4 The meaning of ‘just punishment’ and the role of courts in transnational criminal justice procedures

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**Introduction**

One of the most important legal philosophers of the twentieth century, Gustav Radbruch, pointed out while describing the role of philosophy that it confronts people with their decisions and “make[s] life not easy but, on the contrary, problematical” (quoted in Leawoods, 2000, p. 489). Even though I do not have any ambition to make a new contribution to legal philosophy in general, my aim in this chapter is to problematise transnational criminal justice and its procedures by raising questions that are usually asked by philosophers. In doing so, I want to draw attention to the roles of both justice and punishment – the roles which are usually lost in transnational procedures that are ruled rather by bureaucratic and technical principles.

The legal philosophy and the questions that it raises will be my point of departure in this journey. The most important of them include the following: What is justice in modern and mobile societies? What does delivering justice mean and what elements should be included to make it happen? What is the role and purpose of punishment, and what role should the courts play in the process of delivering it? Against this background, I will analyse the practical implementation of some of transnational criminal justice procedures in Poland (mostly connected with application of European Arrest Warrants and other forms of transfer of prisoners, including extradition processes) and their impact on the people subjected to them. This perspective of bringing someone to justice which involves two (or more) jurisdictions, and which focuses on people on the move, is the pivotal element of this chapter.

To evaluate transnational justice procedures, the findings from several studies will be used, including interviews with Polish practitioners who are involved in the implementation of transnational justice instruments, interviews with people who were forced to return to Poland under those procedures, and analyses of court decisions issuing European Arrest Warrants (EAWs).

This chapter comprises five main parts. I begin with some theoretical considerations about justice and punishment, with a special focus on the transnational dimension of those terms. Then I explain the methodology that I used to collect the material on which this chapter is based. In the next three subchapters, I focus on an analysis of the data gathered during the research process. I divide this material into three main topics, starting with a description of the people who are targeted
by EAWs issued by Polish courts – in other words, in which cases and for what deeds people are pursued using this instrument of transnational criminal justice. The next section is focused on the bureaucratisation of such procedures and their influence on people’s lives, which leads me to analyse how the idea of ‘justice’ is understood in transnational justice – how it is perceived and decoded by different actors responsible for its delivery (or those subjected to such practices). Finally, I conclude by bringing together the theoretical dimensions of justice and punishment and the way they are reflected in the practices of Polish authorities when applying transnational criminal justice.

1. Justice, punishment and their delivery – theoretical aspects

Justice is an elusive concept which is exceedingly difficult to grasp and translate to practical actions. What makes it even more complicated is the fact that it refers both to the law (the form it should take to create a society where justice prevails) and its practical application (i.e. how norms should be interpreted and implemented to make justice happen). The latter element includes a certain behaviour of the individual who executes the legal procedures expected of them by the society (even though expectations of different social actors involved in this process could significantly vary between themselves).

Justice is also a highly politicised concept. Various points of referral are used to explain and validate different social practices, including the law, to prove that they are part of this term or serve as a tool to obtain its goals. Those interpretations solely depend on the values and political stances of someone interpreting the term ‘justice’, and as such they yield a huge variety of concepts and positions, sometimes even contradictory (Dworkin, 1986, p. 425). The Polish philosopher Tadeusz Kotarbiński, while reflecting on the sense of justice, asked:

> What does justice demand? It demands actions according to some equal measure, the fulfilment of what was promised (explicitly or implicitly, clearly or tacitly), the defence of those who have been wronged or are in danger of being wronged in the area available to our interference . . . the important things here are equality, keeping promises and defence.

(Kotarbiński, 1987, p. 182)

This understanding is very much in line with John Rawls’ sense of justice, in which it is equal to fairness. “It conveys the idea that the principles of justice are agreed to in an initial situation that is fair” (Rawls, 1999, p. 11). What is ‘fair’ and thus what is ‘just’, however, is still based on a social agreement, so it can vary in both time and space. The morality serving as an explanation to what justice is – in other words, what is right and especially what is wrong – is not constant. Law is based on morality, so it is not constant either (Black, 2011, pp. 11–13). One can say that this is an obvious statement, but particularly when we are discussing the implementation of transnational justice it should be recalled, as this concept includes multiple jurisdictions which are translated into different and sometimes distinct models of morality.
Another important (and also quite obvious) reminder is that defining what action constitutes a crime is an element of the sovereign power of a state. The same can be said about imposing a punishment (with only a small exception being made for international criminal tribunals). Even though the process of transnationalisation of criminalisation has been developing recently, it takes time, is based on political interests and requires the agreement of the participating countries. Creating a list of crimes that are common and where criminal acts are understood in the same (or at least a similar) way in different countries also requires an intercultural dialogue between different legal cultures – to define not only what should be penalised but also what the role of punishment should generally be, how it should be enforced and what legal protection (if any) should be offered to an accused person. The concept of human rights and the various ways to (mis)understand them play an important role in this process (Cotterrell, 2018, pp. 140–156).

Justice as a value should be reflected in the law. This concept was developed by Gustav Radbruch, who stated that the “law is the reality whose sense is to serve justice” (quoted in Alexy, 2021, p. 109). In Radbruch’s understanding, justice means equality – the same principles apply for all. But it is not enough to draft the statutes in a certain, proper and just way. If justice is to be delivered, it must be accompanied by an expediency and a purpose (which is based on values) since only this allows individualisation, a necessary adjustment of some general norms to the situation of a certain person or a group of people. Both those elements of law are complemented by the third rule: legal certainty. Those three elements refer to the creation of law, but when the law in books reaches a certain threshold of extreme injustice because of its violation of human rights, the law itself is invalidated by its profound unjustness, and thus should not be implemented by a judge, who is obliged to oppose those provisions no matter what personal costs it might bring to them (Alexy, 2021; Leawoods, 2000; Radbruch, 2012). The protection of individual human rights also justifies interference into another country’s internal affairs, as stated by the founding father of international law, Hugo Grotius (Nussbaum, 2007, p. 19).

The role of the judge in delivering justice is thus of the greatest importance. The judge is obliged to take into account all elements of the cases they adjudicate on, as well as the law itself (legal provisions) on which the judgement is based. It is not easy to introduce into everyday practice Radbruch’s guidance on that matter, as the idea of extreme injustice and violation of human rights is itself quite vague. But even if it were not so difficult to prove an abuse of power of the government and unjust regulations that were introduced into law, courts do not always withstand their role as the protector of justice, the protector of an individual against the state and the law. This especially happens when the idea of national security is introduced into the process of sentencing. The role of the court arises in such cases because it is the only institution designated to protect individual rights and to defend the most vulnerable populations: those who became scapegoats and the focus of a moral panic in a society manipulated into disliking them, being afraid of them and blaming them for their own misfortune (Cohen, 1972). But in a crisis and when the so-called national security is at stake, judges do not necessarily properly
fulfil their role of protectors, especially when it comes to shielding individuals from oppressive governmental policies (Cole, 2003).

