiedzą się za wolnorynkową populistyczną koncepcją dekarceracji aniżeli za zachowaniem obecnego stylu prezentacji argumentów. Analizy w tym zakresie zostały przeprowadzone przy wykorzystaniu podejścia ilościowego. Autorzy opracowali narzędzie eksperymentalne, którym przetestowali na próbie Nowozelandczyków w wieku wyborczym wybrane teoretyczne konceptualizacje populizmu. Dzięki analizie podgrup stwierdzono, że statystycznie istotna liczba uczestników, którzy określili się w spektrum politycznym jako „prawicowi" lub głosowali na Partię Narodową (główna centroprawicowa partia polityczna) lub Pierwszą partię Nowej Zelandii (niewielka konserwatywna partia polityczna) w wyborach powszechnych w Nowej Zelandii w 2017 r. byli bardziej skłonni do popierania argumentów za mniej represyjnymi wyrokami, gdy używali argumentów przedstawianych w stylu populistycznym.

Słowa kluczowe: dekarceracja, populizm penalny, powściągliwość w karaniu, polityka inkarceracji, polityka Nowej Zelandii

Introduction

New Zealand has a reputation for being a friendly, hospitable, and informal nation, yet paradoxically, it also has a history of being decidedly punitive, with high levels of incarceration in comparison to similar jurisdictions (Pratt 2006). In 2017, the rate of imprisonment in New Zealand was around 220 per 100,000 population, compared to an OECD average of 147 per

100,000 (Gluckman 2018). Between 2001 and 2018, the prison population increased by over 75 per cent to a peak of 10,364 (Department of Corrections 2020a). The almost continual growth of the prison system over the last 30 years has been seen as largely driven by "penal populism" as successive governments have introduced "tough on crime" policies in response to media and public debates (Gluckman 2018).

The operation of prisons in New Zealand is an increasingly expensive exercise, with total costs tripling since 1996 (Gluckman 2018) and operating costs now amounting to over $1.7 billion annually[54] (Department of Corrections 2020b). This ballooning government expenditure on prisons seems paradoxical in the neoliberal era, and the contemporary prison complex represents perhaps one of the last remaining vestiges of government excess in New Zealand's public service. Unlike areas such as health and education, New Zealand's Department of Corrections and its custodial operations appear to have flexibility in continuously expanding operational budgets (Pratt 2017).

The costs associated with building new prisons and housing prisoners have in the past provided the impetus for privatisation. In 1999 Auckland Central Remand Prison was privatised, until a Labour-led government,[55] which was ideologically opposed to private prisons, opted not to renew the contract, by the end of 2005 all New Zealand prisons were back under public operation. Following another change of government, there was a second partial privatisation by the National-led government in 2010 involving two men's prisons (Rynne, Harding 2016). However, by 2017 the same government had ended the private contract for one of these prisons in response to violent incidents blamed on mismanagement of the facility[56] (Boyle, Stanley 2019). Prison privatisation no longer appears to be on the agenda of either major political party, nor to have widespread public support in New Zealand.[57]

The ongoing use of prisons also imposes further hidden fiscal and social costs on society and on the families and whānau[58] of those imprisoned (Workman, McIntosh 2013; Gluckman 2018). Māori, the Indigenous population of New Zealand, are drastically over-represented in prisons, comprising 53.1 per cent of the prison population but just 16.5 per cent of

[54]About $1.2 billion United States Dollars on current exchange rates.

[55] The Labour Party (centre-left) and National Party (centre-right) have alternated power since 1938 as the country's two largest political parties.

[56] The second prison continues to be privately run; its contract is not set to expire until 2040.

[57] There is little data in New Zealand on public attitudes to prison privatisation, only a non-scientific poll published by the National Business Review in 2017 suggested its readers were strongly against the practice.

[58]Whānau is the Māori-language word for extended family or family group.

the general population (Stats NZ 2020; Department of Corrections 2021). The disproportionate imprisonment of Māori is a human rights issue. The long shadow of systemic racism throughout the justice system has had negative consequences for Māori, their families and communities (McIntosh, Workman 2017). The Pākehā majority, descendants of European settlers, tend to either believe that Māori are treated fairly by the justice system (Norris, Lipsey 2018) or that Māori overrepresentation in prison reflects their being predisposed to criminal behaviour (Nairn, McCreanor 1991; McCreanor et al. 2014). The Department of Corrections for their part have accepted the role of colonisation in this overimprisonment of Māori but remain fixated on challenging individual behaviours, attempting to blend kaupapa[59] Māori principles into programs which seek to rehabilitate Māori offenders (Tauri 1999; Mihaere 2015). In 2019, the Department of Corrections introduced Hōkai Rangi, a strategy designed to tackle the over-representation of Māori in the criminal justice system through working in partnership with Māori and humanising the treatment of those in prison in order to reduce recidivism (Department of Corrections 2019). However, recent scandals including the all-day confinement of prisoners to their cells during the Covid-19 pandemic, the handling of the Waikeria prison riot in January 2021[60] and disturbing reports of inhuman and degrading treatment at Auckland Region Women's Corrections Facility and Auckland prison, have substantially undermined the credibility of this strategy[61] (Johnsen 2020; 2021).

There is limited evidence pointing to the efficacy of prisons as a tool to reduce reoffending in New Zealand (Buttle 2017; Pratt 2017; Gluckman 2018). In 2019/20, 60.8 per cent of those released from prison were re-convicted within two years and 41 per cent were re-imprisoned (Department of Corrections 2020b). This failure stands alongside a voluminous number of critiques of in-house prison programs, including those with a kaupapa Māori focus, from Māori scholars (see: Tauri 1999; 2013; McIntosh, Workman 2014; Webb 2017; 2018). Of these critiques, two which are frequently cited are that prison programs reinforce colonial assumptions that Māori are biologically disposed to crime and must civilise their behaviour, and that co-opting kaupapa Māori principles into the prison system validates the use of prisons, which are themselves a colonial construct.

[59] Kaupapa is the Māori-language word used to describe a plan, theme, proposal, or way of doing things.

[60] The riot led to a prolonged standoff between prisoners and Corrections' staff and was only resolved after mediation involving Māori party co-leader, Rawiri Waititi.

[61] A judge found that the Corrections Department had breached its own policies around the use of direct segregation (solitary confinement) and the humane treatment of two female prisoners.

Prisons in New Zealand are therefore expensive to operate, have little rehabilitative effect, and disproportionately impact Māori. However, regardless of any instrumental purpose, they also play a symbolic role as a sign of security and reassurance in times of substantial societal anxiety and a breakdown of social cohesion (Pratt 2006). Given this, what arguments could be made to wind back the scale of prison operations in New Zealand? What if, instead of the increasing expense of housing prisoners, the public were instead convinced not to imprison a larger share of offenders in the first place? In this paper we set out to test whether an alternative strategy to the usual penal reform arguments might be deployed. We consider if a populist rhetoric might be able to disable, rather than enable, the carceral state by asking whether those who seek to change the punitive paradigm could take an offensive position against the use of prisons, one that discredits the use of public funds. Drawing from Julian V. Roberts et al. we hypothesise that to introduce penal reforms which reduce the prison population, a "change of posture" might be required in the political bargaining of prison policy (Roberts et al.
2002: 164).

We begin by defining penal populism and examining recent international developments and explanations for penal moderation before exploring the theoretical basis for populism, specifically market populism, as a potential antidote for penal populism. We then draw from these scholarly inputs in the field of populism to develop an experimental tool. The purpose of the tool is to provide a side-by-side comparison of two different types of political discourse (*populist* and *status quo*), both of which advocate lower rates of imprisonment. Following an explanation of how both discourses were developed, we outline the method of data collection via self-administered questionnaires distributed through community groups on Facebook. After reporting our findings, we then discuss the implications and limitations of this research for reform in the current New Zealand penal context.

1. Theoretical background

1.1. Penal populism and penal moderation

Criminal justice policy in New Zealand and other jurisdictions has undoubtedly been influenced by the penal populism of the late 1990s and beyond. Penal populism is defined by Julian V. Roberts et al. as "the pursuit of a set of penal policies to win votes rather than to reduce crime or to promote justice" (Roberts et al. 2002: 5). According to John Pratt, it should

not be seen as mere political opportunism, but in New Zealand emerged as a result of deep-seated social and cultural changes, including the decline of trust in politicians and the democratic process, a sense of ontological insecurity caused by the neo-liberal economic reforms of the 1980s and 1990s, public disillusionment with the criminal justice system and the rise of victims' rights campaigns (Pratt 2007; 2013). Such changes have led to a "fundamental shift in the axis of contemporary penal power" (Pratt 2007: 3). Under penal populism, the expertise of the criminal justice establishment is rejected as being "out of touch" with the opinions and interests of the public, while the opinions of those who claim to speak on behalf of crime victims and the public at large are privileged (Pratt 2007; 2013). This was exemplified by three pieces of legislation passed in 2002 (the Sentencing, Parole and Victims' Rights Acts) by the Fifth Labour government, which were informed by a 1999 Citizen Initiated Referendum, where the majority of voters called for greater emphasis on victims' needs and harsher punishments for offenders (Pratt, Clark 2005; Pratt 2013).

A political advocacy group, the Sensible Sentencing Trust, has been remarkably successful in galvanising cross-party political support for its key political aim of obtaining tougher sentences for violent repeat offenders (Pratt, Clark 2005), while, until recently, those who dared to critique the stress on punishment became the target of vilification and personal attack (Pratt 2013). As a result, reactive policies have led to substantial increases in incarceration with no evidential corresponding improvement in public safety or decrease in crime (Gluckman 2018). This speaks to a characterisation of penal populism as being a political rather than criminological problem, and that the solution to this problem might sit within the more ostentatious theatre of political campaigning. John Pratt (2007) argues that when the fiscal demands of the penal system start to threaten the provision of other public services such as health and education, public support for punitive measures may begin to retreat. It seems possible then that drawing public attention to the cost of the penal system in a way that utilises a populist strategy may be effective in promoting penal reform.

Penal tolerance and moderation can either be inhibited or favoured by different social-economic and political contexts (Lacey 2011). In liberal market economies, such as the US, England and Wales, Australia and New Zealand, which are more concerned with innovation and flexibility than stability and economic regulation, and have minimal welfare states and adversarial governments have found it hard "to resist a ratcheting up of penal severity" (Lacey 2011: 624). In contrast, penal moderation is more likely to flourish in coordinated market economies, such as Nordic countries, Germany and the Netherlands, which are characterised by strong welfare states, high degrees of social inclusivity, stable structures of

investment, and proportionately representative electoral systems focused on long-term consensus building (Lacey 2011).

However, since the late 2000s, many countries in the global north, including those with liberal market economies, have witnessed the downsizing of their prison populations. Perhaps most notably, in 2018 the US incarceration rate fell by 15 per cent from a peak of 765 in 2007 to 650 (Brandariz 2021). This trend is far from uniform across US states, but between 2007 and 2019 eleven states including California and New York recorded a decrease of more than 30 percent (Gottschalk 2010; Brandariz 2021). Penal moderation has also been particularly identifiable in EU countries and the former Soviet bloc but has occurred in nations as diverse as Chile, Israel and Japan (Brandariz 2021).

The role of economic arguments in decarceration outside of New Zealand has been the subject of some debate. One explanation is what José A. Brandariz (2021) has termed the "austerity-driven hypothesis" which focuses on the effects of the economic crisis of the late 2000s to early-mid 2010s and the consequent need for cuts in public spending. Hadar Aviram, for example, argues that this financial crisis has given rise to a new discourse of "humonetarianism": "a set of rhetorical arguments, political strategies, correctional policies, and cultural perspectives that focuses on cost-saving and financial prudence as its raison d'être" (Aviram 2015: 11). Although other justifications for reform have included human rights considerations and racial justice concerns, this discourse has been utilised by bipartisan coalitions of politicians, policymakers, businesspeople and taxpayer groups to facilitate criminal justice reforms, such as the abolition of the death penalty in several states, the legalisation of marijuana in Washington and Colorado, and reform of the Three Strikes laws in California (Aviram 2015).

Nevertheless, humonetarian discourse has not necessarily led the penal pendulum to swing away from punitive policies or contributed to the emergence of alternative penal philosophies, such as rehabilitation or concern with human rights and prisoner welfare (Aviram 2015). Throughout the United States, the deployment of austerity by political actors often overlooks the growing cost of penal institutions or in the state of Oregon, such actors have claimed that austerity is best served by punishing crime through the increased use of imprisonment rather than letting it run unabated (Gottschalk 2010; Cate, HoSang 2015). Another consideration is that humonetarianism could validate the use of more austere measures to save money, such as the overcrowding of prisons, out of state transfers of prisoners, and charging prisoners fees to stay (Aviram 2015; see also Bosworth 2011).

Furthermore, others have noted the limitations of the austerity-driven hypothesis in explaining penal moderation (see: Gottschalk 2015 for a

comprehensive overview). Whilst the economic context may have enabled the "consolidation of new discourses, rationales, policies and even actors favouring penal moderation" (Brandariz 2021: 4), other social forces have co-shaped the penal landscape such as long term reductions in crime rates and the lack of critical public concern and anxiety regarding crime (Dagan, Teles 2016; Brandariz 2021). In Republican-led US states such as Georgia and Texas, these forces include the work of a genuine reform cadre consisting of prominent elite conservatives, civil libertarians, and religious advocacy groups such as Prison Fellowship, who have been prepared to challenge the value of incarceration and express compassion for those behind bars and their families (Dagan, Teles 2016). At the federal level, this compassionate conservatism has been exemplified by the US Second Chance Act (Bosworth 2010) and the First Step Act, passed by President Donald Trump.

