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Agata Grudzińska
Maria Curie-Skłodowska University in Lublin
ORCID: 0000-0002-1791-3610
a.grudzinska@poczta.umcs.lublin.pl

The Issues of Criminal Policy in the Interwar Period in Poland

W kręgu problematyki polityki kryminalnej w dwudziestoleciu międzywojennym w Polsce

SUMMARY

One of the debates carried out in interwar Poland among legal professionals, including on the pages of legal journals, regarded the issue of how to define and delimit the scope of criminal policy. It was contributed to by many prominent jurists of that era, such as J. Makarewicz, B. Wróblewski or E.S. Rappaport. The aim of this article is to present J. Reinhold's and A. Moginicki's views on criminal policy. However, these two authors perceived the combat against crime differently as to the use of various means by the State or both the State and society (penalties and/or preventive/protective measures). Although they were influenced by the sociological school of criminal law, mainly F. von Liszt's position, an analysis of their views points to a number of differences in their positions.

Keywords: criminal policy; penalty; J. Reinhold; A. Mogilnicki; purposefulness

The 19th and 20th centuries saw development in many areas of study which focused on crime and punishment. These include criminal anthropology, criminal psychology, criminal statistics, criminal pedagogy, and criminal policy[1]. F. von Liszt is considered a founder of criminal policy[2]. This Austrian criminologist concluded that the social roots of crime, and thus the measures employed by society to combat crime, should be studied[3]. He saw a criminal penalty as a means of the protection

[1] S. Glaser, *Polskie prawo karne w zarysie*, Kraków 1933, pp. 97–102.

[2] F. von Liszt (1851–1919) – an Austrian criminologist and penal law professor at Marburg, Halle and Berlin.

[3] M. Wąsowicz, *Nurt socjologiczny w polskiej myśli prawnokarnej*, Warszawa 1989, p. 184.

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of society against crimes. Von Liszt advocated the individualisation of punishment, and the punishment selection criteria proposed by him included the perpetrator's character and being assigned to a certain group of criminals. In addition to punishment, von Liszt saw the need for using protective measures. According to him, they constituted the main issue under the criminal policy. It should be noted that these changes affected also the prison system because the system was not only intended as a place for serving the sentence but was also to fulfil educational purposes.

The thought of the Austrian criminologist was one of the impulses that inspired the discourse among legal professionals which took place in Poland from the beginning of the 20th century. During the interwar period, many Polish jurists attempted to answer the question about what criminal policy was and about areas covered by it. Depending on the views, attempts to define this concept differed[4]. I provide below only two of them by way of an example and then discuss in detail the issue which is the subject hereof, i.e. presenting the definitions and scope of the criminal policy concept devised by J. Reinhold[5] and A. Mogilnicki[6].

For J. Makarewicz, the criminal policy was to "create a synthesis of means to fight crime as an undesirable symptom"[7]. Consequently, the aim of the policy was to combat crime. B. Wróblewski understood the criminal policy in a broad sense. He maintained that criminal policy was intended to answer "how to organise institutions designed to fight crime so that the highest moral or material social progress can be achieved"[8]. The problem of the scope and definition of the criminal policy

[4] For more see J. Waszczyński, *Prawo karne w zarysie. Nauka o karze i innych środkach penalnych*, Łódź 1983; B. Hołyst, *Kryminologia*, Warszawa 1989; M. Wąsowicz, *op. cit.*; E. Janiszewska-Talago, *Szkoła antropologiczna prawa karnego w Polsce*, Warszawa 1965; L. Lernell, *Podstawy nauki polityki kryminalnej. Studia z zagadnień przestępstwa, odpowiedzialności i kary*, Warszawa 1967; A. Grudzińska, *Celowość i indywidualizacja kary w ujęciu Aleksandra Mogilnickiego*, „Studia Iuridica Lublinensia" 2012, nr 17, pp. 135–150.