Human rights are sometimes explicitly evoked as a referral point that should be taken into consideration in the sentencing process in transnational cooperation. The protection of fundamental rights is obligatory while adjudicating on the extradition of a person to another country (Efrat & Newman, 2020; Efrat & Tomasina, 2018) and to some extent in the execution of an EAW (Montaldo, 2016; Ouwerkerk, 2018). In the latter procedure, yet another element is added that requires the deliberation of a judge. A proportionality test should be applied by the judge in the country which is about to issue an arrest warrant against a certain person. This test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case.

(Klimek, 2015, p. 134)

In other words, if issuing an EAW violates the individual’s rights it should not be imposed. Proportionality was translated into the Polish criminal procedural code as ‘the interest of the justice system’, and it clearly shows the change of the emphasis – from an individual rights to a state’s interest. Theoretically this term includes (or should include) human rights perspective, but it is only one of provisions embedded in it (Jacyna, 2018, pp. 31–33).

All of those provisions were introduced into the law so as to protect the fundamental rights of a perpetrator of a crime. Those measures prevent judges from rubber-stamping decisions taken by other institutions (in one or another country). In practice, though, judges quite often rely on so-called expert opinions or information provided by members of their own administrative staff, and instead of double-checking information presented on paper and hearing a person who is subjected to those procedures, they automatically accept the documents that are provided to them (Fiss, 1983, pp. 1454–1458). This is especially true when it comes to the cases of people from the lower classes. Then the verification of the expert opinions is even more superficial or non-existent, particularly when the judge has a general trust in the expertise of those representing the other institutions, whether the police or probation services (Lipsky, 1980, pp. 129–131). A very similar approach is likely also applied to paperwork from a court of another European country, especially since the rules of mutual recognition of and mutual trust in judicial decisions within the EU have been introduced (Böse, 2015; Klimek, 2015). One can say that this approval comes from bureaucratic reasons and lack of time of the judges receiving EAWs. This is definitely a true assumption but, in my opinion, it is only a part of the whole picture as this rubber-stamping of warrants issued by judges from other countries will not become so easily if it wasn’t for the trust in expert’s opinions of fellow judges from other EU countries (which is also embedded in the EU law).

The expectation of the court’s clientele, as Cyrus Tata (2007) calls them, is also an important element during the process of adjudication – and I do not suggest here
by any means any corrupt behaviour but purely a ‘smooth’ cooperation with other institutions and its representatives. Another reason behind this approach may lie in the fact that judges rely on legal regulations and usually just implement them without giving a second thought to the reasons behind their introduction. On top of that, we should remember that many judges consider their work boring since most of their activities do not pose a challenge to them from a legal point of view (Tata, 2007). One can also argue that due to the accumulation of so many obligations and a significant number of cases to rule on, judges simply do not have the proper time to reflect on every single case (Hester & Eglin, 2017, p. 178), particularly if a case looks easy and obvious, and if a quick approval is expected of them by the bureaucratic judicial system.

Transnational justice usually involves a foreigner as the participant of the judiciary procedure. There is a body of research which shows that foreigners are treated differently and less favourably by courts than citizens (Aliverti, 2018; Brandon & O’Connell, 2018). This begs the question of whether in the opinion of a judge this person “deserves the same standards of (normal) justice as the citizen” (Franko, 2020, p. 175; emphasis in the original). It is even more important when one considers that in several jurisdictions and in some procedures the rights of foreigners and legal safeguards have recently been significantly limited by the law – especially when compared to citizens in a similar situation (Ashworth & Zedner, 2015; Dauvergne, 2005; Macías-Rojas, 2016).

In transnational justice – especially when it comes to both imposing and executing a penalty on a certain person, particularly in a prison – an important notion is a different level of what Ben Crewe describes as the depth, weight, tightness and breadth of various penal systems (Crewe, 2015). Again, it seems obvious to assume that different criminal justice systems work differently, thus the conditions inside prisons, the right to apply for an earlier release and any support after serving a sentence vary greatly between jurisdictions. In the process of sentencing, a judge takes those characteristics (but only from their own country) into consideration – more, or likely less, consciously – and bases their verdict on them. Or at least the actual severity of the punishment, the pains and the suffering that the sentence causes to the individual, should be taken into consideration during sentencing. Those characteristics include not only the obvious pains like deprivation of liberty, for instance, but also indirect (oblique) and contextual pains of the punishment, which are related to the execution of the punishment, the condition in which the sentence is served and the social impact that it brings (both during imprisonment and after release) (Hayes, 2016, 2018). But all of those elements are strictly related to a concrete jurisdiction and cannot be easily transferred to another.

This is the perfect segue to bring me to the reflection on the concept of ‘just punishment’, which is all about adapting the “correct amount” of suffering upon a certain person for their criminal act (van Ginneken & Hayes, 2017, p. 63). In general, the very intention of punishment is “inflicting of pain, intended as pain” (Christie, 1981, p. 1). Obviously, the punishment should be individualised. What makes it difficult, though, is the fact that different people experience what is formally the same punishment differently. This depends on their character, personal
situation and previous experience (also with being punished) (van Ginneken & Hayes, 2017). In other words, punishment can only be personalised to a certain extent, and this raises the question of what should be taken into consideration by a judge in the first place. Would it be the personal characteristics of the person being sentenced, followed by their individual experience (which is usually unknown)? Or rather should equality prevail – the notion that the same (or at least similar) punishment should be imposed for each person if they commit the same crime in the same/similar circumstances?

If we go back to the founding father of the contemporary theory of punishment – Cesare Beccaria – we read that according to him “to make the punishment as analogous as possible to the nature of the crime” (Beccaria, 1872, p. 76) is of the greatest importance in the adjudicating process. He also added further recommendations on how to make the punishment just:

The more immediately, after the commission of a crime, a punishment is inflicted, the more just and useful it will be. . . . The degree of the punishment, and the consequences of a crime, ought to be so contrived, as to have the greatest possible effect on others, with the least possible pain to the delinquent.

