

# Summary

## **Judges on punishment, punishing, and impunity. A sociological analysis of judicial sentencing**

The book “Judges on punishment, punishing, and impunity. A sociological analysis of judicial sentencing” and the preceding sociological and legal research were inspired by the topics discussed since 2008 at meetings of the G. Rejman European Centre for Penological Studies operating at the University of Warsaw<sup>1</sup>. Participants in this forum have claimed that there are no comprehensive answers to many questions about the social phenomenon of punishment. They have pointed out that the multidisciplinary knowledge of persons with legal education (in particular judges and prosecutors) regarding the essence of punishment, its purposes, and functions, as well as knowledge of the history of punishment and the rationalization for its application, adopted in various periods, is not obvious. They have raised the issue of a significant diversity of analytical perspectives on the phenomenon of punishment in the areas of individual academic disciplines as well as in professional and social environments. They have drawn attention to the various emphases put in the definitions of punishment and impunity, formulated in various circumstances. They have asked about the factors determining just punishment and what characteristics a fair judge should have. The answers to these questions had to be sought primarily with the methods used in the social sciences, which created the opportunity to discover the broader context of the phenomena studied.

An important part of the book is those chapters which discuss the results of selected analyses and empirical studies devoted to various aspects of penal phenomena that have been conducted in Poland since 1937. The secondary analysis of their assumptions and conclusions makes it possible for them not only to be

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<sup>1</sup> The title of the research topic reads: “Penal cultures. Cultural context of criminal policy and criminal law reforms. Legal, penological, historical, sociological, and cultural (anthropological) analysis of criminal law reforms in Poland against the background of European and world trends”. Jarosław Utrat-Milecki was the programme manager, Jadwiga Królikowska was responsible for the sociological part of the project.

appreciated as a source of knowledge about the phenomena studied, but also to be treated as illustrative material showing the consequences of what can be called inaccuracy or methodological error. It shows that a critical attitude towards previous research achievements does not have to lead to the total rejection of their conclusions, but it can lead to their correct interpretation and determination of their proper range of application. This attitude towards social research preceding the conduct of their own research favours the observation of changes that have occurred in the defining of social phenomena in connection with the development of knowledge about man and society.

The first broadly themed and significant study, owing to the representativeness of the research sample (the respondents consisted of 285 judges, which constituted about 20% of this professional group), was a study on the judicial sentencing carried out by Bronisław Wróblewski and Witold Świda in the Department of Criminal Law at the Stefan Batory University in Vilnius in 1937. Its main idea was to gain knowledge about “how the sentencing expressed itself in the practice of the courts of the Republic of Poland under the penal code of 1932”<sup>2</sup>. According to the researchers from the Vilnius University, the Penal Code of 1932 played an important role in the consolidation of the justice system in independent Poland. It was considered by its creators to be modern, based on a clearly pronounced system of norms and values, and took into account not only legal knowledge but also the achievements of the social sciences, including criminology. The knowledge of respecting its spirit and letter in judicial practice was important not only for the legal profession, but also for the general public who, after regaining independence in 1918, organized itself in new political, social, and legal conditions. Judges played an extremely important role in the creating of the new order, and their knowledge of and attitude towards crime, punishment, and punishing was a fundamental matter.

In the initial phase of the study, when they wanted to find out “what it is like” and then to be able to “change something”, the official statistics on the imposed criminal punishment were assessed as insufficient. It was found that statistics “speaks little where complex human behaviour is involved”<sup>3</sup>. It was assumed that criminal punishment as a sociological phenomenon was a historically shaped element of culture whose form is built on the foundation of norms and values adopted in a specific society at a given stage of development. Its study as a complex social phenomenon requires complementing statistical materials with sociological data. In this case, it was a survey method that was expected to provide extensive and representative data on “judging and sentencing, which includes judicial sentencing as its component”<sup>4</sup>. 20 points were found in the original Wróblewski and Świda questionnaire, with 10 points providing personal data. A survey prepared by a team of lawyers and sociologists was sent to all judges who, in the light of the ministry’s data, heard cases in criminal courts. Of the 2892 forms sent to the judges, 285 questionnaires were finally taken into account, which were correctly completed. The data was

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<sup>2</sup> B. Wróblewski, *Ustawowy a sędziowski wymiar kary...*, p. 9.