[5] J. Reinhold (1884–1928) – a lawyer, professor of penal law at the Jagiellonian University in Kraków, member of the Codification Commission of the Second Polish Republic, student of F. von Liszt. The author of the work entitled *Środki zapobiegawcze przeciwko przestępcom kryminalnym* (*Preventive Measures Against Criminal Offenders*) published in 1913. See A. Dziadzio, *Józef Reinhold (1884–1928) – „zapomniany" profesor prawa karnego Uniwersytetu Jagiellońskiego*, „Krakowskie Studia z Historii Państwa i Prawa" 2014, nr 2, pp. 263–272.

[6] A. Mogilnicki (1875–1956) – a doctor of law, professor at Wolna Wszechnica Polska (Free Polish University), attorney at law, President of the Supreme Court (Criminal Chamber) and member of the Codification Commission of the Second Polish Republic. His scientific achievements include 30 scientific monographs, including the work entitled *Dziecko i przestępstwo* (*Child and Crime*) and a commentary on the criminal procedure co-authored with E.S. Rappaport. He is the author of 125 more extensive dissertations and many papers published in various legal and general scientific journals. He was one of the first representatives of the legal sociological movement in the Polish lands.

[7] J. Makarewicz, *Prawo karne ogólne*, Kraków 1914, p. 42.

[8] B. Wróblewski, *Zarys polityki karnej*, Wilno 1928, p. 4.

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was described in detail by, among others, M. Wąsowicz[9]. He presented in his book the views of Makarewicz and Wróblewski, but also those of Rappaport, Reinhold, and Mogilnicki. The influence of the sociological school of criminal law can be seen to a greater or lesser extent in all these legal scholars.

Two articles were published in "Czasopismo Prawnicze i Ekonomiczne" in 1921 and 1922. The first one was authored by Reinhold and the second by Mogilnicki[10]. The authors attempted to define the concept of criminal policy. Mogilnicki's work was a polemic with Reinhold. First, I am going to present the views and arguments of Reinhold, and then the criticism by Mogilnicki and his position will be referred to.

To define the concept of criminal policy, Reinhold examined the etymology of both words and their meaning over the centuries. The very term "policy" and derivatives are etymologically related to the primary and basic political and legal concept of ancient Greeks – the term *polis*[11]. However, neither in the 1920s nor today it is understood in such a way anymore. Reinhold adopted the following meaning of the term "policy" for his deliberations: it was "a set of rules according to which the State should act for the fulfilment of its task"[12]. The goal assumed by the State was aimed at fulfilling these tasks. In Reinhold's perspective, the goal was a political one. It was the goal and the means by which the State was supposed to achieve it were "essential, central in this doctrine […]"[13]. The author assumed that the State, when specifying the type of policy, may base the typology on the field to deal with or the means to be used. For these reasons, trade policy or customs or criminal policy can be distinguished. He came to the conclusion that criminal policy is "a set of rules according to which the State should proceed in the fight against crime"[14].

However, a criminal policy so defined raised further author's doubts despite a brief but, according to Reinhold, too sketchy definition. Another problem appeared as regards the term "crime", and consequently the term "offence". He pointed to the variability of the meaning of this concept. This was due to amendments in criminal law involving restrictions in recognition of certain acts as offences, and, on the other hand, the creation of new offences which were penalised in criminal law[15].

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[9] M. Wąsowicz, *op. cit.*, pp. 184–188. See also J. Szumski, *O przedmiocie i zakresie pojęcia polityki kryminalnej*, „Państwo i Prawo" 1979, z. 6, pp. 93–102.

[10] J. Reinhold, *Pojęcie i zakres polityki kryminalnej*, „Czasopismo Prawnicze i Ekonomiczne" 1921, nr 3–4, pp. 89–99; A. Mogilnicki, *Pojęcie i zakres polityki kryminalnej*, „Czasopismo Prawnicze i Ekonomiczne" 1922, nr 3–6, pp. 19–26.

[11] M. Chmaj, *Przyczynek do wyjaśnienia pojęcia polityka*, „Annales UMCS. Sectio K" 1995–1996, t. 2–3, p. 198. See more K. Grzybowski, *Historia doktryn politycznych i prawnych*, Warszawa 1968, p. 42 ff.