(Beccaria, 1872, pp. 73–76)

Those guidelines indicate several points on how to make a punishment just – that is, to impose it rather quickly after the crime was committed, to connect it with that very crime and its severity (the harm that it inflicted on the victim or society) and to make it as mild as possible for the perpetrator. The judge should at the same time take into consideration the preventive element of the punishment – the impact that it has on both the individual and in general (on society). Further on, Beccaria also commented on statutes of limitations and stressed that they should not be too extensive when crimes are of a lesser severity (Beccaria, 1872, pp. 112–116). Recently, the rehabilitation of a sentenced person has been added as an important element of a penalty. In the transnational situation, though, it raises several questions: How should it be implemented? In which country will this aim be better achieved? What elements should be taken into account in the decision of where the sentence will be served – and when, that is, during the sentencing or at the executive stage? Who should be included in this decision-making process? (Wieczorek, 2018)

In this chapter, I would like to reflect on those most important questions – what both justice and just punishment mean in transnational processes and how the latter should be planned and implemented in order to serve justice.

2. Methodology of research

Our research consisted of three basic components.1 We began the process by interviewing experts: different people who are part of the transnational justice system. They represented a rather broad range of different agencies (both public and private) as there is a big group of institutions involved in this process (see Kalir et al.,
We conducted a total of 29 expert interviews with 36 participants (19 women and 17 men). On average, they were between 40 and 55 years old. They were experienced people, with many years of work in their profession, often in managerial positions (especially in law enforcement agencies). The judges had also varied in their experience – from district court judges with just a several years of practice, to highly experienced ones, with more than 30 years in court and a high expertise in international cooperation. Our interviewees included 6 judges, 2 court administration employees, 3 probation officers, 11 NGO social workers from non-profit organisations (including 3 people from Polish organisations helping Poles abroad), 5 police officers, 3 prison officers and 6 border guard officers. The interviews lasted an average of about 1 to 1.5 hours and were carried out according to common guidelines (although they were adapted to the respondents’ varying experience with the transnational criminal justice). Seven interviews took the form of dyads. In quoting the following respondents’ statements, I provide the interview code and the interviewee’s profession.

We conducted the research in the midst of the Covid-19 pandemic, that is, between March 2020 and August 2021. For this reason, most of it took place using remote communication platforms. However, this was not a problem for the experts. In fact, it could be argued that this made it easier for us to contact various people across the country and some of whom we probably would not have been able to reach in the traditional way. As all business meetings at the time were held this way, the remote interview was not an uncommon situation. In fact, it was treated as a normal form of interaction and meeting. In the very beginning, members of the enforcement agencies (police, prison or border guard officers) were rather reluctant to be interviewed online and preferred face-to-face meetings, but as they became more accustomed to remote working during the pandemic, they too agreed to be interviewed remotely (although most of the interviews with this group of interviewees took place in person).

In addition to interviews with experts, we also interviewed individuals who were forcefully transferred to Poland as a result of their contact with the justice system. We carried out these interviews between April 2020 and April 2021. Altogether, 31 people took part, including 4 women. The vast majority had been sent back under the EAW procedure, although a few people were also transferred to Poland following extradition. We were able to reach ten people using contact information we received from social organisations that had worked with them or by posting an add on a Facebook group called ‘I live in the UK. Poles in the islands’. However, the latter method of recruitment was not very successful. Another 21 people who spoke with us were in Polish prisons at the time of the interview, where they found themselves after being transferred from another country. All interviews took place remotely (for more on that subject, see Klaus, Włodarczyk-Madejska & Wzorek in this volume). When quoting our respondents subsequently, I use pseudonyms (all names have been changed and all personal information has been anonymised).

The third method of research was to survey the files of individuals against whom Polish courts issued EAWs in 2018 and 2019. We carried out the study in the first half of 2021, by analysing 336 cases, which constituted a statistically
representative sample of the total number of court cases pending at that time for the issuance of an EAW (for more on this method, see Włodarczyk-Madejska & Wzorek in this volume). In describing the details of these cases, I give their numbers later in square brackets.

As can be seen earlier, the overwhelming majority of the research material we collected focuses on the use of the EAW. This is the main instrument of transnational justice that is found in Polish practice. However, while the following discussion is based on this research material, it seems that the scope of the topics I address in this text is much broader and can be applied more generally to various forms of transnational collaboration in criminal proceedings.

3. Who is prosecuted by Polish courts under the European arrest warrant?

As I mentioned earlier, justice can be understood and administered differently at different stages of punishment. One of its salient elements is the type of punishment imposed. For years, the most common punishment that Polish courts handed down was a suspended prison sentence. Between 2001 and 2015, it represented between 50% and 60% of all sentences. The percentage began to decline from 2016 in the wake of changes in criminal law, which markedly reduced the courts’ ability to impose this type of punishment, and in 2019 it reached 20% of the total penalties (Gruszczyńska et al., 2021, p. 71). Many people who received a suspended prison sentence did not perceive it as a serious and severe punishment, because often in practice it did not entail any additional obligations or inconveniences apart from probation supervision (not always being applied) and refraining from committing further crimes, as this could lead to the suspension being revoked and the person being sent to prison to serve the sentence previously suspended. In fact, the risk of having a suspended sentence revoked was significant, as almost one in four such sentences was eventually carried out and the convict was incarcerated (Klimeczak et al., 2020, p. 46). That convicts had a dismissive attitude towards suspended prison sentences was something that judges saw clearly:

Very often . . . in the eyes of convicts, a suspended prison sentence is not a punishment. Sometimes when defendants stand before the court, . . . the court asks, routinely checking the basic personal data of the accused: ‘Do you have a previous criminal record?’ Sometimes the answer is ‘no’. . . . A suspended sentence is not very memorable to the convicts.

(Judge, ENA_E17)

This judge also noted that convicts often do not register fines as punishment in their minds. It was fines, alongside the sentence of community service, that replaced suspended prison sentences after 2016. On average, the imposition of fines surged from about 10% (2001–2015) to 28% (in 2018), and sentences of community service increased from about 20% to 33%. The adjudication of sentences to immediate custody has also increased, from about 10% to 18% (Gruszczyńska et al., 2021,
Both of these non-custodial sentences – in cases when they are not carried out by the offender – can be converted into a prison sentence by the court during the enforcement proceedings. Such a situation was also recorded in our study.

Our research shows that Poland continues to seek extradition for a large number of people for relatively harmless offences. However, the premise behind the establishment of the EAW was just the opposite: the idea was to prosecute perpetrators of the most serious crimes. In fact, for many years Poland has been criticised by the European institutions and other EU countries for excessive use of the EAW procedure and using it to bring minor offenders to justice (HFHR, 2018, p. 17). Our current research reveals that while the crimes being prosecuted are not utterly trivial compared to previous years (Klaus et al., 2021), many are still hardly considered serious enough to set in motion the entire transnational justice machinery to have the offender punished.

These minor crimes, which are the grounds for international searches, were pointed out by the experts we surveyed, when sharing their experiences.