<sup>3</sup> B. Wróblewski, W. Świda, *Sędziowski wymiar kary...*, p. 9.

<sup>4</sup> *Ibidem*.

so rich and interesting that after the study was completed, it was collected in the volume bearing inventory book number 2759 and kept for possible future use.

Wróblewski and Świda found in the results of their study the basis for a critical assessment of the situation of the judges' sentencing. They stated that the idea of the 1932 Code was not always respected in judgments, the criminological knowledge of judges was modest, and the justifications for judgments and surveys showed that the beliefs and views of judges played an important role in their decisions regarding punishment. The results of that study made it possible, however, to make a diagnosis of the judges' sentencing and to draw conclusions regarding the improvement of the situation. In addition to the practical aim of strengthening legal culture in the studied environment, the Vilnius research contributed to the foundations of sociology in the judicial sentencing, and thus the development of penology.

The issue of the conditioning of the judicial sentencing was also raised in the research carried out or initiated by Adam Podgórecki at the University of Warsaw in the 1960s and 1970s. The research conducted at that time distinguished (legal) criminal punishment from among the elements of social control, emphasizing the formalized institutional coercion contained in it, which functions independently of the impact of social sanctions. They assumed the normative sense of judicial independence in the face of the actual impact of various ideological and material factors as well as socio-professional circles on decisions of persons exercising the profession of judge. They pointed to the resulting complex methodological and terminological issues arising in the course of research into the punishing process, both when they are quantitative and qualitative. The research that belongs to this trend was primarily focused on the characteristics of the opinion of Polish society about applicable law and applicable punishment, the functions and purposes of punishment, impunity, rigorism, punitiveness, and tolerance, and views on law and on the rule of law. Individual feelings of isolation and threat, freedom or inhibition in social relations, rationalism or dogmatism, which were to determine the assessment of facts, were considered as factors shaping the views and attitudes towards legal phenomena. The attitudes of lawyers were shown against the background of the general Polish society.

The achievements of Leszek Lernell, the author of the review paper "Basic issues of penology" are of great importance for penological research and analyses. Like Juliusz Makarewicz, Lernell believed that talion is the source of punishment. Talion stemmed from the rationalized revenge on which a limit was imposed. Lernell assumed that the analyses of the theories of criminal punishment required a clear presentation of philosophical assumptions, because they actually shaped the criminal policy and practice of the state. Penology as a study of the sense of and reason for punishment is the theoretical foundation of criminal policy.

The problem of the judicial sentencing was the subject of a series of legal and sociological researches conducted in the Wrocław academic centre in the 1960s and 1970s. In many aspects it referred to the pre-war Vilnius research. Tomasz Kaczmarek, who supervised this research, assumed that research which is focused on the personality traits of the judge, such as intelligence, emotional sensitivity, memory, the ability to think analytically and rationally, and the tendency to conform

to external influences, can lead to the cognition of “the essence of punishment from the point of view of humanism”<sup>5</sup>. In the conclusion of his research, he stated that both the choice of fair talion for a crime and the justification presented in the matter of punishment resulted from the principles of law adopted by a given legal environment and the personal system of norms and values of judges.

Similarly to the research conducted in the Podgórecki circle, also the conclusions from Kaczmarek’s research showed the occurrence of changes in the attitudes of society towards archaic punishments, defining the purposes and functions of punishment, and an unconditional respect for the law in a situation where it is not considered equitable. Symptoms of the breakdown of the “Socratic” approach to law, the individual cases of which were noted in the Vilnius research, were later seen as an attitude of practical criticism towards excessively strict law. Despite the traditional inclination of the judicial profession to conservatism, a long-term observation of their views made it possible to see changes in the attitudes of judges towards certain types of crime and perpetrators, as well as a more frequent support for individual prevention as opposed to general prevention being the main aim of punishment. This was a sign of changes in public awareness and the axiological foundations of criminal policy.