[12] J. Reinhold, *op. cit.*, p. 90.

[13] *Ibidem*.

[14] *Ibidem*.

[15] *Ibidem*, p. 91. Reinhold gave examples of extending penalisation to other areas of law, such as protection of correspondence, the law on inventions, copyright, and examples of reduction of penal-

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In the fight against crime, it was not important for a criminal policy specialist what actions are and were considered crimes and what will be considered crimes[16]. This was the basis for those involved in criminal policy matters. In the work of a criminal policy specialist, one could not only rely on the positive definition of crime, because it was his task to determine, which action should be considered a crime and which one should not. According to Reinhold, the realistic approach of a criminal policy specialist was of fundamental significance. That is why crime as a social phenomenon was subject to criminal policy action. The author pointed to two immanent traits of a criminal offence as a social phenomenon: "anti-social nature" and "need for the legal and criminal response"[17].

The first of them was expressed in a threat towards a legally protected interest defined in the legal order. This interest was recognized as protected by the State for the sake of the general public and not of an individual. Hence the author's conclusion that "the attack on a [legally protected] social interest" is of an anti-social nature[18].

The second feature indicated above is not unlimited. A criminal policy specialist had to determine interests to be protected as well as types of attacks on interests to be penalised. Only with these aspects could we see the full picture of an offence which according to Reinhold should be seen through the eyes of a criminal policy specialist. Not all acts will be punishable by criminal law though. It was a symptomatic and not a substantive understanding of the term "offence"[19].

The symptomatic understanding of an offence concerned most of the deeds that were not punishable under criminal law, e.g. an act committed by a child which would be punishable if committed by an adult. The individualisation and application of "criminal policy" measures, not punishment, will be of significance here[20]. The too excessive expansion of punishability only caused "hypertrophy of criminal law", which, according to the author, breached the gravitas of law and reduced social sensitivity towards crime[21].

Among the tasks posed to a criminal policy specialist by Reinhold, the following were essential: 1) knowledge of the applicable criminal law; 2) knowledge of its historical conditions; 3) knowledge of social, political and economic rela-

isation, e.g. for suicide, witchcraft, adultery that had been considered crimes, while later legislation eliminated or reduced their punishability. See also M. Wąsowicz, *op. cit.*, p. 148.

[16] J. Reinhold, *op. cit*.

[17] *Ibidem*, p. 92.

[18] *Ibidem*.

[19] *Ibidem*, p. 93.

[20] *Ibidem*. For more on the issue of punishment individualisation, see M. Wąsowicz, *op. cit.*, pp. 189–196; A. Grudzińska, *op. cit*.

[21] M. Wąsowicz, *op. cit.*, p. 94.

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tions within the State; 4) knowledge of and compliance with the ethical values of a given society[22].

The author believed that a criminal policy specialist had to answer one more important question: Should all interests be protected by criminal law? According to Reinhold, not all interests should be protected since criminal law, in many cases, could apply an inadequate measure to the value of the interest being protected[23].

The types of measures that should have been used to fight crime and which should be used by a criminal policy specialist were also the subject of debate. Reinhold recognized that the most important measure is punishment. It should be stressed that he noted that the retaliatory character of punishment began to disappear at that time[24]. This was due to the influence of the sociological school of criminal law on Polish lawyers. He noticed the process of disappearance of certain penalties or elimination of their aggravated forms[25]. Measures used by a criminal policy specialist were to fulfil their task, i.e. to fight crime. According to Reinhold, a criminal policy specialist had to investigate whether a given measure was effective and if not, what should be used instead of it. He called such an examination by a policy specialist "the policy of criminal-policy measures to replace the punishment"[26]. In the author's opinion, short-term imprisonment was not a measure that would deter or correct the convict. The effect of applying such a penalty was the opposite because a person sentenced to prison for up to 3 months was subject to demoralisation rather than resocialisation. He pointed out that it was due to the criminal policy that such institutions as a renouncement of the imposition of a penalty, conditional suspension of a penalty, or other means replacing it, such as a fine, house arrest were introduced. Therefore, a criminal policy specialist had to examine all measures, starting from the death penalty to the institution of indeterminate judgements, in terms of its effectiveness. Apart from penalties, among the measures that can be used by a criminal policy specialist Reinhold also included preventive measures. These measures were then used mainly for juveniles, insane perpetrators, and incorrigible criminals.