1.2. Populism

The codification of populism more broadly is a highly contentious subject area (see Taggart 2000, 2004; Canovan 2004; Plattner 2010; Moffitt, Tormey 2013). Canovan pointed out that populism "has no acknowledged common history, ideology or programme of social base"; the term is usually applied to political movements by those on the outside, often as a term of abuse (Canovan 2004: 243). Populism appears to be a theoretically malleable concept predicated on scholarly assumptions about its democratic or non-democratic functions and where it might be located on the political spectrum. These assumptions can be associated with three broad scholarly camps: those who stress the mostly negative impacts of populism on liberal democracy e.g., Hungary since 2010 (see: Csigó, Merkovity 2016); those who treat populism as a pejorative term for the political right (while protecting populist movements on the left); and those who claim populism has its roots on the political left. On the latter point, populism of the 19th century was traditionally used in the United States as a strategy for political inclusion and was, therefore, a democratic expression of political action (Urbinati 1998; Frank 2000).

If it can be entertained that populism is neither solely associated with the political left nor the political right and is neither democratic nor anti-democratic in nature, then it can be deployed in concert with a range of political actors across the ideological spectrum. Cas Mudde (2004) characterised populism through the framework of a thin-centred ideology, which becomes attached to more comprehensively developed political belief systems. Building from this, Cas Mudde and Cristóbal Rovira Kaltwasser (2012) proposed a minimalist theoretical framework of populism, comprising of four quantifiable traits: the people vs the elite;

advocacy of more direct forms of democracy; an opposition to pluralism; and a penchant for straightforward solutions.

The first of these minimalist traits is the binary opposition of "us vs them", which claims that society is separated into two homogeneous yet antagonistic groups. An "us" as the "pure people" versus "them" as the "corrupt elite" is a construct which demands that the silent majority ought to be heard (see also: Abts, Rummens 2007; Mudde 2007; Pasquino 2008). The second trait is to satisfy the will of the majority through a "plebiscitary politics" or appeals to "direct representation" (Mudde, Kaltwasser 2012). This is an appeal from populists to democratise political systems and break the power of a corrupt political establishment (Mudde 2007). The third requires the rebuke of pluralism, typically in favour of enhanced majoritarian principles (Plattner 2010; Mudde, Kaltwasser 2012; Akkerman, Mudde, Zaslove 2014). Populists are sceptical of the institutional structures intrinsic to pluralism (such as institutions and judicial procedures) which provide the internal checks necessary to maintain a diversity of opinion (Akkerman, Mudde, Zaslove 2014). The last of these minimalist traits borrows from the analysis of Canovan (2004), whereby populism is effective in eliminating the complexities associated with political engagement. Populism is endemic to what Cristóbal Rovira Kaltwasser (2012) referred to as the malfunctioning of representative politics, particularly its difficulties in explaining and legitimising complex policy initiatives.

In critique of this framework, Paris Aslanidis referred instead to the populist frame: "Treating populism as ideology reiterates this essentialist perspective. Hence, a political party or leader can or cannot be populist; there is no grey zone" (Aslanidis 2016: 92). In a similar vein, Moffitt and Tormey (2013) considered populism to be a political strategy deployed at will by political actors who might otherwise not be populist. Ernesto Laclau (2005) offered a more abstract interpretation, theorising populism as a discursive logic that is synonymous with democracy and the existential struggle between those in power and those experiencing subjugation. He reasoned that populism is a function of politics and its agitations are a necessary function of the ruled to overcome their rulers.

To summarise, the minimalist framework interprets populism as an ideology that encompasses the notions of a pure people vs an evil elite, an opposition to pluralism, a penchant for more direct forms of representation and simple straightforward solutions to (usually complex) issues within society. Such a framework has tremendous levels of applicability in the analysis of political actors, their speeches and party manifestos. It also makes a compelling case for certain basic elements to be present within a particular discourse before it merits the "populist" label. With this in mind, we draw from the core tenets of minimalist framework to test the hypothesis

of Julian V. Roberts et al. (2002) that a "change of posture" might be required to counter the consequences of penal populism. Nonetheless, there are also important contributions from outside this minimalist ideological framework which need to be considered; populism might exist among political actors who are not otherwise populist and, therefore, could be a strategy or a frame that is deployed to engender a particular change.

A free-market populism might present an alternative pathway for decarceration by pivoting away from technocratic explanations for why imprisonment is either ineffective or unjust, and instead sharpening focus on the wastefulness of the state through its expansive use of prisons. Marian Sawer (2003) gave an early account of free-market populism by tracing its origins to Friedrich Hayek's 1944 book *The Road to Serfdom*. It was not until later in the 20th century that policies which privileged a market response to the economy entered the mainstream of liberal market economies the world over, a type of thinking propagated by long established think tanks in Anglophone countries which were able to capitalise on the perceived failures of Keynesian policies in alleviating the economic shocks of the 1970s (Sawer 2013). As the political impetus for neoliberal reforms, free-market market populism uses incendiary language to hail the withdrawal of the of state, privileging a view that the new democratic heroes are entrepreneurs and corporate leaders, unshackled by the tax and spend policies of an expansive and inefficient welfare state (Sawer, Laycock 2009; Frank 2020). This populist ideology has become increasingly influential in countries such as Australia, Canada and New Zealand (Sawer, Laycock 2009). Today, voters have already been conditioned to accept market responses to political issues wrapped in what might be broadly considered populist language. What has not yet been tested, however, is whether the language of free-market populism could be applied to the justice system and whether it could be the antidote for what progressive reformers would argue is the overuse of prisons in contemporary society.

2. Researching market populism

2.1. Developing an experimental tool

In order to test whether taking an offensive approach to prisons and penal reform based on market populism would change public opinion, one of the authors developed an experimental tool based on the theoretical insights into populism discussed in the preceding section. We consider the divergent theoretical conceptualisations i.e., ideological, discursive or

framing/strategic to be somewhat complementary in the development of this tool. The purpose is to test the relative strength of one argument for decarceration, the "populist-style" text we develop, against that of another argument for decarceration, a "status-quo" text based on a collection of statements from political actors advocating for progressive penal reform in New Zealand.

The four minimalist conditions of populism set out by Cas Mudde and Cristóbal Rovira Kaltwasser (2012) underpin the tool. The following examples of these conditions are located within the text of the tool: **Us vs. Them**

"big government approaches", "rent-seeking bureaucrats" and "do-gooders in Wellington[62]" **Simple Solutions**

"By sharpening our focus, we could kill two birds by redirecting millions of dollars into compensating the victims" **Anti-pluralism**

"we are paying countless rent-seeking bureaucrats to oversee a system that doesn't work"

Appeal to direct democracy

"An earlier referendum suggested"

The text frames prisons as a fiscal wreck and uses discursive techniques to mobilise voters against existing prison arrangements. Drawing from Paris Aslanidis's (2016) theoretical conceptualisation, this populist frame speaks directly to the wastefulness of prisons and suggests that change is required. Written provocatively, it creates a sense of urgency, seeking agreement from the people that the current situation is no longer tenable. Such framing is pervasive among free-market populists, who rely on the frame of "government deficits" to advocate radical and often immediate cuts to the public sector. The text also reaches to Ernesto Laclau (2005), but in a somewhat incongruous manner. The heterogeneous linking together of demands from the oppressed is a key theme in Ernesto Laclau's conceptualisation of populism. In this piece, the taxpayer, the victim and the offender are joined in unwilling servitude to the government and its lumbering bureaucratic wastefulness.

The more likely discourse used by political actors advocating for progressive penal reform is called the status quo text. This omnibus of statements was drawn from politicians and criminal justice elites in New Zealand. Each argument was made between 2014 and 2019, and so it can be claimed that these comments reflect the likely discourse from those advocating such reform. Wherever possible, direct quotes were sourced and inserted in the text following minor changes for prose.

[62] Wellington is the capital city of New Zealand and thus its discursive use refers to government elites and the country's state sector.

Figure 1. Populist-style text

Our government is squandering public funds on prisons to house an ever-increasing number of people. Such big government approaches to criminal justice are rooted in the beliefs of elites who don't live in the real world.
By sending thieves, druggies and wayward youth off to prison we're simply creating Universities of Crime where kids are being introduced to older, more violent thugs.
While do-gooders in Wellington talk up the prospect for rehabilitation, the only 'prospect' these kids have in prison is a gang.
What we have now is a revolving-door prison industry which has grown into a billion-dollar-a-year taxpayer funded enterprise.
Every person imprisoned costs the state up to $300 each day (more than $100,000 per year), and on top of that are the costs associated with building new prisons.
Corrections have adopted different strategies to combat rising costs, these include:
Limiting the unlock time of prisoners to a few hours per day (minimising staff requirements).
Uniformity in kitchens across the country (e.g. mince on Wednesdays, sausages on Thursdays).
Double Bunking' prisoners (housing two prisoners in a cell originally designed only for one).
Despite having a spending problem in New Zealand, we are paying countless rent-seeking bureaucrats to oversee a system that doesn't work and is frequently condemned for its shortcomings.
By sharpening our focus, we could kill two birds by redirecting millions of dollars into compensating the victims of crime (or back into the pockets of hardworking taxpayers) while also reducing the influence of outsiders.
An earlier referendum suggested that people want prisons to house high-risk violent offenders, perhaps then it's time we start carefully choosing who we send to prison in the first place.

Figure 2. Status Quo-style text

New Zealand's prison population is at near record numbers due to a strategy of punishing people more often and locking people up for longer.
Many criminal justice experts have argued though that prisons are an ineffective method of either deterrence or rehabilitation and fail to keep anybody safe in the long term.
Tougher sentencing policies for nonviolent crime only transform low level criminals into more hardened criminals, leading to escalating costs for the taxpayer.
Every person imprisoned costs the state up to $300 each day (more than $100,000 per year), and on top of that are the costs associated with building new prisons.
Corrections have adopted different strategies to combat rising costs, these include:
Limiting the unlock time of prisoners to a few hours per day (minimising staff requirements).
Uniformity in kitchens across the country (e.g. mince on Wednesdays, sausages on Thursdays).
'Double Bunking' prisoners (housing two prisoners in a cell originally designed only for one).
We also know that higher numbers of Māori in prison stem from racism in the justice system, where Māori have been treated more harshly than non-Māori. This is a legacy of colonisation.
Consequently, our justice system should adopt new approaches to reduce re-offending that are rooted in compassion and fairness.
Meanwhile the increase of incarcerated persons has led to less hospitable prison conditions which has brought into question our commitment to basic human rights. By doing so we are ignoring one of the fundamental tenets of democracy: that prisoners be detained humanely.
Instead of putting more people in prison, we must be brave and focus on the causes of crime by addressing unemployment, inadequate housing and a shortfall in mental health services.

The origins of each statement in the status-quo text are detailed below, alongside the original statement where applicable:

Andrew Little, Minister of Justice, New Zealand Labour Party

New Zealand has adopted a general strategy of punishing more often and locking people up for longer periods of time […] the justice system was not making potential victims safer by focusing on imprisonment and punishment. (cited in Gattey 2018)

> This was adapted to: "New Zealand's prison population is at near record numbers due to a strategy of punishing more often and locking people up for longer periods of time. However, criminal justice experts have argued that this method of deterrence is ineffective."

Kelvin Davis, Minister of Corrections, New Zealand Labour Party

[...] prisons are often training grounds for further offending. Prisoners can build their criminal careers by learning criminal skills in prison, which damages their employment, accommodation and family prospects, and compounds any existing mental health and substance use issues. (cited in Gattey, 2018)

> This was adapted to: "Tougher sentencing policies for non-violent crime only transform low level criminals into more hardened criminals, leading to escalating costs for the taxpayer."

Marama Fox, Member of Parliament, Māori Party[63] co-leader

The high numbers in prison stem from poverty and also from injustice from racism in the justice system where Māori have been treated harsher in the system than non-Māori. (cited in Wright 2016)

> This was adapted to: "We also know that higher numbers of Māori in prison stem from racism in the justice system, where Māori have been treated more harshly than non-Māori."

Professor Tracey McIntosh, University of Auckland

[...] you can't have a conversation about institutional racism without having a conversation about colonisation. (cited in Bingham,

[63] The Māori party are an indigenous rights political party formed in 2004. The party has been represented in the New Zealand parliament in all but the 2017 to 2020 term.

> Penfold 2016) This was adapted to: "This is a legacy of colonisation."

Golriz Ghahraman, Member of Parliament, Green Party of Aotearoa / New Zealand[64]

> […] our justice system should adopt new approaches to reduce re-offending that are rooted in compassion and fairness. (cited in Walters 2018) Peter Boshier, Chief Ombudsman, Office of the Ombudsman

> New Zealand was at risk of falling below minimum standards set by New Zealand's agreement to comply with the United Nations Optional Protocol to the Convention […]. It stands to reason that an increase in prisoners, recycling prison facilities which had been closed and double-bunking meant prisoners not having the same access to facilities which are so important to try and get their heads right. (cited in Fisher, 2018)
>
> > This was adapted to: "Meanwhile the increase of incarcerated persons has led to less hospitable prison conditions which has brought into question our commitment to basic human rights."

Golriz Ghahraman, Member of Parliament, Green Party of Aotearoa New Zealand

> […] we must be brave and focus on the causes of crime by addressing unemployment, inadequate housing and a shortfall in mental health services. (cited in Walters, 2018)

Both the populist and status quo texts make an explicit argument for reducing the rate of imprisonment. For consistency, the theme of each text directly traverses issues related to cost, efficacy and prisoner rights. The efficacy of prisons is disputed in each through a generalisation about prisons as places where criminals meet other criminals, which, importantly, has merit in criminological literature linking imprisonment with gang socialisation (Pyrooz, Decker, Fleisher 2011). Both texts also share a similar format, word count (280) and identical bullet point script in the middle section. The purpose of this identical section was to give participants a realistic impression of the costs associated with housing prisoners, as misinformation can lead to calls for more austere prison conditions (see:

[64] The Green Party of Aotearoa New Zealand is a left-wing political party formed in 1990. The party stood its own candidates in the 1999 election and has been represented in the New Zealand parliament since.

Coyle 2008). The populist text then pivots away from the rights of prisoners as outlined in the status-quo text by drawing attention to the victims of crime, in much the same way as political actors have often done.