I also had one such wanted man, who rode [a bicycle] in an inebriated state around a flower bed in front of the municipality office, and suddenly jumped into it and smashed a 300-zloty vase and destroyed some seedlings. And he was a double criminal because of the destruction of property and being intoxicated. And that’s what the EAW was for. . . . We had an EAW for stealing flowers from a grave. I had one where a man stole several jars of meatballs and a blanket from a basement.

(Police officer, EAW_E1)

We also met people convicted of such offences during the study. This is what they told us about the criminal act for which they were brought to Poland:

This is some kind of joke. Stealing a radio from a car, well, you know what I mean. And on top of that, it’s a case from 2007 and 2009. Well, but I was guilty, there was a sentence of four years, well, and I had to. . . . I don’t know. If it was up to me, I wouldn’t prosecute such [cases].

(Jacek)

I wrote a blank, signed check. Well, and she [a friend] took advantage of it. So it’s such a stupid thing, I think. Because this was not so socially harmful to pay it back. Because there was also the possibility of repayment, they could have notified me, because after all, they knew where I was. They all knew. . . . And they knew my address, where I live. I could have been notified or whatever . . . 7,000 zlotys [about 1,500 euros]! And for that I got a sentence of one year and four months.

(Marta)

The value of what I stole is two and a half thousand zlotys [about 400 euro]. I received a total of two years and two months for this.

(Bartek)
What is striking about Jacek’s case is the amount of time that had elapsed since he committed the crimes. We met with him in prison in 2020. Marta did not have a criminal record before and did not know that she was wanted by the justice system in the first place. No one notified her of the verdict itself, under which she received a suspended sentence or the subsequent conversion of that sentence to imprisonment, or that she was under an obligation to return some money, which, incidentally, she had not misappropriated and which she did not even know had been misappropriated. The punishment Bartek was handed down seems very high compared to the deed he committed (provided, of course, that he was telling the truth). This strict penalty may also have been influenced by his previous criminal record.3

However, the cases described earlier contradict the opinions of court employees. One court administrative employee argued that “judges do not usually adjudicate draconian punishments for petty theft crimes” (ENA_E29). This was echoed by one judge, who exhorted:

Let’s have some trust in courts, which moderate punishments, and see how a prior criminal record affects the person on trial or how this person is not concerned with it.

(Judge, ENA_E1)

Still, perhaps it is a matter of defining what a draconian punishment is, and whether imprisonment for some minor crimes can be labelled as such. Or what is moderation of punishment. In fact, another of the judges we spoke to admitted that

the penalty of one year [of imprisonment] is actually a very low penalty in the Polish justice system, but one that is often imposed. Yes, very often.

(Judge, ENA_E12)

Nevertheless, spending a year in prison can hardly be considered a lenient punishment. Moreover, individuals who are not employees of the courts make a much harsher assessment of the activities of the courts and their rulings (as evidenced by the earlier quotes). Furthermore, the concept of punishment should be broad and should include – as Hayes (2016, 2018) proposes – not only the conviction itself but also all the elements of the enforcement proceedings and the consequences of the decisions made in these proceedings. One such consequence is searching for the person who must serve a sentence through an EAW. This broader view sheds light on the punitive nature of the Polish justice system. If we look only at the information on the EAWs issued by Poland to execute sentences, it turns out that only half of the people were sentenced to immediate custody, while the remaining half had other freedom-restricting sentences (see Table 4.1). Thus, it is difficult to find a moderate response in the courts’ use of the EAW. Sometimes court personnel see this as well:

Well, the European Arrest Warrant sounds proud . . ., it is such a serious tool. Admittedly, we issue these European arrest warrants to a large extent for so-called trivialities.

(Judicial administration employee, ENA_E28)
Table 4.1  Penalties imposed on persons wanted under the EAW for enforcement of sentence (N = 269)*

<table>
<thead>
<tr>
<th>Type of punishment</th>
<th>Number of persons wanted under an EAW</th>
<th>Percentage of persons wanted under an EAW</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment (sentences to immediate custody)</td>
<td>143</td>
<td>53%</td>
</tr>
<tr>
<td>Suspended imprisonment</td>
<td>134</td>
<td>50%</td>
</tr>
<tr>
<td>Community service(^d)</td>
<td>13</td>
<td>4%</td>
</tr>
<tr>
<td>Fine</td>
<td>23</td>
<td>9%</td>
</tr>
</tbody>
</table>

Notes: * The percentages do not add up to 100% because an offender may have committed more than one crime, and the court may have imposed more than one punishment per person.

In a sizable, maybe not sizable, but in a certain definite percentage of cases, I see, I see this kind of, not to say pointlessness, but excessive involvement of the judiciary in searching for an offender abroad under the EAW, when compared to the severity of the crime.

(Judge, ENA_E17)

According to a study of cases in which an EAW was issued, fines were most often adjudicated alongside other punishments. In none of the cases was a fine issued as a stand-alone punishment. As for community service, it was imposed alongside another penalty (imprisonment or suspended imprisonment) in three cases; presumably, in these cases the offenders were wanted for more than one conviction. In all 11 cases in which the courts handed down only a custodial sentence against the convict, these sentences were converted to a substitute prison sentence at the stage of enforcement proceedings, most likely for the offenders’ failure to meet the obligations that had been placed on them.

Let’s look for a moment at the kinds of offences for which custodial sentences were handed down. In many instances, we can definitely speak of trivial matters, such as selling a pawn shop employee an item worth about €40 that did not belong to them [46], driving under the influence of alcohol [54] or other psychoactive substances [174] or after a driving ban [121], or entering someone’s home and not leaving it against the owners’ wishes [183]. Similarly, minor offences can be found among suspended prison sentences. Some of these include an unsuccessful attempted theft of €460 [205], entering into a contract with a cell phone network and failing to pay phone bills [33], fleeing a gas station without paying €40 for fuel [237], and possessing 0.8 grams of heroin [299].

In this group of cases, there are also many offences of driving while intoxicated. Driving under the influence of alcohol can also lead to a sentence of immediate custody: this occurred in nine cases, including two people who were sentenced to one year of imprisonment [11 and 198]. Prison sentences for this felony are relatively rare, averaging about 3% of such cases nationwide, but there are large differences between different judicial districts on this issue, ranging between 0.7% and 8% of the total cases (Klimczak et al., 2020, pp. 31–32). In general, this crime (or
rather, the punishment for it) is relatively common in Poland: In 2018 alone, more than 44,300 people were convicted of this offence, which accounted for 16% of the overall sentenced population (Gruszczynska et al., 2021, p. 64). In our study, there were a total of 17 people wanted for driving under the influence of psychoactive drugs (mostly alcohol), including nine cases where this was the only offence they committed.