Reinhold stressed that he had disagreed with von Liszt, who considered anthropology or criminal sociology a part of criminal policy. In his opinion, these were separate fields of study, which were necessary for criminal policy. It did not mean, however, that a criminal policy specialist became an anthropologist or a criminal so-

[22] *Ibidem*.

[23] To support his claims, Reinhold gave an example of, among other things, abandoning the punishment of adultery or prostitution against nature by mature people.

[24] For a broader perspective, see A. Mogilnicki, *Kary dodatkowe: kary cielesne, kary hańbiące, pozbawienie czci i praw*, Warszawa 1907.

[25] J. Reinhold, *op. cit.*, p. 95. The author referred to penalties that had already been not in use at the beginning of the 20th century, e.g. burning at the stake or dunking.

[26] *Ibidem*, p. 96.

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ciologist. According to Reinhold, the individualisation of punishment referred to by von Liszt was not the only effective method applied by criminal policy (depending on the circumstances, punishment rather than a safeguard could be considered more effective by a criminal policy specialist). However, the penal policy was certainly a part of criminal policy. It should be added that Reinhold, as he stressed himself, agreed with the definition of the criminal policy adopted by E. Krzymuski[27].

As a representative of the sociological current in legal studies, the most important Mogilnicki considered the teleological element of punishment. He consistently rejected the element of retaliation, revenge in punishment. This is why his view on the position regarding the meaning and definition of criminal policy differed from that of Reinhold.

The criminal policy in the broader sense covered all State activities aimed at combating crime[28]. According to Mogilnicki, this was how the scope of the policy was defined by Reinhold. It included, among other things, criminal law, medicine, education, religion, administrative law. However, this only concerned the State's activity in selected areas, which met with Mogilnicki's disagreement. He pointed to the very important issue of social activity in combating crime. It must be remembered that State institutions after the First World War were not that developed, and social organizations, such as patronages, were helpful in a more effective fight against crime.

However, this definition of the criminal policy was too broad. According to Mogilnicki, the policy had to be devoid of all forms indirectly affecting the reduction of crime. It was necessary to remove those areas whose basic objectives were different than those of the criminal policy, e.g. education, health, religion. Also, criminal law did not form part of it. In this case, it was a "policy of criminal protection of society" because new prohibitions "create new crimes but are not aimed at combating the actual ones"[29].

The criminal policy is "a State activity, or social activity, concerning an individual who already is a criminal, or who pursues a criminal lifestyle, who must be influenced in one way or another to prevent him/her from committing a crime"[30]. In this definition, the author also pointed to the subjective scope, not only the objective

[27] E. Krzymuski, *System prawa karnego: ze stanowiska nauki i trzech kodeksów, obowiązujących w Polsce*, cz. 1, Kraków 1921, p. 317. "Undoubtedly, punishment has a prominent place among measures useful for the extermination of crime. To determine this place and indicate the conditions under which the State is supposed to resort to punishment and, in turn, those which define the use of other means to ensure that society has the most effective protection against crimes, is the task of criminal policy, as the third great branch of criminology".

[28] A. Mogilnicki, *Pojęcie i zakres…*, p. 19.

[29] *Ibidem*, p. 21.

[30] *Ibidem*.

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scope. This was undoubtedly the consequence of his views on the individualization of punishment[31].