Public surveys (rather than focus groups or interviews) were identified as the preferred method of deploying this experimental tool because they minimise interviewer effects and social desirability bias, and ensure that large amounts of data can be collected (Bryman 2016). For this research, it was essential to recruit a large number of participants, with a minimum number from key demographic groups, in order to identify demographic patterns (e.g., those who might be susceptible to penal populism) and allow for greater inferences about the utility of populism as a tool for progressive penal reform. Effort was made to locate, as far as possible, a sufficient sample size of key groups within New Zealand's voting age population. In the survey itself, demographic questions were modelled on those asked by Statistics New Zealand in the 2018 Census. In addition to age, gender and ethnicity, two further questions were asked to ascertain the political orientation of participants: one involved participants self-selecting on a left-right politics scale; and the other asked them to declare which party they voted for in the 2017 New Zealand general election.

2.2. Hypotheses

We hypothesise that participants will agree more with a populist argument than a status quo argument. The specific research hypotheses are:

> H1–A Older participants will agree more with a populist argument than a status quo argument compared to younger participants.
>
> H1–B Men will agree more with a populist argument than a status quo argument compared to women.
>
> H1–C Pākehā will agree more with a populist argument than a status quo argument compared to non-Pākehā.
>
> H1–D Politically "right" identifying participants will agree more than "centre" and "left" identifying participants with a populist argument compared to a status quo argument.

These hypotheses draw from a constellation of scholarship outlining the advent of populist phenomenon in contemporary liberal democracies. Beginning with Thomas Frank (2007), a frenzied free market populism (initially associated with both Republican and Democratic parties in the 1990s see: Frank 2000) had taken on a quasi-religious fervour among right identifying voters in the United States. Marian Sawyer and David Laycock (2009) draw on this free market populism as a framework in their analysis

of conservative Prime Ministers, John Howard of Australia and Stephen Harper of Canada. A guiding belief among those most drawn to free market populism is that the welfare state impinges on their individual freedom as taxpayers. Thomas Frank (2007) argues that even as the economic wellbeing of many right identifying voters has deteriorated, little attention has been given to this dismantling of the welfare state and how that relates to the increasingly insecure position that these constituents find themselves. Instead, such right identifying voters are more likely to hold the (now limited) state apparatus responsible for such economic insecurity.

Pippa Norris and Ronald Inglehart (2019) challenged the veracity of this economic insecurity hypothesis through recasting populism, especially an authoritarian populism, as being consequential of a "cultural backlash", suggesting that it was more likely a response to widespread social changes that had been occurring more quickly than the replacement of one voting age constituency by the next. This cultural backlash hypothesis of populism in Europe and North America reflects an omnibus of research from Australia also. David Snow & Benjamin Moffitt (2012) linked populist attitudes to general unease from white Australians to mass non-white immigration and the acceptance of refugees. Meanwhile, Marian Sawer (2006) traced the genesis of a gendered anti-feminist populism back to the 1970s, a time when Australia was at the forefront of multilateral commitments to the rights of women.

This paper is less concerned with the strength of either economic insecurity or cultural backlash as a theoretical explanation of populism. We note however that both arguments identify demographic subgroups which might be susceptible to populist ideation i.e., men, older generations and the white majority (Pākehā), along with right-identifying voters, and consider these subgroups worthy of further analysis.

2.3. Sampling procedure and survey administration

A total of 1,400 participants were recruited primarily through community-oriented groups in New Zealand on the social media platform, Facebook. In each community group, a notice briefly detailing the research was posted and registered voters (i.e., residents who were 18 years of age and over) were requested to provide their opinions on prisons by following a link to the questionnaire. To incentivise participation, members of the public were advised that they had the option of entering a voucher prize draw at the conclusion of the survey. A link then routed those interested to Qualtrics, an online survey collection tool. To be eligible for the prize draw (3x $100 supermarket vouchers), participants provided their email address and were also asked if they wished to receive a brief of the results and/or participate in future surveys. Participants were randomly allocated into one of two

groups by Qualtrics. The first group (n = 697) was exposed to the populist-type approach to decarceration while the second group (n = 703) was presented with the status-quo text (the collage of progressive talking points outlined above).

A minimum subgroup of n = 70 was sought for age, ethnicity, gender and party vote. The four age bands are based on Pippa Norris and Ronald Inglehart (2019): Interwar (born before 1945); Baby boomer (born before 1965); Generation X (born before 1981); and Millennial (those aged 18 and older and born after 1981). Each age band was sufficiently represented. Additional efforts were made to sufficiently account for ethnic minority subgroups and party vote in the 2017 general election by advertising the research in other New Zealand Facebook groups with a specific focus.[65] The participant voter spread was also monitored to ensure that a minimum number of participants (also n = 70) from each of the four political parties[66] (those with more than one parliamentary seat in the 52nd New Zealand Parliament) met the subgroup threshold. Gender participation was also monitored with a view to ensuring that at least 45% of participants were men. At the conclusion of the data collection, a sufficient sample of participants identifying as Pākehā (NZ European), Māori and Pacific Peoples had been collected. However, there were insufficient numbers of participants identifying as Asian (collectively, Chinese or Indian are the next two largest ethnic minorities in New Zealand) and so these participants were folded into an "other" category, along with Middle Eastern, Latin American and African.

3. Results

A 7-point Likert scale ranging from "strongly agree" to "strongly disagree" was used to capture levels of support for either of the two texts. Likert scales allow the intensity of participants' feelings towards social phenomena to be measured (Bryman 2016). Responses to this scale were then grouped into categories of "broadly agree", "neither agree nor disagree" and "broadly disagree", after which, significance testing was used to determine the

[65] E.g., in Facebook groups such as 'Kai Māori', a group promoting contemporary Māori cuisine.

[66] There were actually five political parties represented in the 2017–2020 parliamentary term: National, Labour, New Zealand First (a centrist nationalist party), the Green Party of Aotearoa New Zealand and ACT (a right-wing libertarian party). However, ACT only won 1 seat and 0.5% of the national vote in the 2017 general election.

relative strength of one text compared to the other, with specific reference to age, gender, ethnicity and political persuasion.

A larger proportion of all participants broadly agreed with the populist argument than the status quo argument. Table 1 shows the overall agreement with either the status quo or populist argument. An independent samples t-test also showed that there was a significant effect from the type of argument which was read by participants at the $p < .05$ level ($t (1295.301) = 2.472$, $p < .001$). However, the overall mean difference was negligible, as outlined in Table 1, reflecting shifts in the intensity of agreement and disagreement. In other words, while there were proportionately more participants who agreed with the populist argument, they were less inclined to strongly agree with it. Also evident in the table is that a larger proportion of participants took a neutral position when presented with a populist-type text instead of the status quo text, suggesting that a larger number of participants were ambivalent rather than opposed to the populist text.

Table 1. To what extent do you agree with the text? Populist vs Status Quo (all participants)

	Broadly agree			Neither agree or disagree	Broadly disagree			M (SD)
	Strongly agree	Agree	Somewhat agree		Somewhat disagree	Disagree	Strongly disagree	
Status Quo	11.4 (165)	11.4 (165)	9.5 (137)	2.6 (38)	5.8 (84)	4.0 (58)	3.9 (56)	3.16 (1.925)
Populist	14.1 (98)	24.5 (171)	14.8 (214)	4.4 (64)	4.9 (71)	6.7 (47)	4.6 (32)	3.15 (1.621)

H1–A stated older participants will agree more with a populist argument than a status quo argument compared to younger participants. To test this, Baby Boomers and Interwar were grouped together as "older" participants (those born before 1965), while Generation X and Millennials were grouped together as "younger" participants (those born in 1965 and after). 57.7% of older participants broadly agreed with the status quo text and 60.7% broadly agreed with the populist text, while 68.8% of younger participants broadly agreed with the status quo text and 71.5% broadly agreed with the populist text. A two-way ANOVA showed that at the $p < .05$ level the differences were not statistically significant ($F (1, 1294) = 0.101$, interaction p value = 0.751).

Table 2. To what extent do you agree with the text? Populist vs Status Quo (age)

	Broadly agree			Neither agree or disagree	Broadly disagree			M (SD)
	Strongly agree	Agree	Somewhat agree		Somewhat disagree	Disagree	Strongly disagree	
Millennials: Status quo	27.2 (58)	25.8 (55)	19.7 (42)	6.6 (14)	7.5 (16)	7.0 (15)	6.1 (13)	2.87 (1.823)

Millennials: Populist	19.3 (47)	28.7 (70)	27.9 (68)	9.0 (22)	8.6 (21)	3.7 (9)	2.9 (7)	2.82 (1.503)
Generation X: Status quo	24.0 (82)	22.0 (75)	20.0 (69)	5.6 (19)	11.4 (39)	8.8 (30)	7.9 (27)	3.16 (1.933)
Generation X: Populist	11.7 (36)	25.6 (79)	30.8 (95)	9.1 (28)	9.4 (29)	7.8 (24)	5.5 (17)	3.24 (1.651)
Baby Boomers: Status quo	19.8 (25)	21.4 (75)	16.7 (21)	2.4 (3)	19.0 (24)	9.5 (12)	11.1 (14)	3.52 (2.046)
Baby Boomers: Populist	9.8 (12)	13.0 (16)	35.8 (44)	10.6 (13)	13.8 (17)	11.4 (14)	5.7 (7)	3.63 (1.657)
Interwar: Status quo	0.0 (0)	34.8 (8)	21.7 (5)	8.7 (2)	21.7 (5)	4.3 (1)	8.7 (2)	3.65 (1.668)
Interwar: Populist	13.6 (3)	27.3 (6)	31.8 (7)	4.5 (1)	18.2 (4)	0 (0)	4.5 (1)	3.05 (1.558)

H1–B stated men will agree more with a populist argument than a status quo argument compared to women. As illustrated in Table 3, 60.3% of men broadly agreed with the status quo text and 66.6% broadly agreed with the populist text, while 71.9% of women broadly agreed with the status quo text and 71.4% broadly agreed with the populist text. Due to the small number of gender diverse participants (n = 11), these were excluded when measuring the significance of gender on the results. A two-way ANOVA showed that at the $p < .05$ level, men did not have statistically significant higher levels of agreement than women ($F (1, 1278) = 1.999$, interaction p value = 0.274) with a populist argument compared to a status quo argument.

Table 3. To what extent do you agree with the text? Populist vs Status Quo (gender)

	Broadly agree			Neither agree or disagree	Broadly disagree			M (SD)
	Strongly agree	Agree	Somewhat agree		Somewhat disagree	Disagree	Strongly disagree	
Men: Status quo	21.8 (72)	20.9 (69)	17.6 (58)	4.8 (16)	13.3 (44)	11.2 (37)	10.3 (34)	3.42 (2.039)
Women: Status Quo	25.1 (91)	25.6 (93)	21.2 (77)	6.1 (22)	11.0 (40)	5.5 (20)	5.5 (20)	2.91 (1.771)
Men: Populist	12.3 (40)	21.8 (71)	32.5 (106)	7.7 (25)	10.4 (34)	9.8 (32)	5.5 (18)	3.34 (1.692)
Women: Populist	15.5 (57)	26.7 (98)	29.2 (107)	10.6 (39)	10.1 (37)	4.1 (15)	3.8 (14)	3.01 (1.544)

Table 4 illustrates the differences in agreement for each text based on ethnicity. H1–C stated Pākehā participants will agree more with a populist argument than a status quo argument compared to non-Pākehā participants: a majority of Pākehā participants, 64.4%, broadly agreed with the status quo text, while 67.9% broadly agreed with the populist text. Ethnicity was not indicative of a broader agreeability with the populist text. A two-way

ANOVA showed that at the $p < .05$ level, Pākehā participants did not have statistically significant higher levels of agreement than non-Pākehā participants ($F (1, 1294) = 0.112$, interaction p value = 0.738) with a populist argument compared to a status quo argument.

A participant's political leanings appear to be the most significant determinant of responsiveness to the populist text. H1–D stated right-of-centre identifying participants will agree more with a populist argument than a status quo argument compared to non-right-wing identifying participants, the data for which is illustrated in Table 5. Those who self-identified with the political right showed the greatest proportional difference: 39.2% broadly agreed with the status quo text, while 57.4% agreed with the populist text. A two-way ANOVA showed that at the $p < .05$ level, right-identifying participants had statistically significant higher levels of agreement than non-right-identifying participants with a populist argument compared to a status quo argument ($F (1, 1278)$ 11.456, interaction p value = .001). Those who self-identified in the political centre showed only a small proportional difference: 64.4% broadly agreed with the status quo text, while 67.2% agreed with the populist text. A two-way ANOVA showed that at the $p<.05$ level, centre-identifying participants had statistically significant higher levels of agreement than non-centre-identifying participants with a populist argument compared to a status quo argument ($F (1, 1278) = .005$, interaction p value = .945).