The research conducted since the pre-war period devoted to the phenomenon of punishment has been based mainly on basic sociological methods adapted to legal issues. A new type of methodology and theory in penological research, defined as the culturally integrated research, was adopted by Jarosław Utrat-Milecki in the study “Podstawy penologii. Teoria kary”. “The term ‘culturally integrated studies’ is applied to a specific, humanistic kind of interdisciplinary studies in the area of legal and social sciences. Studies are labelled with this term when they are based on common, inherently distinctive, general methodological guidelines concerning the formulation of the syntheses of detailed results of research in the area of legal and social sciences. These guidelines are used to create a theoretical model that serves as a tool in the comprehensive, contextual exploration and explanation of selected, usually quite broadly delineated and when possible – integrated into social-cultural entities, problematized fragments of social and normative reality”<sup>6</sup>. The formulation of general principles of culturally integrated research is intended to lead to the breaking of the disciplinary divisions in the penological research and to looking at issues of punishment and punishing in the most comprehensive way possible. The intention is to integrate knowledge accumulated by many methods in various fields

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<sup>5</sup> T. Kaczmarek, *Sędziowski wymiar kary w Polskiej Rzeczypospolitej Ludowej w świetle badań ankietowych*, Ossolineum, Wrocław 1972, p. 7.

<sup>6</sup> J. Królikowska, J. Utrat-Milecki, *Culturally Integrated Studies*, [in:] Europejski Ośrodek Studiów Penologicznych, Uniwersytet Warszawski, Wydział Stosowanych Nauk Społecznych i Resocjalizacji, Instytut Profilaktyki Społecznej i Resocjalizacji, Zakład Prawnych i Społecznych Badań Integralnokulturowych, ed. J. Królikowska, J. Utrat-Milecki, IPSiR UW, Warsaw 2010, p. 96.

of study while maintaining its legitimacy and verifiability. This requires greater care for the logical and semantic coherence of the formulated statements that should be tested within applied sciences and social activities such as law making and application. “A broad use of the findings concerning the studied subject, obtained through different disciplines and research approaches, is a very important methodological postulate of culturally integrated research. (...) However, a true fulfilment of this postulate requires truly extensive interdisciplinary knowledge and stands in a certain contradiction to the far-reaching division (specialisation) experienced by modern, institutionalised science”<sup>7</sup>.

The concept of punishment to which is referred to in this book states that: “Criminal punishment is an intentional condemnation decided by a court on behalf of a political authority and expressed by a legally defined unpleasantness for a perpetrator of a crime”<sup>8</sup>. This concept is further developed to say that punishment is: “complex actions undertaken on the basis of law by authorized bodies, actions that are to satisfy the sense of security, order, and justice of individuals and social groups. Actions that would not be taken in response to a previous crime and would not comprise condemnation expressed legally as a perpetrator’s personal unpleasantness based on a final court judgment, would not be criminal punishment”<sup>9</sup>.

The same author gives further details on the correct understanding of the concept, and states that “criminal punishment contains today the following elements: 1) condemnation of harmful or dangerous human acts (acts and omissions) determined by law with regard to their form and content; 2) assignment, on the basis of law and doctrine in the manner prescribed by law and doctrine, of the condemned act to a punished person; 3) intentional unpleasantness for a punished person; 4) the fact it is decided or accepted by an independent authority (court) acting by law on behalf of the polity; 5) specification in the law of its forms and principles of inflicting and execution. Criminal punishment is therefore a series of actions taken on the basis of universally binding law (*ius cogens*) and within the limits and forms provided for by it”<sup>10</sup>.

160 judges from criminal courts who performed their duties in district, regional, and appeal courts took part in the survey part of the “Penal cultures” study. Twelve judges answered more than 60 questions during interviews lasting 2 to 4 hours. The idea of the study was to reach the area defined by Stefan Czarnowski as “internal social reality”. He claimed that “researching this side of the facts requires methods other than historical research in the ordinary sense. The point is not a causal

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<sup>7</sup> Ibidem, pp. 99–100.

<sup>8</sup> J. Utrat-Milecki, *Kara. Teoria kary i kultura penalna: perspektywa integralno-kulturowa*, Wydawnictwa Uniwersytetu Warszawskiego [*Punishment. Theory and penal culture: culturally integrated perspective*, University of Warsaw Press], Warszawa 2010, p. 43.