The criminal policy was to deal with a strictly defined person, which was contrary to Reinhold's views. He believed that this led to the situation that resources available to a criminal policy specialist were reduced to preventive measures. Mogilnicki's opinion was different. He assessed that a criminal policy specialist could deal with a criminal who had already committed a prohibited act and whose prospects were not promising despite serving a sentence (incorrigible criminals) and "alleged prospective criminals"[32]. The task of a criminal policy specialist in the first case was to indicate what protective measures had to be applied to meet a goal that could not be achieved by punishment, i.e. it failed to deter the offender from committing new crimes and failed to protect society. Mogilnicki believed that only isolating such an offender would bring the expected result. In the second group, the author included children and the mentally ill. He concluded that for these people one did not have to wait for committing an offence because the government or social organizations should immediately take care of e.g. an abandoned or neglected child, and thus prevent a possible future offence, and the same applies to the mentally ill. Only then will the crime be prevented in the future.

As regards punishment, classified by Reinhold as one of the measures used by criminal policy, it should be noted that Mogilnicki shared a different view. This stemmed from his position regarding the primacy of purposiveness of punishment and the elimination of "an element of revenge" from it[33]. He assumed that since the primary goal of the criminal policy was to fight crime, this goal should also be the main goal of the punishment. However, according to Mogilnicki, this was not the case in Polish criminal law. The main goal of the punishment imposed by the court on the offender was "retaliation, […] requital for the crime committed"[34]. The only exception that met the purpose of criminal policy were administrative penalties, mainly fines.

Therefore, criminal law with punishment as retribution did not fall within the scope of criminal policy. Already in 1907, in the book *Kary dodatkowe: kary cielesne, kary hańbiące, pozbawienie czci i praw* (*Additional Punishment: Corporal Punishment, Dishonouring Punishment, Deprivation of Honour and Rights*), Mogilnicki showed a gradual disappearance of additional penalties. He hoped that this example would also lead to a gradual disappearance of basic penalties. "The fight against crime will not be carried out as retaliation for the crime committed but will involve the elimination of crime using protective measures. Then the word

[31] *Idem*, *Indywidualizacja kary*, „Gazeta Sądowa Warszawska" 1899, nr 50–52.
[32] *Idem*, *Pojęcie i zakres…*, p. 21.
[33] *Idem*, *Pierwiastek zemsty w pojęciu kary*, Warszawa 1916.
[34] *Idem*, *Pojęcie i zakres…*, p. 24.

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»punishment« will become a historical monument"[35]. Mogilnicki was of the position that this change would replace criminal law with criminal policy.

However, the question when punishment could be one of the measures used in criminal policy still remained. Here, Mogilnicki, similarly to Reinhold, pointed again in the article to the gradual disappearance of certain types of penalties over the centuries, but he came to different conclusions than Reinhold. He held the position that if a penalty (understood as a retribution) disappears, then it can be counted as one of the preventive measures that are used in criminal policy. However, before this happens, he only classed "no-longer-punishment" and "not-yet-punishment" as measures to which criminal policy applies[36]. This meant that measures used in the then "current" criminal policy were only preventive measures applied to three groups of people, i.e. the mentally ill, children and incorrigible offenders[37]. Mogilnicki concluded that the scope of criminal policy should be devoid of the question which acts from the point of view of current state policy should, and which ones should not be considered as crimes because the narrower scope of understanding this field eliminates chaos and facilitates scientific approach to the subject.

Despite the fact that both these lawyers were influenced by the sociological school of law, diverse approaches to one institution are visible. It would seem that the views of the authors should have been very similar due to the influence of von Liszt. And the one to emphasize the importance of the "individualistic" approach in criminal policy should have been Reinhold. It was he who participated in the seminar run by von Liszt. However, after analysing the authors' work, it can be seen that Mogilnicki represented a position that was extreme at that time. Despite the unquestionable influence of von Liszt on Reinhold, the latter did not go so far into his deliberations and he did not support the elimination of punishment as one of the measures used by the criminal policy. Nor did he strongly defend his views during the work of the Codification Commission. As J. Koredczuk wrote, his appointment to the Codification Commission was aimed at strengthening the position of Krzymuski, who, after all, represented the classical school of criminal law[38]. It should be added that the definition and scope of criminal policy proposed by Reinhold were not criticized solely by Mogilnicki but also by Rappaport, but on a much smaller scale[39]. Rappaport stated to Reinhold that criminal policy should not be run by the government but should also be based on social activity. He agreed with Mogilnicki's claim. This mainly concerned the fight against juvenile delinquency

[35] *Idem*, *Kary dodatkowe…*, p. 367.