Table 4. To what extent do you agree with the text? Populist vs Status Quo (ethnicity)

	Broadly agree			Neither agree or disagree	Broadly disagree			M (SD)
	Strongly agree	Agree	Somewhat agree		Somewhat disagree	Disagree	Strongly disagree	
NZ Euro: Status quo	22.0 (132)	22.7 (136)	19.7 (118)	5.5 (33)	12.7 (76)	9.0 (54)	8.3 (50)	3.25 (1.940)
NZ Euro: Populist	12.3 (74)	23.3 (140)	32.4 (195)	9.1 (55)	10.6 (64)	7.1 (43)	5.1 (31)	3.25 (1.628)
Māori: Status quo	33.0 (37)	27.7 (31)	18.8 (21)	1.8 (2)	8.0 (9)	4.5 (5)	6.3 (7)	2.63 (1.797)
Māori: Populist	23.9 (27)	32.7 (37)	23.9 (27)	7.1 (8)	5.3 (6)	5.3 (6)	1.8 (2)	2.60 (1.479)
Pasifika: Status quo	38.1 (16)	21.4 (9)	19.0 (8)	4.8 (2)	7.1 (3)	7.1 (3)	2.4 (1)	2.52 (1.714)
Pasifika: Populist	26.7 (8)	36.7 (11)	20.0 (6)	6.7 (2)	3.3 (1)	6.7 (2)	0 (0)	3.20 (1.406)
Other: Status quo	17.3 (13)	30.7 (23)	13.3 (10)	9.3 (7)	16.0 (12)	6.7 (5)	6.7 (5)	3.24 (1.842)
Other: Populist	17.4 (12)	15.9 (11)	34.8 (24)	11.6 (8)	7.2 (5)	7.2 (5)	5.8 (4)	3.20 (1.685)

Table 5. To what extent do you agree with the text? Populist vs Status Quo (political leaning)

	Broadly agree			Neither agree or disagree	Broadly disagree			M (SD)
	Strongly agree	Agree	Somewhat agree		Somewhat disagree	Disagree	Strongly disagree	
Left: Status Quo	47.4 (90)	35.3 (67)	8.9 (17)	2.6 (5)	3.2 (6)	0.5 (1)	2.1 (4)	1.89 (1.249)
Left: Populist	20.9 (61)	31.9 (61)	28.3 (54)	7.3 (14)	6.3 (12)	3.7 (7)	1.6 (3)	2.63 (1.392)
Centre: Status Quo	17.6 (63)	21.6 (77)	25.2 (90)	6.4 (23)	14.6 (52)	7.8 (28)	6.7 (24)	3.29 (1.810)
Centre: Populist	12.0 (44)	22.7 (83)	32.5 (119)	10.1 (37)	11.7 (43)	5.7 (21)	5.2 (19)	3.25 (1.603)
Right: Status Quo	5.6 (8)	13.3 (19)	20.3 (29)	6.3 (9)	18.2 (26)	19.6 (28)	16.8 (24)	4.44 (1.883)
Right: Populist	10.3 (14)	18.4 (25)	28.7 (39)	9.6 (13)	11.8 (16)	14.0 (19)	7.4 (10)	3.65 (1.786)

Of those who self-identified on the political left, there was a proportional difference in favour of the status quo text: 91.6% broadly agreed with the status quo text, while 81.2% agreed with the populist text. A two-way ANOVA showed that at the $p < .05$ level, left-identifying participants had statistically significant lower levels of agreement than non-left participants with a populist argument compared to a status quo argument ($F (1, 1278) = 10.374$, interaction p value = < .001). As illustrated in Table 6, differences in the agreeability of a status quo text compared to a populist text generally map over to who the participant voted for in the 2017 election. A two-way ANOVA also showed that at the $p < .05$ level, there were statistically significant differences in agreement based on the 2017 party vote choice of participants ($F (5, 1279) = 3.509$, interaction p value = .004). Agreement based on party vote also supports the hypothesis that political leanings influence the agreeability of the populist text compared to the status quo text, both National Party and New Zealand First voters were statistically more inclined to support the populist argument than Labour and Green party voters.

Table 6. To what extent do you agree with the text? Populist vs Status Quo (party vote 2017 election)

	Broadly agree			Neither agree or disagree	Broadly disagree			M (SD)
	Strongly agree	Agree	Somewhat agree		Somewhat disagree	Disagree	Strongly disagree	
National: Status Quo	7.1 (15)	14.3 (30)	27.1 (57)	5.2 (11)	19.0 (40)	15.7 (33)	11.4 (24)	4.08 (1.829)
National: Populist	9.1 (17)	18.2 (34)	32.6 (61)	10.2 (19)	13.9 (26)	8.6 (16)	7.5 (14)	3.57 (1.691)
Labour: Status Quo	31.5 (74)	33.2 (78)	16.2 (38)	6.0 (14)	7.2 (17)	2.6 (6)	3.4 (8)	2.46 (1.558)
Labour: Populist	17.4 (42)	28.6 (69)	26.6 (64)	10.0 (24)	7.5 (18)	7.1 (17)	2.9 (7)	2.94 (1.577)

Green: Status Quo	60.0 (36)	20.0 (12)	8.3 (5)	6.7 (4)	0.0 (0)	1.7 (1)	3.3 (2)	1.85 (1.436)
Green: Populist	22.9 (16)	28.6 (20)	31.4 (22)	5.7 (4)	8.6 (6)	0.0 (0)	2.9 (2)	2.60 (1.387)
NZ First: Status Quo	9.2 (6)	21.5 (14)	16.9 (11)	3.1 (2)	18.5 (12)	10.8 (7)	20.0 (13)	4.12 (2.080)
NZ First: Populist	5.1 (4)	20.3 (16)	35.4 (28)	7.6 (6)	10.1 (8)	15.2 (12)	6.3 (5)	3.68 (1.684)
Other: Status Quo	19.4 (7)	25.0 (9)	13.9 (5)	0 (0)	19.4 (7)	8.3 (3)	19.9 (5)	3.56 (2.144)
Other: Populist	9.7 (3)	35.5 (11)	29.0 (9)	12.9 (4)	6.5 (2)	0 (0)	6.5 (2)	2.97 (1.494)
Did not vote: Status Quo	24.6 (16)	23.1 (15)	21.5 (14)	4.6 (3)	10.8 (7)	10.8 (7)	4.6 (3)	3.05 (1.858)
Did not vote: Populist	20.5 (15)	21.9 (16)	32.9 (24)	9.6 (7)	9.6 (7)	2.7 (2)	2.7 (2)	2.85 (1.488)

4. Discussion

There were three points of interest derived from this experiment. First, overall, participants were more likely to broadly agree with the populist text than the status quo text, albeit with less intensity, suggesting perhaps that some participants were more persuaded by the populist text though still harbouring some reservations about how the argument was presented. Second, a participant's gender, ethnicity and age were not statistically significant factors in determining whether one text was more broadly agreed with relative to the other. For example, while men were less inclined to broadly agree with either a status quo or populist text for penal reform, the populist text was not measurably more popular among this cohort. Third, the participant's self-identified political orientation or party preference in the 2017 New Zealand general election appears to be the most significant determinant of agreeing with the populist-style text. Because each text advocated reducing the number of persons imprisoned, this experiment found that participants who identify with the political right and its parties might be more willing to accept arguments for lower rates of imprisonment if they are presented using a free-market populist lens.

The relevance of a participant's political identity helps to conceptualise the sort of political environment where a market populist approach might be deployed. Former Alberta Premier Ralph Klein is one notable example of a free-market populist whose fiery rebuke of government excesses led, perhaps inadvertently, to a reduction in the province's prison population. Klein's populist rhetoric was wedded with New Right thinking, an ideology of free-market liberalism promoting less government intervention in the economy and in the lives of ordinary Albertans (Denis 1995; Taft 1997; Martin 2002). What happened to Alberta's prison population between 1993 and 1997 was dramatic, falling by 32 per cent (Webster, Doob 2014). Of

note also is that despite the Klein government enacting policies which cut provincial funding of prisons, this did not precipitate a shift toward private prisons, it simply resulted in less people imprisoned (Nossal, Wood 2004).

While the early Klein era provides an interesting anecdote of a market populist enacting policies which led to a significant reduction in imprisoned persons, there are some limits to its comparability to politics in New Zealand. Klein sought a 20 per cent cut across public service expenditure for which the justice sector was only one of many budgets under pressure to cut costs, and there is no strong evidence that Alberta provincial government intended to reduce its prison population during this time. In contrast, Corrections New Zealand has enjoyed expanding budgets since the 1990s as its prison population has increased (Gluckman 2018). It remains to be seen at a time of increasing government spending due to the Covid-19 pandemic whether a free-market populist style argument similar to the one used in this experiment, might be employed to convince right-identifying voters of the need to reduce the use of imprisonment.

The outcomes of this experiment also support suggestions that public punitiveness might have been overstated and that the public is more amenable to alternatives than first thought (see: Dzur 2010; Green 2014). A considerable majority of participants broadly agreed with either the populist or status quo text, with widespread support for arguments leading to lower rates of imprisonment. Some evidence of this also exists within recent measures of public opinion in New Zealand. In 2016 the Ministry of Justice commissioned a survey into public perceptions of crime, asking participants what would increase their confidence in the criminal justice system. Only 6% responded with a preference for longer or harsher sentences. Notably these punitive responses were less popular than a focus on victims or the rehabilitation of offenders (Colmar Brunton 2016). This survey and the research discussed in this paper therefore seems to confirm a sense of moral ambivalence that much of the public feel towards the notion of punishment, which those advocating for penal moderation need to bring to light and engage with (Loader 2010).

In New Zealand, there are signs suggesting that the time of penal populism has passed. The Labour Party has now committed to reducing the prison population by 30 per cent in 15 years (Coughlan 2020), and by June 2021, the prison population in New Zealand had dropped around 19 per cent to 8,397, from a peak of 10,364 in 2018 (Department of Corrections 2020a; 2021). This decrease is the result of a number of different factors, including reduced victimisation and the postponement of jury trials during the 2020 Covid-19 lockdowns, administrative measures to facilitate bail and parole processes, but also the increasing use of non-custodial sentences (Ministry of Justice 2020). Although right-leaning parties in New Zealand have retained a punitive focus, attempts by the National Party to stir up concerns

about criminal gangs in the 2020 election campaign (Walls 2020) went largely unnoticed. The Covid-19 pandemic has also undoubtedly played a role in this and could potentially end populism as a political force (Pratt 2020). During the pandemic, expert opinion has been given prominence in media reporting (Pratt 2020), and New Zealanders' trust in science, politicians and the police all increased during the first Covid-19 lockdown (Sibley et al. 2020). As John Pratt (2020: 323) suggests, "the triumph of expertise and science over the virus may lead to the re-establishment and respect for such capabilities in other areas of government […] they may even find their way to back to guiding penal policy."

While the rate of imprisonment appears to be in decline in New Zealand, it is noteworthy that there have been few attempts to repeal existing punitive legislation. Despite promises to repeal the "three strikes" law, an attempt to do so in 2018 failed after Labour's then coalition partner, New Zealand First, publicly refused to support the proposal (Moir 2018), and further attempts have not been forthcoming even though Labour is now strong enough to govern alone. It could therefore be suggested that New Zealand has engaged in what Loader (2010: 361) calls "moderation by stealth", which largely avoids "engagement with citizens whose visions of punishment may not fully overlap with those of the penal moderate." What is now needed instead is penal "moderation-by-politics" (Loader 2010) which does not treat public opinion as a ticking time bomb to be carefully diffused, but seeks to challenge prominent understandings of the meaning and place of punishment in society by explicitly engaging with the "passions that crime and punishment provokes" (Loader 2010: 363).

The most resounding finding of our experiment provided some clues as to what might aid this penal moderation-by-politics; that among right-identifying voters, an offensive free-market populist style of politics yields more favourable results than the technocratic status quo. Consequently, a change of posture by proponents of more progressive penal reform might contribute toward the dual goals of lowering rates of imprisonment further and entrenching it in the political culture of New Zealand. As in some US states, using these "cost-saving rationales", may enable bipartisan coalitions of political adversaries to advocate for fiscally prudent policies and reform, without being penalised by voters for promoting nonpunitive policies (Aviram 2015).

Because the experiment was an omnibus of viewpoints, we can only speculate as to what specifically was most agreeable among this subgroup of participants. Only the status quo text contained views on the impacts of colonisation on Māori and New Zealand's human rights obligations and it could be that the right-identifying subgroup strongly disagreed with these specific claims. Alternatively, the populist text centred on the wasteful and unnecessary use of prisons and suggested instead that such resources could

be directed toward the victims of crime. It could also be that this argument resonated strongly with the right-identifying subgroup. Both the omission of Māori as victims of unfair treatment in the justice system, and the prioritisation of support for victims of crime in the populist text, plays on the cynical politics that already underpins both penal populism and populism in New Zealand.[67]

5. Limitations

There were some noteworthy limitations to this experiment. Surveys in criminal justice are likely to attract the participation of a particular voter type, instead of a mix that is representative of the wider voting population (Hough, Roberts 2005). Despite attempts to ensure a mix of the New Zealand voting age population, it was not a probabilistic sample. One alternative to the methods deployed in this paper would have been to obtain a probabilistic sample from the electoral roll and then send out surveys to potential participants; however, costs and increasingly low response rates have made such practices less viable than what they once were (Greaves et al. 2021).

Survey timing is also crucial, but can be problematic. Criminologists have noted that a spike in public punitiveness tends to arise following particularly heinous crimes (Roberts et al. 2002; Dowler 2003; Pratt 2007). During piloting of the experimental tool, Grace Millane, a female tourist, was declared missing and later found deceased. Details of this case were widely reported in the New Zealand media, leading to vigils and a public outpouring of grief for the victim and her family. In the same month, in a separate incident, a man was decapitated in a particularly gruesome murder that was also graphically reported in the New Zealand media. Due to these incidents, a decision was made to halt the pilot process and resume later. Subsequently, the timing of the survey – a period of relative calm – may have important implications for the applicability of the research findings. Data collected in periods of relative calm can obscure the realities of the effects of violence, which are neither predictable nor a respecter of political campaign cycles. If a high-profile instance of violence were to overlap with a populist-type campaign for decarceration, it could be less effectual or not effectual at all.

Inferences can therefore only be made based on what is comparable in this experimental tool (a populist-type argument vs a status quo argument)

[67] There is irony in this cynical politics of omitting Māori but also talking about victims because Māori themselves are also disproportionately the victims of crime.

at times of relative political calm (in the absence of a recent heinous and highly publicised crime). For these reasons, there is only a limited extent to which this methodological approach can wholly satisfy the research question and, by extension, its *real-world* applicability. Finally, this questionnaire does not test how a political actor relying on penal populism might respond to populist-type arguments for decarceration. We cannot regulate the emergence of confounding socio-political factors (such as the random chance of a violent act overshadowing a populist-type decarceration argument, or a political actor taking a position that nullifies such an argument).