<sup>9</sup> J. Utrat-Milecki, *Podstawy Penologii. Teoria kary*, pp. 78–79.

<sup>10</sup> J. Utrat-Milecki, *Z dziejów pojęcia kary kryminalnej* [*From the History of the notion of Punishment*], [in:] *Z dziejów afektu penalnego* [*From the History of Penal Affects*], ed. J. Utrat-Milecki, Oficyna Naukowa, Warszawa 2014, p. 73.

explanation, but a reconstruction of a system of values that is outside the event and which is their justification in psychology and social logic”<sup>11</sup>. In this case, the point was first of all examining what value system underlies the practice of sentencing by the judges of three instances, and, secondly, to what extent the judges, when sentencing, orient themselves to legal provisions and to what scientific knowledge from various disciplines that also deal with this phenomenon, and, thirdly, whether affiliation to the autopoietic system of law is essential in the professional activities of judges and in their social functioning, and, fourthly, what are the differences in the perception of social reality by judges and other members of society, and, fifthly, whether behind the statements of judges regarding punishment and punishing these phenomena are ordered into a specific theory. These were the fundamental issues that characterized the professional culture of this profession.

The research “Penal cultures” provided data on the position of judges regarding the function of (criminal) punishment in the area of individual prevention. The most numerous group of respondents (111 people in total, i.e. 69.38%) indicated the educational function or the preventive function of punishment as the most important for individual prevention, or listed both functions as equally important. The judges’ views on the educational impact of criminal punishment is based on the belief that improvement of a perpetrator’s behaviour can be initiated by legal and moral elucidation of the acts performed and by showing their legal consequences. The judiciary is perceived as an institution which is active in the implementation of educational and rehabilitative social functions which, by applying a criminal punishment, fulfils the basic task of criminal law which is combating crime.

The belief that criminal punishment is educational in the pedagogical sense does not stem from the scientific knowledge of judges. Most of the respondents (90 people, 56.25%) did not gain any penological knowledge related to psychology, pedagogy, anthropology, or history at any level of education. Thinking about the educational function of punishment of judges is based on common belief and is a convenient rationalization.

According to 77 judges (48.13%), the role of punishment in general prevention is primarily negative, consisting in the preventive deterrence of potential perpetrators by using repression and isolation, preventing impunity, visualizing the unprofitability of crime and the inevitability of talion satisfying the social sense of justice, and arousing respect for the norms and power of the state. An indication for the positive function of punishment in the area of general prevention is, above all, shaping legal awareness, satisfying the social sense of justice and security, showing the efficiency of power, affirmation of protected legal rights, and showing the citizens that their rights and freedoms are subject to real protection.

On the other hand, according to 123 judges (76.88%), the purpose of imposing criminal punishment is to deter perpetrators from committing crimes, according to 114 people (72.25%) to compensate the victim, and in the opinion of 106 of the

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<sup>11</sup> S. Czarnowski, *Historia a historia kultury*, [w:] tegoż, *Dziela*, v. 5, PWN, Warszawa 1956, p. 85. Also: J. Szacki, *Wstęp: krótka historia socjologii polskiej*, [in:] *Sto lat polskiej socjologii*, sel. and ed. by J. Szacki, PWN, Warszawa 1995.

respondents (66.25%) to impose fair talion. According to 96 respondents (66%), other important goals are to deter people from committing crimes, according to 88 (55%) to show applicable norms and values, in the opinion of 87 (54.38%) to instruct the perpetrator not to commit crimes, and according to 80 (50%) to isolate the perpetrator from society. In determining the purpose of punishments judges first consider perpetrators, then victims of crime and the general public.