Apart from drink driving, we also have several other crimes in Poland that are quite specific to our country and are clearly visible among all convictions. The first of these is failing to pay child support. In 2018, more than 42,200 people were convicted of this offence (15% of all those convicted), including more than 4,500 sentenced to custodial sentences. This was a record year compared to previous years, as the number of convicted individuals rose almost fivefold, due to a change in the sentencing policy for this crime and a subsequent amendment to the criminal law. Even in earlier years, however, the number of convictions for this offence was considerable, averaging thousands per year, with about 1,000–1,200 people being sentenced to mandatory imprisonment (Gruszczynska et al., 2021, p. 88; Ostaszewski, 2020). The problem of how to deal with (mostly) men refusing to support their children is an important social policy issue. However, solving it using criminal justice measures is certainly not the best way to address it. Polish studies have long shown that a large proportion of child support offenders are alcohol abusers or addicts (about one-quarter of those convicted), and that most of the offenders are poor, financially distressed, unemployed or even homeless. Over 10% have serious health problems (physical or mental) (Ostaszewski, 2020, pp. 199–202). In the EAW cases we studied, there were 11 people sentenced for not paying child support. Paweł Ostaszewski’s research shows that, in general, about 1% of those convicted of this crime live outside Poland (Ostaszewski, 2020, p. 202).

Another law that has a strong presence in Polish practice is a severe punishment for drug possession. It is true that since 2011 it has been possible to waive punishment for a person who possesses a small amount of drugs for personal use, but this is only an option, not an obligation for law enforcement agencies or courts (in 2014, more than 40% of prosecutors’ offices did not use this option even once [Jankowski & Momot, 2015, p. 1]). Additionally, different courts interpret this provision differently. As for the internationally prosecuted persons we studied, there were also cases of people convicted of possessing small amounts of drugs, such as 0.7 or 2.7 grams of amphetamines [115, 80], 0.75 or 8.3 grams of marijuana [224, 320] and 0.8 grams of heroin [299]. Another convicted person was growing seven cannabis plants in his flat [248].

The prosecution of these specifically Polish, rather petty offences was criticised by some of the experts in our research. This is because, having worked with people who were brought to Poland for these offences, they saw little point in involving the entire machinery of the transnational justice system in these matters. They also saw the people behind these criminal acts and the interruption to their lives – they saw them on their own eyes and met them; they didn’t have just a small note about them in their files. They were much more than just someone described on paper. One example is the following statement by a police officer, who nonetheless
It is the role of the judge to assess the gravity of the crime. If I were a judge, I wouldn’t, for example, issue an EAW for failing to pay child support, or for drink driving on a bicycle. On the other hand, it’s the sovereign decision of the court and the prosecutor’s office whether they want to prosecute someone on the basis of the European Arrest Warrant, and we just carry it out.

(Police officer, EAW_E1)

I’ve come across an EAW for failure to pay child support, which I think is kind of, well, it’s a bit odd. Because the guy is abroad and working to earn money for his children, and he ends up in a Polish prison, where he’s going to do time. I don’t understand it. Well, but I don’t have to understand everything.

(Prison officer, ENA_E14)

The low number of EAWs issued in the types of cases described earlier, however, was due not so much to the realisation that these are petty offences and the response to them should be different (or that, in general, a criminal law response to offences resulting from alcohol or drug abuse and solving social problems in this way is not a good idea), but to the pragmatism of judges. This is because at some point they came to the realisation that there was no chance of prosecuting these people through the EAW, because in many European countries these kinds of actions are simply not recognised as crimes, and thus one of the fundamental conditions for issuing a warrant, that is, the obligation of double criminality, does not apply.

I was no longer issuing European arrest warrants at that time, for example, for all those cases of unpaid child support. Because it was clear, I was aware, that generally in many European countries this does not constitute a crime. It is only prosecuted as a civil violation in general, and there’s no chance of it being issued at all. But this was [also] a category of offences that I thought it would be disproportionate to prosecute. Another thing was also such famous cases as . . . detection of marijuana in urine, [. . . that is] possession of drugs.

(Judge, ENA_E19)

When we were dealing with the crime of driving under the influence of alcohol, on the other hand, there was the problem that in some countries this threshold is set lower, in others [it’s] higher. So, with this [alcohol level] between 0.2 and 0.5 [per mile of alcohol in the blood] we also rather did not [issue the EAW].

(Judge, EAW_E18)
The previous discussion shows that when judges decide whether to use transnational measures they are most often guided by pragmatism, that is, the knowledge that the offender will not be transferred anyway for certain crimes. However, two elements are important here. First, they don’t always have this reflection (the study included judges who were more committed and more reflective, while others declined to be interviewed) and EAWs are issued in such cases anyway. Second, this reflection does not extend to a general approach to the imposition of punishments or to decision-making in enforcement proceedings, such as those involving commutation of non-custodial sentences to imprisonment.

4. The bureaucratisation of transnational justice – is the person lost between the papers?

The problem of bringing back to Poland people who have committed relatively minor crimes and have been given various types of non-custodial sentences lies in the excessive bureaucracy and formalism of the Polish justice system connected with punitive criminal law and sentencing practices (Krajewski, 2016). Indeed, the entire justice process is fragmented: One court (or judge) decides on the punishment for the offence, another on the question of commuting a non-custodial sentence to imprisonment, another motions for an EAW and yet another decides whether to issue it. Throughout this process and at its various stages, the person and the crime they committed are lost, because judicial proceedings from the executive stage onward are based mainly on documents. Judges do not get to see the convicted person or hear about their situation. Next, our experts give examples of such cases:

Well, these are different kinds of fraud; the vast majority of them are where the convicted person . . . showed up at the bank, took out a loan and did not pay the instalments. And it turned out that their ability [to repay] was nonexistent. Often there was also a false certificate of employment, so it is obviously fraud. . . . the bank has long since got rid of this debt, because it sold it. So then there is the question: Whom would they [the convicted person] have to compensate for this damage, so to speak. But [the court] doesn’t have the resources to check this. There is no time for that. And punishment is also sometimes ordered against such people.

(Judge, ENA_E17)

[It was a case for] burglary and [there was] an obligation imposed on the convict to compensate for the damages. He did not fulfil this obligation. It was a liquor store in that village where he lives, you know, a broken window, some goods stolen, high-alcohol-content products. He didn’t remedy that either.