Conclusion

We began by setting out how prisons in New Zealand are expensive, ineffective in reducing reoffending and reflective of the country's colonial history and its contemporary failure to address inequity in the justice system. Noting the political culture of both penal populism and populism in the socio-political culture of New Zealand politics, we went on the decarceration offensive, testing the strength of a hypothesis put forward by Julian V. Roberts et al. (2002) nearly twenty years ago. We acknowledged that cost arguments alone might be insufficient to induce penal moderation, but might be more successful if they were drawn from the more incendiary rhetoric of free market populism. To develop an experimental tool necessary to test this hypothesis, we considered looking within populism itself and detailed the literature explaining its core features.

Our experiment showed through subgroup analysis that the participants who were more inclined to support a populist-style text advocating decarceration were those who self-selected their political leanings as "right of centre" or who voted for the National Party, New Zealand's main centre-right political party. However, both texts elicited strong support from participants, suggesting that opinions on penal reform were malleable irrespective of the argument being presented. These findings have important implications because they suggest that discussing criminal justice in a different way, as hypothesised, might be of greater utility to advocates of criminal justice reform, especially if such discussions could be deployed in a manner that does not alienate an existing support base. But they also suggest that existing arguments for penal reform might resonate more strongly across the political spectrum than was once thought.

As this experiment did not draw on a probabilistic sample, some caution must be taken before claiming that these results broadly represent the New Zealand voting age population. Nor was this experiment staged against the

backdrop of a political campaign where rhetoric and the tactics deployed by political actors are rarely display a conscientious regard for penal institutions and how they operate. Finally, despite there no longer appearing to be an appetite for prison privatisation in New Zealand, this experiment cannot rule out privatisation or more austere prison conditions in response to the deployment of a market populist argument for penal reform. For that reason, the authors recommend further research to test the validity of populism as a tool for decarceration, employing a wider range of methodologies to better determine its real-world utility.

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The pandemic as an antidote to populism: Punishment, immobilisation, and COVID-19

Pandemia jako antidotum na populizm: karanie, unieruchomienie i COVID-19

Abstract: The contemporary rise of populism across much of Western society – especially the Anglosphere countries that are the main focus of this article – has threatened many of the protections and freedoms provided by the post-1945 commitment to a democratic political order: guarantees of human rights, adherence to the rule of law, and a media that is free to criticise governments and hold them to account. Populism has also come to be associated with a very different penal programme from that which, for several decades after 1945, characterised a given society's commitment to democracy. That pattern of justice – largely based on reason, liberalism, and expert knowledge – was significant beyond its operational boundaries. It symbolised the Western democratic order, standing out as a beacon of humanity against totalitarianism. The rise of populism, however, has helped to fashion a very different penal programme, associated with historic rises in imprisonment levels and the immobilisation of those who pose risks to public well-being – even if, in so doing, the foundations of criminal justice in the democratic world are undermined by the strategies employed. It might thus be supposed that governmental reactions to the COVID-19 pandemic pose a further threat to democracy and its criminal justice processes. Additional forms of immobilisation have been introduced to combat the spread of the virus: restrictions on freedom of movement in public spaces or stay-at-home orders equivalent to house arrest – controls which now cover entire nations rather than just individuals at risk of committing particular crimes. As such, this kind of 'rule by decree' might seem to be a blueprint for would-be autocrats wishing to subvert democratic

processes and forms of accountability altogether. However, the article also argues that the pandemic provides very different possibilities of governance to populist authoritarianism. Indeed, the virus acts as an antidote to populism. COVID-19 has laughed in the face of populist demagogues. It shows them to

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be nothing more than incompetent, though usually malevolent, charlatans with some of the world's highest infection and fatality rates in their societies. Instead of their empty populist blustering, the pandemic can only be eliminated by science and expert knowledge, acting in conjunction with a strong but accountable central government amidst forms of immobilisation to which the general public have largely acquiesced – strengthening rather than weakening social cohesion in the process in many instances. As the virus has eaten into the support for populism, the dangers which the latter posed to democratic order have also been pushed back. Previous pandemics have been followed by dramatic social and economic changes. Such changes post-COVID-19 may now sever the links between populism and penal development, allowing for a different and more restricted penal framework. **Keywords:** populism, COVID-19, immobilisation, punishment, security

Abstrakt: Współczesny wzrost populizmu w znacznej części społeczeństw zachodnich – zwłaszcza w krajach anglosaskich, na których koncentruje się niniejszy artykuł – zagraża wielu prawom i wolnościom wprowadzonym po 1945 roku do demokratycznego ustroju politycznego, w tym: gwarancjom praw człowieka, przestrzeganiu praworządności oraz swobodzie krytykowania rządu przez media i pociągania go do odpowiedzialności. Obecnie populizm zaczął być kojarzony z zupełnie inną polityką kryminalną, niż ta, która przez kilkadziesiąt lat przed 1945 rokiem charakteryzowała się zaangażowaniem społeczeństwa w demokrację. Ten wzorzec sprawiedliwości – w dużej mierze oparty na racjonalizmie, liberalizmie i wiedzy eksperckiej – miał znaczenie także poza granicami jego obowiązywania. Symbolizował zachodni porządek demokratyczny, wyróżniający się jako wzorzec przeciwko totalitaryzmowi. Jednak wzrost populizmu pomógł ukształtować zupełnie inną politykę kryminalną, związaną z historycznym wzrostem orzekanych kar pozbawienia wolności i izolacją tych, którzy stanowią zagrożenie dla dobrobytu publicznego – nawet jeśli obowiązujące strategie podważają taki sposób postępowania w sprawach karnych w demokratycznym świecie. Można zatem przypuszczać, że reakcje rządów na pandemię COVID-19 stanowią kolejne zagrożenie dla demokracji i procesów karnych. W celu przeciwdziałania rozprzestrzenianiu się wirusa wprowadzono dodatkowe ograniczenia mobilności: ograniczenie swobody poruszania się w przestrzeni publicznej lub nakaz pozostania w domu równoznaczny z aresztem domowym – a zatem kontrole, które obecnie obejmują całe społeczności, a nie tylko osoby mogące popełnić przestępstwo. Tego rodzaju rządzenie dekretami, pomijające parlamenty i oddające w ręce rządu władzę do przedłużania sytuacji wyjątkowych, mogą stanowić wzorzec dla niedoszłych autokratów, chcących całkowicie obalić demokratyczne procesy i formy odpowiedzialności. Jednak, jak wynika z niniejszego artykułu, pandemia daje również zupełnie inne możliwości rządzenia niż autorytarny populizm. Wirus działa jak antidotum na populizm. COVID-19 wyśmiał populistycznych demagogów, pokazując, że są tylko

niekompetentnymi, choć zwykle wrogimi, szarlatanami, którzy jednak przyczynili się do jednych z najwyższych na świecie wskaźników zachorowań i zgonów w swoich społeczeństwach. Pandemia może zostać wyeliminowana nie dzięki ich pustym, populistycznym hasłom, a dzięki nauce i wiedzy eksperckiej, działającej w połączeniu z silnym, ale poddanym kontroli rządem. Będzie on decydował o ograniczaniu mobilności, jednak w sposób, na który zgodzi się ogół społeczeństwa, co w wielu przypadkach przyczyni się do wzmocnienia, a nie osłabienia spójności społecznej. Ponieważ wirus osłabił poparcie dla populizmu, zagrożenia, jakie ten ostatni stwarzał dla porządku demokratycznego, również zostały zminimalizowane. Po poprzednich pandemiach nastąpiły drastyczne zmiany społeczne i gospodarcze. Takie zmiany po COVID-19 mogą zerwać powiązania między populizmem a rozwojem polityki kryminalnej, pozwalając na wprowadzanie innych, bardziej ograniczonych ram dla tej polityki.

Słowa kluczowe: populizm, COVID-19, ograniczenie mobilności, karanie, bezpieczeństwo

Introduction

The contemporary rise of populism across much of Western society – especially the Anglosphere countries that are the main focus of this article – has threatened many of the protections and freedoms provided by the post-1945 commitment to a democratic political order: guarantees of human rights, adherence to the rule of law and the separation of powers, and a media that is free to criticise governments and hold them to account. Populism – "an ideology of popular resentment against the order imposed on society by a long established, differential ruling class which is believed to have a monopoly of power, property, breeding, and fortune" (Shils 1956: 100–101) – has also come to be associated with a very different penal programme from the one which, for several decades after 1945, characterised a given society's commitment to democracy.

This post war route followed a course that largely prohibited punishments involving excessive and inhumane use of state power, pursuant to Articles 5 and 7 of the 1948 United Nations Universal Declaration of Human Rights. Punishments to the human body all but came to an end in democratic society, as did indeterminate sentencing (Bottoms 1977) and the prosecution of status offences such as homelessness and begging, to a large extent in the USA especially – in this case because of the reform-orientated US Supreme Court (Pratt 2020). All such matters were seen as contravening the respect for human rights and due process that were meant to be embedded in the penal affairs of a democratic society. Thereafter, it was also recognised by those then driving policy – law professors, senior judges and civil servants, the staff of research institutes, and corrections representatives in conjunction with government – that the use of imprisonment should be restricted whenever possible: it was deemed too expensive, inhumane, and inefficient.

This pattern of justice – largely based on reason, liberalism, and expert knowledge – was significant beyond its operational boundaries. It symbolised the Western democratic order, standing out as a beacon of humanity against totalitarianism. The subsequent fall of the Iron Curtain in 1989 seemed to ensure the permanence of this mode of governance. As Francis Fukuyama (1989: 4) wrote, what we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the endpoint of mankind's ideological evolution and the universalisation of Western liberal democracy as the final form of human government.

Central and East European

countries not only joined the democratic world, but – with membership in the EU at stake – also agreed to reshape their own penal policies in conformity to its expectations.

However, democracy has since gone sour in some of these recent converts. Hungary, for example, now espouses an "illiberal democracy". But in addition, it has even come under severe pressure in some of the Western societies previously thought to be amongst its exemplars – societies such as the UK and the USA, where the rise of populism has been exemplified by "Brexit" in the former and the presidency of Donald Trump in the latter. Well prior to those events, however, populism had helped to fashion a different penal programme from that which had been envisaged in the post-war era in Anglo-American society. This new programme is probably most dramatically associated with the language of punishment that it brought into existence ("zero tolerance", "three strikes and you're out", etc.), in conjunction with historic rises in imprisonment levels. At the same time, though, the rise of populism has also been associated with the emergence of what has been referred to as "the security sanction" (Pratt, Anderson 2016; Pratt 2020). Here, the central task of criminal law is not to punish those who have committed a crime, but to prevent particular crime risks from eventuating. The way to do this is by *immobilising* those who pose such risks – even if the strategies employed undermine the foundations of criminal justice in the democratic world.

In Anglosphere democracies, these have been implemented across a broad spectrum of threats and fears. They take the form of restrictions on movement and conduct in public spaces through the use of civil injunctions and the like, backed up by criminal penalties for breaching these injunctions (including imprisonment, even though no crime has been committed) for those whose status or presence seems to signify future crime. In addition, for those suspected of or charged with particular types of crime – especially sexual or violent crimes – they are now likely to have to prove that they are not a risk to the public (rather than be released because of previous presumptions of bail) or face being remanded in custody. For those

imprisoned for crimes which they *have* committed, the security sanction in some jurisdictions allows for them to be detained indefinitely if they are thought to be at risk of committing further crimes on release – especially sex offenders and terrorists. It can further allow for their effective *reimprisonment* at the end of a finite term, when they are then held indefinitely in "civil detention" until their risk ceases. Measures such as these have been steadily put in place since the late 1980s through mechanisms that have variously involved retrospective and hybrid legislation, lower standards for the burden of proof, relaxations of the rules of evidence to facilitate the establishment of a risk, and (for all intents and purposes) the use of double punishment for the same crime – all of which have steadily undermined the primacy previously given to the rule of law.

Given the way in which these measures point to important shifts away from democratic norms, it might be supposed that governmental reactions to the COVID-19 pandemic pose a further threat to democracy and its criminal justice processes. Additional forms of immobilisation have been introduced to combat the spread of the new coronavirus: restrictions on freedom of movement in public spaces or stay-at-home orders equivalent to house arrest – controls which now cover entire nations rather than just individuals at risk of committing particular crimes, with police (and sometimes the military) given powers of enforcement. The mechanisms used to give effect to these controls may simply take the form of a declaration of a "state of emergency", as in New Zealand in March 2020, or in the UK, through the provisions of the Public Health (Control of Disease) Act 1984 that gives government ministers "extraordinary powers" if they judge the need to be "urgent". As such, this kind of "rule by decree" might seem to be a blueprint for would-be autocrats wishing to subvert democratic processes and forms of accountability altogether. *The Guardian* (2021) thus editorialised that "even in the most extreme emergency, the [UK] prime minister does not have the power to make law by himself, live on television. The pandemic [however] has sometimes created the impression that something along those lines is happening."

Yet it might also be the case that, in spite of these forebodings, the pandemic will provide different possibilities of governance to this kind of populist authoritarianism. These are not certainties, but are possibilities all the same, emerging from the way in which the virus, or at least the struggle to contain and restrict it, acts as an antidote to populism. The latter is premised around nationalistic visions of a glorious future, that only "strongman" leadership can provide, with demagoguery blustering its way past science, reason, and expertise: hence the attraction of such leaders, as well, to rule by decree rather than the rule of law. This can then more readily allow them to bring "enemies of the people" under control, immobilising them and their menace to the public good as necessary. COVID-19 has

become one such enemy, but this is one that laughs in the face of populist demagogues. It shows them to be nothing more than incompetent, though usually malevolent, charlatans with some of the world's highest infection and fatality rates in their societies.[68] It is also an enemy that can only be eliminated by science and expert knowledge, acting in conjunction with a strong but accountable central government amidst forms of immobilisation to which the general public have largely acquiesced – strengthening rather than weakening social cohesion in the process. Previous pandemics were followed by dramatic social and economic changes (Snowden 2019). In these ways, the virus has generated a range of interventions and reactions – science, expertise, and social cohesion rather than division – that fundamentally challenge and undermine the belief systems of populism and its supporters. This has not been a uniform pattern, of course – indeed, in some instances, suspicions of the cause of the virus, of vaccines, of medical experts, and so on would seem to have solidified some levels of support for the strongman demanding that he be placed at the helm of society. However, where science and expertise in conjunction with clear, concentrated governmental action have been demonstrably successful in controlling the virus, the dangers populism has posed to democratic order have been pushed back. One of the consequences of this may then be that the primacy given to public health can sever the links that populism had been able to make with penal development.