In one of the questions, it was proposed that judges should indicate the most important features of criminal punishment. Of the 15 variables proposed, the judges chose justice, proportionality to guilt and the inevitability of punishment. Justice was indicated at the highest level of importance by 145 respondents, that is 90.63% of respondents. Proportionality to guilt was indicated at the highest level of importance by 127 respondents, that is 79.38% of respondents. Inevitability of punishment was indicated at the highest level of importance by 126 judges, that is 78.75% of the respondents. Less numerous groups of 103 (64.38%) each indicated the importance of punishment effectiveness and its comprehensibility for perpetrators. During the interviews, judges confirmed the central importance of the same parameters of punishment. In turn, the least important features of punishment are its publicity mentioned by 63 judges (39.38%) and severity mentioned by 29 respondents (18.13%).

The judges surveyed were asked to formulate a definition of punishment. The point was not only the exploring of the awareness of its sociological nature, but first and foremost about the ability of criminal judges to formulate an exhaustive definition of this concept, basic for them, including the giving of axiological assumptions adopted by the legislator while setting the rules for its application. There should be doubts as to whether a judge of a criminal court can do his or her job well by disregarding the multidisciplinary penological knowledge and without making the effort to define criminal punishment. However, out of 160 respondents, 66 (41.25%) completely skipped the answer to the question about the definition or helplessly answered "I don't know". The difficulties with defining punishment are confirmed by remarks of the judges that "it is difficult to provide such a definition. Punishment is a problem too complex to be defined", "cannot be given", "this is a task for theoreticians of law and people with much greater scholarly achievements", "definitions – I leave them to theoreticians, regardless of the definition, the judge is guided by his or her own reason", "the definition is of no practical relevance for those sentencing." In these statements it is noteworthy to consider the profession of judge as a practitioner guided by common sense, not someone carrying out practical activities, but grounded in theory. The view of law as a practical discipline was even more clearly pronounced during the interview with the judge, who stated that the researchers incorrectly "assume that the judge thinks about punishment when sentencing".

When asked to define punishment, some judges stated that they accepted it "as the Criminal Code currently reads", which would suggest that it was given by the legislator. The point is, there is no "codex definition of punishment." The legislator lists the types of punishment (Article 32 of the Criminal Code), but does not say what the punishment is, what conditions must be met in order for the deprivation

of liberty, a work order, or an order of payment of a specific amount to acquire the features of criminal punishment. What the respondents could think of as a definition of punishment is the statutory principles of punishment given in the Code. However, they do not constitute a definition of punishment, because they do not describe the content of the concept (essence and meaning), nor do they indicate how to understand this term in various conditions, and also how to distinguish it from other social phenomena. The disregarding by lawyers of the theoretical problems of punishment and of its non-legal aspects show the answers to the question "What do the judges not know about punishment, but they would like to know?". As many as 90 judges (56.25%) did not answer this question at all, and 15 judges (9.38%) answered that they "know everything", "know everything (almost)", "think that they know enough", "knows everything that is needed" and "does not feel such a need [to know more]", or even "I do not want to know anything more about punishment."

The features of the judiciary as an autopoietic system appear in the answers to the question about the content of talks about punishment held among judges. An image of a community of professionals emerges from these conversations, caring for the achievement of the system's own goals, functioning in the area of internally defined ideas and codes of meaning, feeling loyalty to established rules and procedures, and approving the pattern of relations with the environment. Judges perceive the problem of punishment as an issue analysed primarily in the field of law, related to the operation of the judicial system served by officers trained for its own needs. The extra-legal aspects of the phenomenon, including the philosophically and socially established theory of punishment, are secondary to practical issues such as criminal policy issues, the problems of severity of punishment, or the statutory framework of judicial sentencing. In addition, the respondents confirmed that judges generally did not know legal systems other than the Polish system, so they had no knowledge with which to compare the Polish legal system with the systems of other countries and assess which one was better. As many as 32 (20%) respondents replied that their colleagues "definitely" did not know other systems, and a slightly smaller group of 28 (17.5%) – "almost" do not know. To this group should be added eleven (6.88%) answers describing the knowledge of judges about other systems as fragmentary, superficial, demonstrated as little, or limited, "unless they must acquire such knowledge for a specific case, then, having developed it, they can compare the systems". However, Polish judges' knowledge of other legal systems was confirmed by 29 (18.13%) respondents without comments, and the next four (2.5%) said that their colleagues had "some" knowledge of these systems.