(Probation officer, EAW_E24)

In the latter case, the suspended prison sentence was revoked for failure to fulfil the court-imposed obligation. As in the bank cases, suspended sentences are
sometimes revoked because, as the judge pointed out, the court does not have time to get to the bottom of the case and investigate whether it makes sense to carry out the ruling – makes sense from any point of view when it comes to the goals of punishment, as stated in the Polish Criminal Code: individual prevention and rehabilitation, reparation of damage, the interests of justice or even deterrence. None of these goals will be achieved, and the convicted person will only suffer further unnecessary hardship, which may negatively affect their future life.

Another problem that judges face is the lack of time and a large caseload, including executive proceedings. One judge spoke explicitly about this: “We can’t cope with the number of [cases]” (Judge, ENA_E17). On the other hand, executive proceedings are not thought of as important or a priority by judges. Here, guilt is not being adjudicated, so they are – as one of the interviewed judges said – dead boring.

During all those years of my work [as a judge]. . . . I dealt with this second stage, i.e. the execution of punishment, literally by accident. . . . I never liked doing it. Somehow it seemed to me that it was such, such, I don’t know, well dead proceedings. . . . Actually, boring. But in fact, this is the essence of this principle of inevitability of punishment and of such a justice approach.

(Judge, ENA_E12)

Reflection on the significance of the decisions she was taking and how crucial they were to administering and experiencing justice only came years later, when our interviewee was no longer involved in these types of proceedings. While working on these cases, the judge was overcome by a sense of boredom. It may also have been because executive proceedings take place in the silence of the office and are based only on documents, with no contact with people. Additionally, the ruling in the case has already been made, and the punishment has been ‘administered’. The technicalities involved in how it is executed are of little interest.

This adherence of judges to legalism, to following first and foremost the letter of the law, the literal formulation of a certain provision without any deeper thought about the effect of these actions and their impact on the lives of those subjected to them, is problematic. Such thoughts rarely enter the judges’ minds, and they most often give way to pragmatism or habit. This is what one judge said during an interview:

After this conversation with you I will probably think about it even more often, because in such minor, let’s say trivial, matters.

(Judge, ENA_E17)

Because judges are not in the habit of going beyond the strictly literal letter of the law and thinking about the principles of applying the law or the guidelines on what the punishment is supposed to achieve, they rarely resort to the discretionary instruments contained in the regulations, even when it is possible to do so. And it is the EAW procedure that creates such opportunities, for example, of using the
proportionality check when issuing EAWs (Carrera et al., 2013, pp. 16–18). This principle is interpreted from the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) and recommended by the European Commission (EC, 2017), but in practice it has not been applied in Polish courts for many years, as it was not explicitly introduced into national legislation. Instead, it was used only by way of exception and required judges to have a good understanding of European law, which was rare. Finally, it was included in the Polish Code of Criminal Procedure. This is how one judge assessed the step:

I was very happy when the rules changed from 1 July 2015, and when principle of proportionality gave way to ‘the interests of justice’. It’s a pity that it had to come to this. After all, we are bound by EU law, the principle of proportionality too. And there was no need at all to write it directly in the Code. [But] it is important that it is there. Perhaps it is easier now.

(Judge, ENA_E16)

In the interviews, we asked judges how they understood the concept of ‘the interest of justice’. The answers depended on the judges’ experience. Some of them, who have been dealing with the subject of transnational collaboration for a long time, had this to say:

The interest of justice must be understood more broadly than just the interest of the Polish judiciary. I guess it should be defined as the interest of European justice in the sense that this international instrument should work efficiently and be executed, so that the system is not overloaded with unnecessary searches for people.

(Judge, ENA_E18)

I assess [it] from two sides: it must be the interest of the victim and . . . of the accused, also construed from the perspective of a fair trial to the very end: a certain loyalty and fairness of the judicial bodies, which then carry out the verdict. . . . And this is how I try to evaluate this interest of justice, that is, a little bit through the fairness of the proceedings and a little bit through the attitude of the courts.

(Judge, ENA_E19)

However, these are model approaches, and probably rarely seen in practice (judging by a survey of EAW case rulings). Lower-level judges with less seniority treat the principle of the interest of justice in a utilitarian way. For them, the interest of justice is their own interest. As one judge put it:

There was a problem with these pending cases, where we couldn’t track down a person. And there were constantly inspections of these cases, and they went on and on. And in fact, the European warrant was a salutary measure . . .
from my point of view as a judge who is supposed to execute a sentence and keeps running into problems, because the case is pending. And because of the audits of pending cases and the inability to execute the sentence, I evaluate this interest of justice differently. And that’s why, as I say, I think I would still apply for the European Arrest Warrant, with wilful persistence.

(Judge, EAW_E12)

The justice system is a huge hierarchical, bureaucratic machine. This affects the actions of individuals who must keep their ‘paperwork in order’. With many cases to handle, it turns out that this bureaucratic duty comes before the values and principles involved in the administration of justice. This is because order in documents is a very tangible thing that can be subjected to scrutiny. It is important, for example, in the promotion proceedings of judges, when they are evaluated by senior judges; this assessment is formalised, specifically based on an analysis of the files of the cases they handle (Guarnieri, 2003). Thus, these files must be in order, and more ephemeral things like fairness or equity become less of a priority. This is why judges take such care with documents. And they use a variety of legal instruments precisely to make sure that the documents are complete and correct and that the authorities overseeing their work have no grounds for objection. They do this not only for pragmatic reasons but also out of routine, perfunctorily. In the interviews, they were very straightforward about this:

[The EAW] is an institution that we are keen to use. I think it’s mostly to keep our files in order. And so it goes – we use it sort of mechanically.

(Judge, EAW_E17)

From the perspective of a district judge [the EAW is] the only, the last resort, to execute a punishment, just to apprehend the defendant . . . then this poor court applies . . . for the European Arrest Warrant . . . it is a comfortable situation insofar as the district court filed for a warrant, did everything it could and has this record in the documents. But the regional court refused to issue it. And everyone is happy, you can say, because [a convicted person] is also safe where he is staying, his life has not crumbled to pieces. And as I said everyone is happy. It is also a little bit of a conformist approach, well maybe, but sadly that’s the way it is.

(Judge, ENA_E12)

Let’s take a closer look at these statements: It’s the court that is ‘poor’ here, and applying for the EAW is its ‘last resort’ to ‘get the files in order’. And, after all, the higher court can ultimately refuse to issue the order and ensure the safety of the convict, preventing his life ‘crumbling to pieces’. Then, ‘everyone is happy’. It is the separation of this part of the criminal procedure into different stages, as I described earlier, that makes it easy to avoid responsibility for the application of its various elements and to shift it onto another person. Because it is this other person who – sooner or later – should do something, check or consider. And the person
who is currently ‘handling’ the issue wants to get rid of it as soon as possible just to get the documents in order.