1. The renaissance of populism

How, though, was populism able to make its renaissance? It has indeed been a renaissance, since in the post-1945 era it seemed that the victory of the Western democracies over the Axis powers had ended any further prospects for the prewar type of demagogues. As President Truman explained on 16 August 1945, the day after Japan's capitulation, this is the end of the grandiose schemes of the dictators to enslave the peoples of the world, destroy their civilisation, and institute a new era of darkness and degradation. This day is a new beginning in the history of freedom on this earth.

This new freedom was to be built around the post-war "solidarity project" (Garland 1996) and the welfare-driven mode of governance associated with it. Notwithstanding the higher taxes needed, it initially engineered high levels of social cohesion and trust in government, while removing great human sores that had previously been in place on the social body – homelessness and begging, for example (see Home Office 1974).

[68] Rates of COVID-19 infection and deaths per capita are amongst the highest in those countries where populism has had the greatest political successes: the UK, the USA, Brazil, and India.

However, early criticisms from neoliberal ideologues such as Friedrich Hayek (1944, 1960) and Milton Friedman (1962) that this governmental form was both inefficient and oppressive gathered force during the 1970s. Neoliberalism, its supporters claimed, would not only restore individual liberty and freedom of choice, but would also bring a greater sense of responsibility to the conduct of everyday life. The election victories of Margaret Thatcher in the UK in 1979 and Ronald Reagan in the USA in 1980, as well as subsequent programmes of economic restructuring, sowed the first seeds of populism's renaissance. Now, an individual's fate and prospects would be in their own hands rather than having this entrusted to the cushioning that careful state planning had previously provided. In the course of the restructuring many government services were privatised. Financial and service industries became the focus of economic development rather than manufacturing, along with a reliance on market forces. Reagan's observation in his 1981 inaugural address that government was "the problem, not the solution" was illustrative of the growing distrust of the state which such politicians cultivated. Individual risk-taking and self-reliance, rather than reliance on the state, was to be encouraged and rewarded. As Charles Handy (1989: 9) contemptuously argued in *The Age of Unreason*, "discontinuous change is the only way forward for a tramlined society, one that has got used to its ruts and its blinkers and prefers its own ways, however dreary, to untrodden paths and new ways of looking at things." Such ideas helped to build a habitus that was moulded on individual risk-taking and self-reliance rather than reliance on the state. It became second nature for individuals to serve as their own risk managers, as reflected in the growth of private insurance schemes, pensions, health care, education, etc. from the 1980s onwards.

Risk-takers were lauded now rather than looked upon as eccentric outsiders, as they had previously been (Pratt 2020). The more successful one's risk-taking, the more this could herald entry to a world of fabulous wealth and fame, riches set free by neoliberal economics. The emergence of entrepreneurs such as Richard Branson and Donald Trump was emblematic of the changing values of these societies: celebrity status was more desirable than conformity; individualism was more important than solidarity. Indeed, to maximise the opportunities for wealth creation and the fame this now brought with it, it was best to be free of ties and encumbrances that might otherwise impede this travel in the fast lane to success. As Zygmunt Bauman (2002: 62) wrote of this time, "individuals who are untied to place, who can travel light and move fast, win all the competitions that matter and count."

Inevitably though, this encouragement of risk-taking and enterprise led to great social divisions: neoliberalism contained no guarantees that all would enjoy prosperity. While some certainly did become winners of

massive fortunes in the casino-style economies that had been brought into existence, the previous pillars of security and stability began to crumble away: norms regarding the permanence of family life, with the decline of marriage and the growth of divorce and cohabitating practices; norms regarding community living, as local cultures disintegrated in the face of advancing redevelopment and electronic and private security replacing informal modes of surveillance and control; and norms regarding employment, with continuity and collegiality giving way to impermanence and competition with rivals for bonuses (Pratt 2020).

In effect, as the restructuring brought about the assembly of lives free to enjoy its economic rewards, it also brought about the assembly of lives without attachments, lives that no longer had any familiar roadmaps to guide the individuals making their solitary travels along the route to success. Events such as the stock market crash of October 1987 quickly demonstrated how precarious this route might be: many were destined to become losers rather than winners, with the state now unable or unwilling to protect them from personal disaster, as they encountered unnerving risks and dangers along the way. When asked about the crash at a press conference, President Reagan (1987) said "I think everyone is a bit puzzled […]. I have no more knowledge of why it took place than you have." Nothing seemed certain anymore, except that individuals would have to take responsibility for any ensuing misfortunes themselves.

Consequentially, vastly increased social distances began to appear in those societies that were most committed to neoliberal restructuring – Anglo-American democracies especially. These distances reflected both the rewards now to be won and the consequences of failure that might come with any such attempts. "Gated communities" became one of the architectural features of post-1970 urban life at one end of this spectrum. Here was the opportunity, for those who could afford it, to insulate themselves from all that was unknown and uncertain beyond the boundaries this design provided:

> The prices for properties in gated communities [in the UK] show no signs of slowing down. Developers are reporting increasing demand for homes surrounded by high walls and security gates […]. There is a definite trend towards more security. People want to feel secure and the perceived safety of walls and even porters adds value to the developments […]. [S]ecurity is one of the top priorities for today's buyers. (Gardner 2000: 3)

At the other end of this spectrum, a "cardboard city" existence beckoned with the resurgence of homelessness, begging, and those otherwise living on the street.

In the UK, it was reported that there are now twice as many people officially homeless than in 1979, one in five of the rentable homes

> has vanished from the stock, projected [state-sponsored] house building is at its lowest ebb, and foreign television crews find it all too easy to mark down our nation as uncaring with documentaries showing the 4,000 or so of London's homeless who regularly sleep rough. (James 1989: 12)

In effect, the break-up of the solidarity project and the vastly different futures that might now befall each individual generated a sense of perpetual anxiety and insecurity – even amongst the casino economy's winners. New media outlets, especially cable/satellite television and phone-in radio programmes – all products of deregulation and technological development and all dependent for their existence on advertising revenue that in turn necessitated them having large audiences – both articulated and responded to these concerns. Whatever the depth and breadth that this anxiety and insecurity might be in reality for each individual, the new media largely defined them in terms of the fear of crime and crime risks: crime and risks that would cause irreparable harm if they eventuated (the more extensive the risks were purported to be, the more this was likely to attract audiences and advertising revenue) and which were the product of *individual* irresponsibility or wickedness. In such ways, the complexity of these existential anxieties was compressed, while providing foes that the rest of the public could unite against.

One such category came to be the homeless and other such street people. They were thought to pose a threat to quality of life, meaning a "safe haven", a sanctuary free from such disturbing sights (Bauman 2000). As James Q. Wilson and George
L. Kelling (1982: 29–30) put the matter, many citizens are primarily

> frightened by crime […] involving a sudden, violent attack […] but we tend to overlook another source of fear – [that] of being bothered by disorderly people. Not violent people, not necessarily criminals but disreputable or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers […] loiterers, the mentally disturbed.

Another came to be "strangers", because of anxieties that they might, in reality, be paedophiles, sexual predators, or terrorists: "Locals detain[ed] innocent tourists on Southend [UK] seafront after mistaking them for paedophiles. One of the locals uploaded pictures of the tourists onto Facebook claiming a 'paedophile ring' had been 'smashed'' (Sims 2016: 1). Or sexual predators:

> No sinister old man in white van [say] Invercargill [New Zealand] police […]. [A] 17-year-old girl who said she had been grabbed by a man with silver-grey hair in a white van admitted making it up. Police took the reports seriously, warning schools about stranger danger and asking the public to be vigilant. However, there were

> some reports of vigilante behaviour. (Fensome 2012: 1) Or terrorists: thousands of shoppers [were] evacuated from London's Regent Street over [a] 'suspicious taxi' – which had been left there while the driver went Christmas shopping. (Linning, Duell, Tonkin 2015)

What prompted these suspicions? Growing individualism in conjunction with a distrust of government and its organisations had led to fewer and weaker community ties and responsibilities. The absence of informal controls and warning mechanisms that had previously been provided (Jacobs 1992) meant that strangers might be transformed into potential monsters. Before, such monsters had had hardly any presence in public discourse (Pratt 2020), but were now thought to be capable of inflicting irreparable harm on all that which had come to have special value in the course of restructuring. Children, for example, because of the way in which restructuring accelerated already existing trends towards small (and more impermanent) families, made them increasingly scarce – and increasingly precious: At a time when very few human relations can be taken for granted, the child appears as a unique emotional partner in a relationship […]. [U]nlike marriage or friendship, the bond that links a parent to a child cannot be broken; it is a bond that stands out as the exception to the rule that relationships cannot be expected to last forever. (Furedi 2001: 107)

Women are another example. Consumer-driven economies that have transformed the adult body (particularly the bodies of women) into a prized vehicle for pleasure and self-fulfilment, at the same time make women especially more vulnerable because of the increased presence in public space this gives them. Or the public at large, because of the random nature of terrorist attacks: after one such incident where a terrorist murdered 30 British tourists at a Tunisian resort, Prime Minister David Cameron observed that "[these] attacks can happen anywhere […] this is a threat that faces all of us" (Dearden 2015).

The framing of risk and uncertainty around these types of crime was regularly informed and enhanced by victims' rights groups, law and order activists, business organisations, right-wing journalists, and media personalities. They claimed that government and its elite experts had generated these risks because of their liberal penal programme: law-abiding citizens had been put at risk, while lawbreakers, or those at risk of becoming so had been favoured at their expense. The evidence for such claims was usually based on anecdote, sensational one-off cases, distortions, or outright fabrications – but they were very attractive all the same to these media outlets precisely because of the opportunity for easy sensationalism they provided within this new framework of knowledge. Equally, the "public

opinion" these campaigners said they represented was more likely to be based on headlines in the tabloid press or angry voices on a phone-in than any social scientific survey.

Nonetheless, governments from both Left and Right were prepared to align themselves with these forces, simultaneously reducing the influence of criminal justice elites on policy. Previous concerns about the effectiveness and cost of imprisonment, or the difficulty in predicting future criminality as an argument against indeterminate sentences were thus relegated in importance. Indeed, governments that now made these alignments were more likely to claim that a high prison population was an indicator of the government's success rather than failure (Cavadino, Dignan 2002; Pratt, Clark 2005). Here, then, was the first flowering of those populist seeds sewn in the 1980s, albeit in a form of *penal* populism at this juncture.

Aside from generating "incarceration mania" (Harcourt 2001), this brand of populism has also brought about the development of the new kind of utilitarian criminal justice that takes effect in the form of the security sanction. For example, the US measures to immobilise the homeless, beggars, and so on:

> The most widely adopted of such civility laws prohibit sitting or lying on sidewalks or in bus shelters, sleeping in parks or other public spaces, placing one's personal possessions on public property for more than a short period of time, camping, urinating, or drinking in public, selling newspapers and other written materials in public spaces, and begging. (Beckett, Herbert 2008: 9)

Similarly, UK legislation on public space protection orders: warning notices proliferate around the country telling all what they cannot do in a particular area on pain of prosecution and punishment that can lead to prison, even though no crime has been committed. In Oxford, a sign thus reads,

> No person shall aggressively beg. Aggressive begging includes begging near a cash machine or begging in a manner reasonably perceived to be aggressive or intimidating […]. [N]o person shall remain in a public toilet without reasonable excuse […] council staff are put at risk when having to remove people and drug related paraphernalia from the toilets. (Oxford City 2015)

These controls on movement in public space extend to those who would otherwise put the human body at risk. In the USA, community notification procedures have meant that "from North Carolina to Washington State, communities have designated swimming pools, parks, and school bus stops as 'child safety zones', off limits to some sex offenders. They are barred

from libraries in some cities and all public facilities in others" (Lovett 2012). In the UK, the Prevention of Terrorism Act 2005 allows the courts "to restrict the activities of individuals suspected of terrorist activity but for whom there is not sufficient evidence to charge" (Hanman 2009).

Those already imprisoned for crimes against the body can be immobilised through forms of indefinite imprisonment (in New Zealand, the number of preventive detention prisoners has increased from 10 in 1981 to 293 in 2020). Or at the end of a finite term, if they are considered a high risk, they may be detained in what is referred to as "civil detention." That is, they remain in prison indefinitely, despite having completed their sentence – or at least until they are assessed as no longer being a risk to the public – as under the provisions of the sexual predator laws in the USA, or the 2012 public protection order legislation in New Zealand.

Here, it seemed, was the solution to providing protection from risks of crime that would otherwise cause intolerable harm, and from which citizens had only limited measures of self-protection (children: "don't talk to strangers"). On this basis, penal populism was able to override government instructions that individuals should be responsible for their own well-being: here were grave risks that were beyond their own management. If governments did not extend their protection to meet this deficiency in essential safety, a "legitimacy gap" between government and the electorate was likely to open up: governments lose legitimacy when their power is exercised in a manner that contravenes existing conventions and expectations. If this deficit is not addressed, it may lead to a serious threat or challenge to the rules of power in the form of a legitimation *crisis* (Beetham 1991). To offset this threat, the distance between the governing class and the governed has to be reduced, with some realignment of their respective roles in governance – as with the reversal of penal power here.