The criticism by judges of their own legal system was expressed in the answer to the question whether there is a better system than the Polish one. Only 23 (14.38%) wrote that there is no better system than Polish, 29 (18.13%) that there were better systems, e.g. Anglo-Saxon, German, Scandinavian, American, French, Dutch, and 69 (43.13%) respondents claimed that it was difficult for them to take a position on this matter, and that they had no opinion.

In the question about the factors taken into account when determining a specific criminal punishment, the respondents variedly emphasized judicial independence from influences and situations that could threaten it. The majority (104, 65%) said

that when imposing punishment, only to a small or moderate extent were judges guided by the thought of stopping potential criminals and reducing overall crime in the country. As many as 133 (83.13%) respondents believe that the decisions of other judges in similar cases are unimportant for the respondents' judgments, and 113 (70.62%) that in their decisions judges are not guided by the predicted position of the appeal instance. The community, which is seen as a threat to judicial independence, is much broader when public opinion is taken into consideration. The group that detached themselves from these influences consisted of 142 (88.75%) judges, who stated that public opinion was at most "moderately important" for them, and 39 (24.38%) most radical judges in this group claimed that public opinion was "completely unimportant to them."

However, according to 146 (91.25%) respondents, the perpetrator's personal conditions play an important or very important role in their decisions on criminal punishment. According to 129 (80.63%) respondents, the family situation of the perpetrator and his or her social and professional status, whose significance was indicated by 116 (72.5%) respondents, play a lesser, but also significant role. The judges' observations show that the opinion on the validity of the status of a punished person is based on the belief that people with higher professional and social status suffer more losses as a result of severe punishment (including isolation) than persons whose professional activities are not affected to such a broad extent.

When asked about what the judge is guided by in sentencing, the respondents said that the most by law, conscience, justice, reason and personal experience. The heart and the ten commandments are definitely less important, and public opinion and the opinion of superiors as well as the assessment of the perpetrator are even less important.

The expectation that the authority of multidisciplinary knowledge of punishment plays a significant role in the decisions of judges has not been fulfilled on such a scale as could be expected from a society declaring its activity based on knowledge. In total, only 43 (26.88%) judges value multidisciplinary knowledge of punishment. While 11 (6.9%) judges from this group believe that taking into account the resources of other disciplines is very important, even more respondents (16 (10%)) consider the taking into account of multidisciplinary academic knowledge about punishment as having no importance. The largest group of 95 (59.38%), judges said that penological knowledge was for them "moderately important" at the most.

The situation with the authority of science is similar to the situation with recognition for outstanding lawmakers. It is surprising that 50 (31.25%) judges surveyed did not declare at all that they drew on the intellectual achievements of any of the eminent lawmakers: they did not follow their system of values and their insight into criminal policy. The judges referred to as authorities not the authors of classical legal works but their diploma thesis supervisors.

The key questions of the study were questions about the severity and mildness of punishment. When asked about "excessive severity" and "excessive mildness" of punishment, judges for whom justice is the supreme value suggested that the question "how can severe punishment be considered fair?" should be answered, because the justice of punishment sets the framework of severity. Others stated that severity

must be related to the real circumstances of the crime and must be “appropriate”, which was sometimes referred to as “adequate” to the circumstances of the act and the perpetrator’s conditions. Many judges assessed excessive punishment to be unjust, causing a sense of injustice not only for the convict, but also for his relatives and the public. It was argued that excessive severity of punishment leads to effects “opposite to those envisaged by the Code”, as it stimulates feelings of compassion for perpetrators, evokes unfavourable assessment of the justice system, hostile attitude of citizens to the state apparatus, “deprives convicts of dignity, and devalues values such as freedom”.

The consequences of excessively lenient punishment are also serious. Indulgent treatment of perpetrators of crimes causes not only bitterness, a sense of danger, injustice, and harm to victims, but also a loss of confidence in the state. In the opinion of the judges, excessively lenient punishment means the resignation of the justice system not only from individual prevention, but the loss of the objectives of general prevention. It allows impunity to creep in. The disproportionate gentleness of the punishment imposed reassures criminals that “committing crimes is profitable and causes their lives to be based on crime”. In extreme situations, this leads to a very dangerous state of impunity. The respondents warned that impunity gave privilege to groups not only breaking the legal, but also social, and moral order. The chaos and disregard for the standards that impunity imposes is a threat to the existence of the state. Punishment without which judges cannot imagine social life helps to avoid the state of impunity that judges fear the most.