Sometimes this responsibility for the case is even shifted onto the convict, who supposedly should have done something to change their situation. This is illustrated well in the following statement: The initial deliberation of our respondent on whether to hastily commute the sentence is quickly superseded by other arguments, that, after all, it is not the judge, but the convict who should remember about many things, because it is, in the end, their punishment. Moreover, even the court’s failures – such as ‘overlooking in a flurry of cases’ to revoke some prohibitions incumbent on the convict – are also shifted to the convict. The court may have forgotten, but the convict must remember. Because it is their case. As if it was not also the case of the judge who adjudicates it and who is responsible for it. Not the state (that the judge represents) who is and should be responsible for it (Carlen, 1994).

One can sometimes conclude that someone was rash in executing this punishment. And on the other hand, one can take a closer look at it and wonder why it is the convict not contacting [the court]? . . . And as I think about it here, I regret a little bit, here I recognise that this is a minor crime. But then the thought still comes back: all right, but what have you, man, done for yourself to have this punishment revoked? Do you even have any idea that it will happen someday? Do you even want it to happen? Do you care about it? Do you even care about paying off all those debts that you owe? . . . So, on the one hand, it’s the convicts’ lack of responsibility and remembering that there’s still some kind of a ban – for example, a ban on leaving the country – and there’s this failure to make such a request. The court will sometimes, with a flood of these cases, overlook the measure altogether and not lift it. Well, on the other hand, if the punishment is not yet fully executed, there are some obligations. If no-one has applied for it to be waived, the ban is there. It must not be violated!

(Judge, ENA_E17)

In many of the interviews, the judges mentioned the obligations of convicts. In doing so, they assumed that the convicted persons were similar to them: well versed in the regulations and all their intricacies. They assumed that these people have an excellent understanding of instructions about their rights and obligations, which are written in difficult legal language. Thus, what is required of the convicted persons is exceptional agency, which they often do not possess. And the judges who meet them in the courtroom should know this and see it. They should understand that they are dealing with poorly educated people, some of whom have a problem with various kinds of substances, who have an unstable living situation, and that remembering to inform the court even of changes in their address is a requirement that is definitely beyond their capabilities. Besides, even if they informed the court of their foreign address, it is customary for Polish courts not
to send correspondence abroad anyway, because this is their practice. One of the judges confirmed this herself:

If we have two addresses of the accused person, sometimes an overseas address and a Polish address, there’s the question: Should we go out of our way and try to serve at this foreign address or not?

(Judge, ENA_E17)

And the answer to this question is usually ‘not’. This means that even fulfilling these expectations of the court and informing them of an address change would not accomplish much in practice. And these individuals may simply not have a permanent address in Poland. Specifically, people with prior criminal records often have nowhere to go after leaving prison (Klaus, 2023). But instead of seeing all this and trying to understand them, it is more convenient for judges to maintain the fiction of convicts’ full responsibility for ‘their’ proceedings – in which, at the executive stage, they do not actually participate in after all, and about which they often know nothing at all.

5. What does justice mean in transnational criminal justice cooperation?

If we think and talk about justice in terms of its transnational cooperation, two – seemingly contradictory – elements most often come into conflict. On the one hand, there is the inevitability of punishment and the equality of all people who have been convicted, equality being defined as the necessity for each person to serve the sentence they have been ordered to serve, regardless of whether they remain in or have left the country. On the other hand, there is the fulfilment of other goals of punishment besides retribution understood as inflicting direct pains of it, as the point is to reflect on whether (especially in the case of petty cases), it makes sense to prosecute someone years later and to execute a punishment against them. In this chapter, I would like to focus on this dichotomy.

The basis underlying Polish criminal procedure is the principle of legality (Daniluk & Leciak, 2016, p. 154). Thus, in principle, there is no room for discretion, that is, for saying that prosecuting certain cases or perpetrators simply does not make sense from a financial or pragmatic point of view. As one judge put it:

we have the principle of legalism in our system. The principle of prosecuting a convict for the rest of their life and one day longer.

(Judge, ENA_E19)

A police officer added:

in Poland, there is the so-called inevitability of punishment. And it doesn’t matter whether it’s for stealing a bicycle for 500 zlotys [120 euro] or for
fraud involving millions. In Poland, there is an inevitability of punishment, and the courts act according to this principle.

(Police officer, ENA_E2)

Basically, the principle of legalism applies at all stages of criminal proceedings: from the pre-trial stage to the executive stage. It shapes the Polish idea of what justice is by often equating it with the inevitability of punishment. However, it should be remembered that the purpose of introducing the EAW was specifically to deter offenders from hiding abroad and to ensure that the punishment is enforced. This aspect of counteracting impunity, which is made possible by transnational instruments, was noted by our experts (as well as convicts like Katarzyna) when they spoke about the goals of their application:

So that people who commit a criminal act do not feel that they will go unpunished in the territory of another member state or in the territory of another country, if we are talking globally. And so they don’t feel that they can go unpunished, and so they feel that they can’t hide or continue to carry out certain actions that would result in them breaking the law again.

(Border guard officer, ENA_E15)

We are all equal under the law, and any of those people being supervised or convicts who knowingly or unknowingly stay abroad should be brought back to the country and serve their sentence here.

(Probation officer, ENA_E23)

Penalties are necessary and they serve a purpose. In fact, I think that if it [getting caught] hadn’t happened, well, I and probably everyone who was on that [returned] flight would have continued to avoid [punishment], right? And we would have continued to live in our world, kind of like we avoided serving this punishment. . . . Well, because if there is a crime, there must be a punishment too. Yes! That’s my opinion.

(Katarzyna)

However, one element is missing from the statements made earlier. The interviewees assume that the only way to serve a punishment is to be sent back to Poland for this purpose. This inconsistency, however, was noted very accurately in the context of the EAW by one of the judges:

The inevitability of punishment does not at all mean that one has to deploy god knows what resources. . . . And if we don’t want to do something like that, to issue this European Arrest Warrant, well then let’s make a little more effort and apply for this punishment to be served there. Come on, this is the
way to make sure the punishment is honoured, and the convict doesn’t necessarily have to serve it in Poland.

(Judge, ENA_E27)

The judge’s view was echoed by a probation officer, who stressed that serving a sentence is often necessary, especially when it comes to more serious crimes in which someone has suffered. In such cases, waiving enforcement of the sentence would violate the victims’ sense of justice, or society’s. But at the same time, he pointed out that serving one’s sentence abroad, in another EU country, would both satisfy the sense of justice and not be overly burdensome and harsh for the convicts themselves (for more on the consequences of the forced transfer of convicts to Poland for themselves and their families, see Klaus, Wlodarczyk-Madejska & Wzorek in this volume).