At the same time, immobilising sanctions became particularly apposite to this era, where informal community controls had broken down and where there was so strong an emphasis on individualism at the expense of social cohesion. It meant that civic duties and responsibilities could be communicated through official signs and warnings in the absence of informally produced and communicated knowledge. These sanctions were also apposite to an era where mobility had itself become a prerequisite if risk-taking entrepreneurs were to be able to compete for all the prizes and riches that this restructuring had made possible. Indeed, mobility itself became one of these prizes, allowing the *possibility* at least of exciting and exotic foreign travel in some way or another, to nearly all rather than just a privileged few. The immobilisation of those who jeopardise such possibilities not only prevents any further participation for them in this race to the top, but also represents a remarkably equivalent penalty to the risks

they pose – at least, where criminal justice systems have shifted towards judging risk rather than crime.

How has it been possible, though, to engineer immobilising practices to ensure protection from risk through a range of enabling mechanisms that undermine the rule of law? The answer is that while governments have been anxious to push these immobilising strategies beyond the previous boundaries of criminal law, the courts, for the most part, have been reluctant to stand in their way. In Kansas v. Hendricks (1997), for example, the US Supreme Court determined that civil detention under the provisions of the US sexual predator laws is not a double punishment for the initial offence since it is intended to provide "treatment." It then follows that if there is no double punishment, then these laws do not invalidate the conventions against retrospective legislation that has put them in place.

This kind of reasoning is illustrative of a range of rationalisations from both governments and courts justifying these measures and maintaining that they are anyway within the limits of democratic society's legal framework. They simply represent, for example, a necessary "rebalancing" of criminal justice interests – in favour of those of the public now over those who would otherwise put them at risk. The UK anti-social behaviour legislation was thus justified on the grounds that "it will shift the balance of power in communities from the anti-social and the criminal to the law-abiding majority. It will put the victim first […] to help to rebuild community life and prevent social exclusion" (Straw 1998: col 372). In so doing, the concept of human rights has also been redefined: the New Zealand Minister of Justice claimed, as regards the public protection order legislation, that "once public safety has been assured, [the law] provides that people detained will have all the rights of other citizens […] [and it] strikes the right balance between the liberty rights of individuals under a public protection order and our duty to protect New Zealanders from imminently dangerous offenders" (Collins 2013: 13441).

Similarly, it has been rationalised that these powers of immobilisation fulfil the expectations of democratic governance rather than undermine them:

> The civil liberties of individuals who might be suspected of terrorism is important… but we have to balance that against the civil liberties of all the citizens of this country who also have a right in a democracy to expect to live their lives free from the fear and possibility of harm by people who act in that way. (Hughes 2003: col 954)

By signalling that those so detained/imprisoned under these powers will not be permanently consigned to some sort of remote Soviet-style gulag, but in fact have been provided with a pathway of return, albeit obscure and

prolonged, such measures can then again be understood as being within the democratic purview. Rather than being undermined by such measures, democratic order is seen as being protected in these ways from those would otherwise put its freedoms at risk.

Meanwhile, these immobilising initiatives also demonstrate that governments will not be held back by the liberal criminal justice establishment in pursuing these ends. If this then puts them in conflict with criminal justice experts demanding that the rights of individuals should be respected and arguing that retrospective legislation and the like had no place in democratic society, then so much the better for governments. They can claim to be on the public's side while criticising the experts and the criminal justice bureaucracies that oppose them as being hopelessly out of touch with public sentiment. Indeed, the more spectacular that governments can make their rescue measures – "Dangerous paedophiles to be caged indefinitely" was the headline that greeted the New Zealand public protection orders legislation (Vance 2012) – the more this seems proof that they are on the side of the public.

2. The rise of populist politics

Nonetheless, this specific brand of populism was unable to sustain its intended function of maintaining order and cohesion in a time of growing social and economic divisions. Instead, the societies in which penal populism flourished – again, the Anglosphere democracies in particular – became further divided and fractured, beyond the maintenance it could provide. This was largely because of the twin impact of the 2008 global financial crash, quickly followed by surging immigration from East to West and from South to North around the globe. Both events have further weakened loyalties to the neoliberal programme of government. The financial crisis intensified existing divisions and brought new ones into existence, as a new social class emerged – the "precariat".

> Taking a temporary job after a spell of unemployment […] can result in lower earnings for years ahead. Once a person enters a lower rung job, the probability of upward social mobility or of gaining a 'decent' income is permanently reduced. Taking a casual job may be a necessity for many, but it is unlikely to promote social mobility. (Standing 2011: 25)

While there were those who prospered even more in the ruins the crash brought about, there were many more for whom there was no recovery, nor any prospect of one. Instead, they were likely to remain trapped in modern

society's bargain basement, staring enviously and angrily at those on the upward escalator to success that operated beyond its locked doors.

Meanwhile, the flow of immigration that had been encouraged by post-1970s governments committed to the free movement of labour was gaining force. The flight of many thousands from conflict in the Middle East added to this increasingly threatening imagery of legal but unwanted migration, illegal migration, refugees, and asylum seekers.[69] For those who already saw themselves in the "left-behind"and immobilised category of these societies, it seemed that here was a further threat to their security and economic prospects. Even their national identity was at risk, all that many of them had left to cling to. It was as if immigrants brought their own cultures and values with them, values that undermined all that had once been taken for granted as familiar, indelible features of a particular society:

> Schools don't [now] refer to Christmas holidays but the winter break. In some US cities they put up holiday trees, not Christmas trees. The State of Iowa passed laws to change the name of Good Friday to the Spring Holiday. In the name of racial and religious tolerance, eggs aren't decorated, carols aren't sung, and tinsel isn't hung. (McCrohan 2012)

This coincidence of economic catastrophe and apparent uncontrolled and unwanted immigration provided the opportunity for the emergence of "anti-politics" politicians, claiming to be outside of the Establishment circles that were responsible for the national decline that the crash and immigration symbolised. Here were the saviours, it seemed, for those abandoned by the state. In contrast to the neoliberal orthodoxies that had exhorted individual responsibility with a minimal state and free-market-inspired global trade in post-1970s political development, they offered visions of a nationalistic glorious future based around trade and border controls that would protect local jobs and with lavish public spending on vanity projects: but all based on a mythical past. It would be a largely immigrant-free future and one where state power was concentrated in the hands of the saviour-leader and the quasi-magical powers they seemed to have been endowed with to recreate the nation in such a fashion.

Anti-immigration politics – especially from Asian and Muslim countries – in conjunction with protectionist economics had already brought

[69] The real levels of immigration are by no means clear. Using the USA as an example, the unauthorised immigrant population more than tripled in size from 1990 to 2007 – from 3.5 million to a record high of 12.2 million in 2007. By 2017, that number had declined by 1.7 million, or 14%. There were 10.5 million unauthorised immigrants in the USA in 2017, accounting for 3.2% of the nation's population. In 2014, 12% of the 42.4 million foreign-born persons in the United States have entered since 2010, 29% entered between 2000 and 2009, and the majority (59%) before 2000.

political capital for right-wing populist parties in Australia and New Zealand[70] (and similarly in a range of European societies). However, it was the success of the Trump presidential campaign in the USA in 2016 ("Make American Great Again") and the UK Brexit campaign in the same year ("Take Back Control") that made populism a dominant international force. Now, rather than being used as a governmental strategy to maintain the status quo, a recharged populist politics intended to overturn it. To this end, strongman leadership rather than effete democratic processes was needed to bring about the necessary cleansing and purifying of the social body in order to avoid further erosion of national values and financial security. Only by "draining the swamp" of government corruption and nepotism would it be possible for their glorious visions to become reality, claimed Trump and his counterpart in the UK – Boris Johnson, leader of the Brexit campaign and then Conservative prime minister.

Fear of crime and crime risks have remained part of the populist repertoire all the same, since cleansing these threats would be part of the envisaged purifying process. Johnson's Conservative government thus signalled initiatives such as "'life to mean life' for child murderers, together with more prison places […] and less early release" (Jenkins 2019). What is the justification for these policies? Invocations of the empty phrase "most people think" (or variations of it – "people tell me that" and so on) determine the direction of government, rather than expert knowledge based on science or even facts. Thus, a prime minister's source claimed that "most people think all [political] parties and the courts have lost the plot on sentencing" (Jenkins 2019). Here, then, was a template for electoral success for populist politicians. Law and order issues could be placed on a more expansive terrain of threats, seemingly on the verge of engulfing the nation state – unless the local strongman, brushing aside rule of law ephemera and other democratic niceties, is given the power to vanquish them. Conjuring new clusters of enemies (real or imagined) sustains the sense of grievance and victimisation that attracts their supporters and their own grievances that they bring to the populist cause. Trump thus called in the National Guard in 2018 to defend the border against mythical "caravans" of foreign hordes and alien others approaching from Latin America – and then bypassed legal channels and human rights concerns altogether by declaring an "emergency" that allowed him to override such matters.

It follows that the more swamps in need of draining that can be discovered and the more victims that can be found to defend, the more powerful populist politicians become. The more imperilled the nation state

[70] Respectively, One Nation and New Zealand First. While the former has won parliamentary seats in both state and federal elections, the latter has been a collation partner of both left and right governments on three occasions since 1996.

is made out to be in these conspiratorial machinations, the greater, it seems, is the need for their strongman leadership – as if they alone are able to extinguish such existential risks to the nation. During the US presidential campaign of 2020, Trump, professing to be "the president of law and order", thus claimed that "the stated goal [of the Black Lives Matter movement] is to achieve the destruction of the nuclear family, abolish the police, abolish prisons, abolish border security, abolish capitalism, and abolish school choice" (Massie 2020).

Indeed, Trump became a master of presenting himself as a victim of the corruption and conspiracy of "the Establishment and their media enablers [who] control this nation… Anyone who challenges their control is deemed a sexist, a racist, a xenophobe, morally deformed. They will attack you; they will slander you; they will seek to destroy everything about you, including your reputation" (Transcript: Donald 2016). By asserting his victimhood, it was as if those left behind and forgotten about in the last few decades (those working in sunset industries such as coal mining, for example) could better identify with him.

Similar tactics to those that had brought penal populism success – the use of anecdotes, lies, distortions, and conspiracy theories, sensational news headlines, and a reliance on "public opinion" rather than experts – have been deployed on the broader political canvas that leaders such as Trump and Johnson have chosen to work on. This has been at the expense of science and reason – these are seen as merely matters that can be discarded or distorted to suit: "truth isn't truth", Rudi Giuliani, Trump's sometime "personal lawyer" has exclaimed (Morin, Cohen 2018). When expert knowledge threatens the fanciful visions of the future that these populist politicians have promised, this too is discredited. Conservative Cabinet Minister Michael Gove, another leading Brexit campaigner, thus proclaimed that "the British people have had enough of experts" in 2016, after being challenged about Brexit's economic viability (Mance 2016).

What neoliberal governance had set in motion to sustain itself through penal populism, populist politics exaggerates and twists and distorts still further in a bid to affirm the legitimacy of authoritarianism and isolationist nationalism, and, in so doing, sharpens populism's threat to democracy. The persistent attacks of this politics on what are claimed to be elitist, corrupt institutions of government – a free press, an independent judiciary, and a politically neutral civil service – then further erodes trust in the bedrock features of democracy. Those who stand in the way of populism – rival politicians, judges, journalists, academics, scientists, economists, and so on – become "enemies of the people." Richard Spencer, Secretary of the Navy in the Trump administration before he resigned over Trump's decision to pardon a Navy SEAL for war crimes, has stated that "it is the rule of law that sets us apart from our enemies" (Cummings 2019). However, judges

who would safeguard this democratic pillar are likely to be publicly denounced if they hand down a decision that populist politicians disagree with. Trump (2017), ignoring the separation of powers convention, reacted with the following tweet regarding a judge who removed his 90-day travel ban to the US on seven Muslim-majority countries: 'The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned.' It is as if the decision automatically made the judge another member of the "deep state conspiracy" that Trump and his acolytes project themselves as uncovering and fighting and which would otherwise subvert the democratic order they claim to be defending, while simultaneously destabilising it themselves.

Meanwhile, the use of new social media outlets, unbound by any kind of ethical constraints (until 2020, when censoring protocols were introduced, followed by the forced closure of Trump's Twitter account in 2021), has facilitated populist attempts to directly address large sections of the population – in conjunction with broadcasting/newspaper outlets (such as Fox News in the USA and the *Daily Mail* in the UK). These abandon any pretence of objectivity and peddle conspiracy theories that confirm and strengthen the version of reality that the leader proclaims, however distant it may be from the real world. Any criticism of this populist trajectory in the mainstream media, meanwhile, can be dismissed as "fake news".

3. The arrival of COVID-19

For a politics that thrives on identifying and attacking what it sees as "enemies of the people", it might be assumed that the arrival of COVID-19 in early 2020 would be welcomed as another such enemy by populist leaders. But this is an enemy that is real rather than imaginary. And because it exists in microbe form, it cannot be blocked by a wall or scared away by the presence of the National Guard. It cannot be detained. It cannot be shamed out of existence by a Twitter outburst. And it brings incalculable harm to individuals and societies. At the same time, it would seem to undermine the foundations on which populism had been built. For example, the pandemic has led to a huge public demand for more knowledge about it. Where is this information to be found? Many widely read conspiracy theories exist on social media: it was deliberately unleashed on the rest of the world by China, for example, or it does not exist at all but was a plot fashioned by Democrats/international bankers/George Soros/the mainstream media, etc. to destabilise Trump's presidency. However, vast numbers of citizens have looked instead to the mainstream media – particularly public broadcasting organisations – for their news and knowledge of it. In the UK, "the BBC was the most popular source of news and information about COVID-19 – used by 82% of adults during the first week of [the March 2020] lockdown" (TV watching 2020). For these

substantial numbers of viewers and listeners, it seems, truth is truth after all, and not something to be discredited or falsified if it happens to be inconvenient.