[36] *Idem*, *Pojęcie i zakres…*, p. 25.

[37] *Ibidem*.

[38] J. Koredczuk, *Wpływ nurtu socjologicznego na kształt prawa karnego procesowego w okresie międzywojennym (Les classiques modernes)*, Wrocław 2007, p. 64.

[39] E.S. Rappaport*, Uwagi z powodu artykułu Prof. dr. Józefa Reinholda (Ankieta). Pojęcie i zakres polityki kryminalnej*, „Czasopismo Prawnicze i Ekonomiczne" 1921, nr 9–12, pp. 246–247.

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but not only this. This fight should take place by creating patronages for minors, homes for the older ones, however not only by governmental organizations but also through social organizations[40].

Despite many critical opinions, Mogilnicki consistently presented his views on the purposiveness of punishment, stressing the importance of eliminating the "element of revenge"[41]. He certainly advocated the maxim expressed by Plato, reiterated by Seneca: *Nemo prudens punit, quia peccatum est, sed ne peccetur*[42]. Punishment should not express an emotional attitude towards the perpetrator, it should not condemn him, but should only aim to protect society. He often emphasized this, for example in the introduction to *Projekt kodeksu karnego dla ziem polskich* (*The draft Criminal Code for the Polish lands*) from 1916, or in the article which is an expression of polemics with Reinhold[43]. The idea was to remove the punishment in the classical sense with its retaliatory character and to introduce it as one of preventive measures to criminal policy. Then criminal law would no longer be necessary, and all actions taken in the fight against crime would be carried out under criminal policy, not criminal law. However, despite the efforts to present his views in this area, he failed to implement his postulate in the draft act written with Rappaport, or in the Codification Commission work, and ultimately opted for the dual nature of his draft and the Penal Code of 1932, i.e. the division into penalties and preventive measures. Nonetheless, Mogilnicki concluded that in criminal policy, the measures that could be used by a criminal policy specialist included only protective measures, not punishment with its retaliatory character.

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[40] *Ibidem*, p. 247.

[41] Cf. *Z Towarzystwa Prawniczego*, „Gazeta Sądowa Warszawska" 1916, nr 11, pp. 122–124.

[42] "No reasonable man punishes because a crime has been committed, but to prevent a crime from being committed in the future".

[43] A. Mogilnicki, E.S. Rappaport, *Projekt kodeksu karnego dla ziem polskich*, „Gazeta Sądowa Warszawska" 1916, nr 16–19, 21, 23.

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STRESZCZENIE

Jedna z wielu dyskusji, które były podejmowane przez prawników w dwudziestoleciu międzywojennym w Polsce m.in. na łamach czasopism prawniczych, dotyczyła zdefiniowania i określenia zakresu polityki kryminalnej. Uczestniczyło w niej wielu wybitnych prawników, w tym J. Makarewicz, B. Wróblewski i E.S. Rappaport. Celem niniejszego artykułu jest przedstawienie poglądów J. Reinholda i A. Mogilnickiego na politykę kryminalną oraz uwypuklenie różnic w przyjętych przez nich stanowiskach. Mimo tego, że na obu wpłynęła szkoła socjologiczna prawa karnego (głównie stanowisko F. von Liszta), można wskazać szereg rozbieżności w ich zdaniach. Po przeanalizowaniu tekstów tych autorów należy stwierdzić, że walka z przestępczością w ich ujęciu miała przebiegać odmiennie: poprzez użycie różnych środków (kary i/lub środków zabezpieczających/ochronnych) przez państwo lub przez państwo i społeczeństwo.

Słowa kluczowe: polityka kryminalna; kara; J. Reinhold; A. Mogilnicki; celowość