In the “Penal Cultures” study, the judges emphasized that after examining a case brought to court, punishment need not always be imposed. The value of court proceedings can be – and often is – the presentation of the course of events and the assessment of the subject of the case in terms of good and evil. Participants in the proceedings do not always expect punishment, they often want to find out on whose side the moral, social, and legal reasons are, and whether the participants are legitimately hurt by someone’s actions. People don’t go to court for punishment, they come to court for justice. Justice can be granted to them in many ways. The words quoted by the interviewed judge that punishment is to be just and the judge is honest are not slogans, but important statements about the principles of community life.

An issue that inherently accompanies empirical research is the problem of assessing whether the collected materials make it possible to formulate a statement forming a coherent theory of the phenomena studied. The ability to use the correctly defined concepts that can be used to formulate general statements about reality is the key to the explaining of the past and a tool for predicting future social processes and phenomena. A concept that provides a coherent conceptual system that can be used to explain legal phenomena including the application of criminal punishment, is the theory of autopoietic systems by Niklas Luhmann<sup>12</sup>.

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<sup>12</sup> N. Luhmann, *Systemy społeczne. Zarys ogólnej teorii*, transl. by M. Kaczmarczyk, introduction G. Skąpska, Zakład Wydawniczy Nomos, Kraków 2012.

The system of law defined as self-conceptual is separate from systems of morality, religion, or politics. It uses his own rules for creating and applying the law. As an autopoietic system, it gives autonomy to such internal segments as criminal punishment. Its important feature is its expressive self-referentiality which, among other things, means the ability to create by its own means the most important elements of its social being – structures and principles. The autopoietic legal system is also a norm-forming and controlling system to the whole system within which it exists. Not only does it create its own network of institutions and a canon of rules governing relations between them, but it uses, in the processual communication with the environment, the self-established rules of the selection of content that it exchanges with the environment. Sustainability is ensured by the multi-generational loyalty of professionals who maintain the system ethos and principles in constant use. It is also a cognitively open structure, oriented to maintain its own uniqueness by processing incoming messages in accordance with preferences.

Some elements of Niklas Luhmann's autopoietic theory of the system can be associated with the concept of Pierre Bourdieu, who analysed phenomena in the field of law<sup>13</sup>. He pointed out to the importance of conducting research on the concepts of one's own professional activity adopted by professionals operating in the field of law and on the mechanisms that cause the forming, maintaining, and disseminating of the concepts, as well as the social ideas regarding law, which were generated by other environments. He also asked the question what social effects result from the operation of the law itself and which stem from the professional activities of lawyers undertaken both in the field of law and outside it. He emphasized that the phenomena occurring in the field of law are organized on the foundations of harmonious norms and values, internal regulations, and typical behaviours that create a unique "legal culture". He argued that the behaviours of people acting in the field of law defined in their content and form, resulted from their common *habitus*. It is thanks to the unique "legal culture", internal culture of the profession, and people with common cultural features that an incomplete but well-established autonomy of law is possible. Bourdieu claims that, in a sense, we are all within the field of law, the law surrounds us, and determines our living conditions. This makes law making and enforcement one of the most important attributes of power. Both Luhmann and Bourdieu affirmed the exceptional importance of legal phenomena. They emphasized that the autonomy of a legal system is also expressed in the unique ability to create social facts by means of speech acts. Both legal acts and performative utterances of judges are endowed with this creative power. The experience of these authors in the conducting of analyses devoted to legal phenomena – including criminal punishment – is one of the most inspiring experiences in the area of the legal system that gives direction to current research processes undertaken in the fields of increasingly integrating various scientific disciplines.

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<sup>13</sup> P. Bourdieu, *The Force of Law. Toward a Sociology of the Juridical Field*, "Hastings Law Journal", 38(5)/1987.