By the same token, it is no longer the case that people have "had enough of experts." On the contrary, the opinions of epidemiologists, virologists, immunologists, and the like, regularly given in press conferences or published in the mainstream media (rather than social media), are eagerly awaited. And rather than the magical cures proffered by populist strongmen, or their outright denials of the existence of the virus, a large proportion of the public have put their trust in science. A Canadian opinion poll in March 2020 reported that 87% of the public cited the local health authority as the most trusted source of information (Coronavirus reckoning 2020). In the USA, a *New York Times* poll in June 2020 showed high levels of trust in medical scientists (84%), the Centers for Disease Control (77%), and Anthony Fauci, the Director of the Institute of Allergy and Infectious Diseases (67%) as opposed to Donald Trump (26%) (Sanger-Katz 2020). Trust in science is also reflected in the large number of people wanting to be vaccinated against the virus when given the opportunity, rather than be taken in by populism's snake oil cures.[71] The willingness of most of the public at least to wear masks and practice social distancing is another indication of widespread conformity to medical knowledge and expertise. Opinion polls indicate high levels of support for even stricter lockdowns than most governments have been prepared to introduce, as well as support for travel bans and other restrictions.[72] Many have demonstrated a willingness to sacrifice individual liberties that lockdown restrictions – a form of immobilisation across entire nations – impose to support the public good of virus control. But further levels of protection are still needed from government (coordinated public health strategies, delivery of vaccines etc.) with the help of scientific expertise. The virus has thus become another intolerable risk, one that is over and above the ability of individuals to manage themselves.

In those societies where governments have worked in tandem with their experts and expressed confidence in them (rather than trying to undermine

[71] Seventy-six per cent in New Zealand in December 2020; 75% in Australia; 69% in the USA; 77% in the UK; and 71% in Canada (One fifth 2020; U.S. and U.K. 2020).

[72] For example, there is strong support for mandatory vaccinations against COVID-19 in Australia (77%) and the UK (70%). In the UK, the public have supported more extensive lockdowns than the government had been prepared to impose. During the first lockdown period there in April 2020, 'We found that 87% believed the lockdown should continue for at least another three weeks (with 6% unsure and 7% disagreeing)… when asked their opinion on whether the UK's plans over the next few weeks were "not firm enough with restrictions on people" or were "putting too many restrictions on people" […] 56% felt they were not firm enough' (Recchia 2020).

or ignore them), public trust in government has also increased – as with Australia and New Zealand, two of the most successful countries in containing the virus, with government approval rates of 85% and 86%, respectively, in late 2020 (Brain 2020; Deveaux 2020). What this would suggest is that when central governments provide clear, effective leadership and are prepared to disseminate both good and bad news – but news which is true, accurate, and clear – high levels of public support are generated. Reversing the Reagan aphorism, it is as if governments can once again be the solution rather than the problem. In contrast, trust in government is much lower in those societies where expert advice has been ignored in favour of maintaining the economy and what is presented as respect for "individual freedom" – even the right to become infected with the virus and then infect others. It is also lower where government policy is inconsistent, shifting according to news headlines and soundbites – a familiar populist strategy, but one which only undermines trust in those who vacillate in this way when the public are hoping for consistency and clarity. In the USA, approval of Trump's handling of the pandemic dropped from 40% in March 2020 to 32% in July that year in an Associated Press-NORC Center for Public Affairs Research poll (Mckinley, Azem, Sith 2020). In the UK, the drop in support for the Johnson government was much starker: from 72% in March 2020 to 34% by November 2020 (International COVID 2020).

There is also a high level of public recognition that the solution to the virus involves, first, the development of national strategies that are part of a global response, rather than a race to be first with a vaccine which can then be celebrated in a form of jingoistic triumphalism. This means a willingness to develop and disperse vaccines with other nations, as advocated by the World Health Organization, rather than populism's emphasis on nationalistic isolation. Secondly, there is recognition that government policies need to provide protection for all citizens: failing to protect all will only lead to higher rates of infection. At the same time, opinion polls reflect a yearning for government to provide adequate health care rather than treating this as another consumer product to be purchased in the private sector: post-pandemic health care should be prioritised over economic growth, according to 60% of UK respondents (Harvey 2020); likewise, 63% of US respondents indicated that the government has a responsibility to provide health care for all (Jones 2020).

Certainly, the lockdowns and their immobilising consequences have become part of the terrible price that COVID-19 has exacted, with the poorest and most vulnerable members of communities likely to be the worst affected. However, the lockdowns and related restrictions have also had the effect of strengthening social cohesion. Doctors and nurses have come out of retirement to help with medical services. In the USA, "the Auntie Sewing Squad, which has sewn more than a hundred thousand cloth masks to

distribute to frontline, vulnerable, and devalued groups, from farmworkers to former prisoners" (Solnit 2020). In the UK, "hundreds of the nation's top restaurants […] pledge their support to a charity focussed on feeding the most vulnerable after the pandemic left them in urgent need of support" (Roberts 2020). As mobility has declined, this has simultaneously provided the opportunity to strengthen local cohesion – as with volunteers delivering food to those unable to do their own shopping.

Amidst such reassertions of community values, there is evidence of a strong desire for post-pandemic personal and social change. In an April 2020 opinion poll, only 9% of Britons wanted a return to their pre-pandemic lives, based as these had been around expectations of endless striving for individual success at the expense of family, community relationships, and so on (Wood 2020). Instead, there was greater recognition of the importance of environmental improvements (cleaner air or more wildlife) and more appreciation of belonging to family and community. Similarly, a global survey by the World Economic Forum and Ipsos found that 72% of respondents wanted their personal lives to change and 86% wanted the world to be more equitable and sustainable after the pandemic (Broom 2020). In other words, these respondents seem to be questioning the emphasis that neoliberal restructuring had given to the mass movement of goods and populations in the form of globalisation and the concomitant shift to urban living and its attractions – both of which trends are seen as having laid the groundwork for pandemics such as COVID-19 (Snowden 2019). During the course of the pandemic, new role models also emerged. Rather than these being the risk-taking entrepreneurial heroes of neoliberalism, they were those who provided medical care or social care along with those working in supermarkets, pharmacies, and public transport: essential occupations that heal and help to bring communities together.

What does this all mean, then, for the prospects of populism as a political force in post-COVID society? It is recognised that these above-noted shifts in public opinion may only be temporary. Nonetheless, the most important and demonstrable political consequence of the pandemic has been the role it played in bringing the Trump presidency to an end in 2020. COVID-19 enlarged his faults "so they became too frightening to miss. It showed him lacking even the most rudimentary empathy […] it showed him to be dishonest, insisting that the virus was likely to 'disappear' […] and it showed him to have contempt for facts and science, regularly contradicting and undermining the US response" (Freedland 2020). While Trump attracted 74 million votes, a record 81 million votes were against him, sounding his presidency's death knell.

Elsewhere, as Bobba and Hube (2021) show, populist parties for the most part have not made gains in Europe as the pandemic has raged. Indeed, in some European countries, it is evident that support for populism has

declined.[73] The need to control the virus through a strong central state authority, effective government bureaucracies, and health services, the importance of public broadcasting organisations, the guidance of experts, and the increased social cohesion brought about by the experiences of lockdowns have also put the brakes on populism. Of course, it is recognised that the shifts in public mood that these trends indicate may only be temporary – and there are still outliers. In UK local elections in 2021 and in opinion polls, the popularity of the Conservative Party and Johnson himself significantly increased. This is largely due, it would seem, to them capitalising on the state-financed National Health Service being able to provide a speedy vaccination programme. Here as well, as indicated earlier, there has been familiar recourse to penal policy based around risk control and public protection: the Home Office (2020) White Paper, A Smart Approach to Sentencing, has parole restrictions, whole life sentences, and the like for those judged to be high risk.

Nonetheless, the attempt by Trump to make his own versions of law and order the central issue of the 2020 US election was a manifest failure. Indeed, it may be that a further consequence of the pandemic will be that risk becomes uncoupled from crime and linked instead to public health concerns, thereby allowing initiatives to drive down prison populations (this would continue a trend already in place for some years in the Anglo-American democracies[74]). It would also involve shifting resources from penal to public health administrations, reversing a trend that began in the US in the mid-1990s (Snowden 2019). As it was, as the pandemic took hold, both public health and penal experts called for the release of the most vulnerable prisoners. In the USA, dozens of American doctors and public health officials called for decarceration and expanded access to healthcare for released prisoners in an open letter to the CDC (Coalition letter 2020). It has been recognised that prison conditions in these societies – often poorly ventilated, dirty, and with inadequate healthcare – provide breeding grounds for the virus. Of course, overcrowded prisons have also meant that social distancing is nearly impossible. Furthermore, the American Medical Association recommended that inmates should be prioritised, as prisons are "hotspots" for the spread of COVID-19 (Plater 2020). US Data collected by the Associated Press and the Marshall Project show that prisoners are four

[73] In fact, support for populist parties has been on the decline in Germany, France, the Netherlands, and Czechia (Politico.eu 2021).

[74] In the USA, the rate of imprisonment declined from 755 per capita in 2008 to 639 in 2018; in Canada, from 117 to 104; in the UK, from 150 to 130 in 2021; in Australia from 172 in 2018 to 160 in 2021; and in New Zealand from 214 in 2018 to 188 in 2021 (World Prison Brief 2021).

times more likely to contract COVID-19 than the general population (Schwartzapfel, Park, Demillo 2020).

This awareness has led to both the USA and Canada releasing inmates early (no-one is safe from the virus until all are safe). The US prison and jail population has fallen by 11%, primarily due to mass release (So et al. 2020). In the first few months of the pandemic, Canadian correctional institutions saw a 16% drop in inmate populations due to early releases (Bradley 2020). The prioritisation of health care over incarceration was again demonstrated when California Governor Gavin Newsom allotted USD 30 million to organisations that offer transport, quarantine housing, and health care for people released from prison during the pandemic (Servick 2020). California and New York have also set up hotel stays for released prisoners. In addition, inmates were given priority in vaccinations, even before some of the elderly populations in a dozen US states (Rabin 2020). Similarly, the Australian government has also promised that prisoners will be among the first to receive the vaccine, with their Health Department attributing this decision to the advice from medical experts and the World Health Organisation (Hendry-Tennent 2020).

This is not a uniform pattern, of course. While an End of Custody Temporary Release scheme in April 2020 in England and Wales was intended to release up to 4,000 low-risk prisoners, it was indefinitely "paused" in August of the same year, after only 275 were released. Negative reports in the virulent mass media there appear to have frightened politicians away (Maruna 2021). There have been no such initiatives for early release in Australia and New Zealand, where control of the virus has been especially effective and removed the urgency for special prison measures. Indeed, in New Zealand, multiple media stories have highlighted the "appalling" conditions prisoners have been subjected to during the pandemic. After rioting against the insanitary conditions at one prison in December 2020, 16 inmates were engaged in a six-day rooftop standoff with corrections officials.

Nonetheless, the successes of state and central government in controlling the virus in these two societies coincided with dramatic falls in support for their Trump-like parties – New Zealand First and One Nation – in their own general elections in 2020. The former won only 2.6% of the vote (7.2% in the 2017 election), which lost them all nine of the seats they had previously held (2020 General Election 2020). Similarly, One Nation won only one seat in the Queensland state election, having received only 7.12% of the vote – down from 13.7% in 2017 (Election results n.d.). Government successes in controlling/defeating the virus, in conjunction with the way in which immobilisation halted immigration and along with

the priority given to public health over law and order[75] meant that both these parties had little fuel for festering the grievances on which their electoral support had previously been based. There have still been hate crimes and racial abuse prompted by the pandemic in these countries, as there has been in the UK and the USA. But there are also examples of overt disapproval of such activities when they do come to light (see Pratt 2020: 314). Perhaps most importantly, these election results from Australia and New Zealand are likely to mean that governments there are less likely to pursue populist penal props themselves: control of the virus has given them legitimacy, without the need for extra-penal measures to shore this up.

Indeed, the stronger indicators of social cohesion and greater participation in the performance of civic duties and responsibilities provide opportunities for local and central states to manage problematic populations through social assistance measures rather than penal controls. Giving primacy to risks to public health over risks of future crime meant that, at least in the early stages of the pandemic, the homeless were not simply expelled or moved on in New Zealand, but were provided with government-subsidised accommodation in hotels. Thereafter, a Mayoral Relief Fund was set up in Wellington, the capital city, for those in need of food, shelter, and clothing (although some of the homeless have returned to the streets in spite of this). Similarly, the Canadian government has spent CAD 157.5 million on its homeless strategy in the light of the virus (Reaching home 2020). Individual US states have provided new funding and other measures to house the homeless to avoid risking their exposure to the virus (Parsell, Clarke, Kuskoff 2020). The absence of significant public opposition to such initiatives also indicates that the fears and anxieties generated by the presence of those living on the streets may have been defused, replaced by fears and anxieties of the consequences of a lack of social distancing in unhygienic surroundings which might provide opportunities for the virus to spread.

At the same time, where there have been intimations of strengthened social cohesion induced by the virus, this may recreate possibilities for the rekindling of more informal channels of regulation. Stronger social cohesion might provide the knowledge, guidance, and instruction through which the presence of strangers is assessed – avoiding the suspicions that can currently lead to quasi-vigilante interventions on the one hand and formal action to control and restrict such dangers taken by the state on the

[75] In New Zealand, a Horizon public opinion poll found that 54% of respondents chose health as the most important issue in the 2020 election. This was followed by 'Pandemic Economy Recovery' (51%) and 'Pandemic Management' (48%). Comparatively, 'Law and Order' (30%) and 'Crime' (29%) were ranked 19th and 20th, respectively (Health is 2020).

other: part of a more general picture where it is possible to see security being provided once again through social cohesion rather than the use of penal power. Similarly, if risk is indeed decoupled from crime, as crime risks have been greatly reduced because of the immobilisation of entire nations, and transferred to the public health arena, it might then be understood and justified as a strategy to provide public protection in this domain, rather than being used as a form of penal control over dangerous individuals.

Of course, all such matters are still contingent and speculative. And if they do eventuate, they will not be spread evenly. But they remain, all the same, possibilities in the aftermath of COVID-19. Every previous pandemic has brought about extensive cultural, political, and social change (Snowden 2019). Whatever the changes that COVID-19 will bring, there seems no reason to think that penal affairs will remain untouched by them.

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