Someone lives [abroad], has a family there, has a life there. Why drag them all the way to Poland? Let them serve their sentence there, right? . . . Because there are also serious crimes, which, well, can’t be forgiven, . . . where someone has suffered. There is always this other party who must feel that justice has been done. But I think it’s not always the case that we need to bring them to Poland.

(Probation officer, ENA_E24)

It is also worth remembering that transnational justice cannot always be applied, hence in practice the principle of legalism and the related principle of the inevitability of punishment will not be applied anyway. This divergence may occur especially in two circumstances. First, we may be dealing with an offence against which the principle of dual criminality in another EU country does not hold, as in the aforementioned cases of drink driving, failing to pay child support or drug possession. In these instances, for formal reasons, there will be no transfer of the offender to Poland, and therefore no serving of the sentence. The second circumstance is the application of the principle of proportionality. This occurs of course when the judge issuing the order takes a closer look at the case in question, instead of simply approving it without going deeper into it, as I wrote earlier. In transnational proceedings, there is a better chance for this to happen, because it is one of the few executive proceedings in which a case is analysed by two different judges. Sometimes even three judges are involved, because a judge from the other Member State also takes part in the proceedings, and decides whether to approve an EAW against a particular person by drawing precisely on the principle of proportionality or referring to fundamental rights (Böse, 2015; Ouwerkerk, 2018; Schallmoser, 2014).

In this type of a situation [drink driving] in the UK, this person would get a fine and probably a [driving] ban. In Poland, on the other hand, the most severe penalty in the catalogue of punishments was ordered. . . . The court imposed a suspended prison sentence of 5 years plus a fine in connection
with the suspended sentence – not a small one either. . . . [The convict] paid this fine. . . . Meanwhile, there was an order for the execution of this [suspended] sentence. I don’t know for what reasons. . . . And the British court writes that according to British law this was too harsh a repercussion. And because of this, it took the position that, as it were, these interests of justice weigh against upholding this European Arrest Warrant.

(Judge, ENA_E12)

This is how the same judge went on to deliberate on the principle of legalism vis-à-vis the principle of proportionality:

for example, there was a man who drove drunk, colloquially speaking . . . and fortunately did not kill anyone. He just simply drove under the influence of alcohol. Of course, in no way am I trying to commend this act, but [looking] from the perspective of these mechanisms, well, there should not be motions [for the EAW] in these types of cases. There really shouldn’t! In spite of the fact that the inevitability of punishment will actually amount to nothing, this idea of a trial and conviction of a person who has, let’s say, violated traffic rules will amount to nothing. But well, tough. It seems that the rule of proportionality is screaming to be heard here. Is screaming to be heard and should be taken into account.

(Judge, ENA_E12)

Other people involved in transnational justice also referred to exactly this type of minor cases in condemning the overly strict and formalistic approach of the law (and therefore the judge who applies the law) to the person. A border guard officer called the procedure a ‘machine’ and said that using it in such cases is like ‘using a hammer to crack a nut’. He further added:

If these people were offered, I don’t know, to pay back the debt, to work, 90% of them would pay it back. Bags of money would stay in our country in the pockets of taxpayers, and the whole procedure would not have to be triggered.

(Border guard officer, EAW_E15)

This pointlessness, especially from a financial point of view, of launching the whole transnational procedure, was also evident to others, both convicted persons and judges:

I think that this European warrant is being abused for sure. . . . Because I think that a man who has to serve 3 months in jail because he didn’t pay 800 zlotys [180 euro] . . . , he automatically gets the European warrant, and this is totally unreasonable . . . from the point of view of not even justice, but finances. Well, because the whole procedure is very expensive, it’s very costly, because to bring someone . . . from Bulgaria, from England, on a
special plane sent by Poland, we are talking about hundreds of thousands of zlotys. And this person actually owes the Polish state or society – let’s call it that – 800 zlotys. So, where is the sense, where is the logic?

(Marcin)

We order this punishment, and we see it is 6 months, and sometimes 5 months, and sometimes even 4 months [of imprisonment]. Such a short-term punishment because of 3,000 zlotys that someone did not pay and the court must get involved again. . . . Then we have the whole international machinery . . . because we have to fly not only the convict, but also their guards. I then put these numbers together and say: really? 3,000?!! 4,000 [zloty]?! Is it worth it?!! . . . And that’s something to think about: To what extent is this very sense of justice, the obligation to serve the sentence, more important to us than the costs we pay for it?

(Judge, ENA_E17)

Departing from the principle of legalism and moving towards a different understanding of justice should also be done when it is justified by the circumstances of the convicted person. We should consider the individual with the warrant, against whom there is no point in carrying out the punishment at a given point in their life, because not only would the punishment not bring the expected results (such as rehabilitation and the cessation of their crimes), but its effects could be counterproductive and could even cause the person to return to crime. I am referring to cases where enforcing the punishment by means of bringing the convict to Poland and incarcerating them would lead to a loss of a job or the end of a life built abroad. Thus, the goals of punishment as indicated in the Polish Criminal Code would certainly not be achieved (see Klaus, Włodarczyk-Madejska & Wzorek, in this volume). But these problems are mainly perceived by those who work with convicts. And from the point of view of the judge and the documents that they analyse, this problem is unfortunately invisible because, to reiterate, the judge does not see the particular person whose case they are deciding, and relies basically only on documents in these proceedings.

The fact is that it often happens, that they actually leave [Poland and] work, cut themselves off from their peers . . . alcohol and drugs and so on . . . this man works diligently, hard and honestly [abroad], and this is a good reason to think that he will not commit these crimes again. And at this point, taking him away from this place to serve some outstanding few months of suspended probation, well that is a bit pointless.

(Prison officer, EAW_E14)

The isolation of such people, separation from their loved ones or loss of work, can negatively affect their family and social relations. And I think that the courts should take into account exactly these sorts of aspects. But this is my personal opinion. So that families don’t suffer.

(Border guard officer, ENA_E25)
Another problem with our judicial system is that cases last for years, that someone who committed a crime on Polish territory 10 years ago, managed to leave, start a family, become a respectable person, a businessman and so on, . . . well, and then he just has to . . . serve the sentence, although . . . he is a completely different person. Well, but that doesn’t exempt him from facing the consequences for it. . . . It’s completely pointless. I mean, completely pointless!

(NGO social worker, ENA_E11)

The last interviewee pointed out another important thing, namely the criminal proceedings that often last for years. Our research has shown that in the case of those prosecuted to serve their sentences (i.e. almost 80% of all EAW prosecutions), in one out of four cases more than ten years have passed from the crime itself to the issuance of the warrant, and in one out of three cases at least five years have passed from the issuance of the sentence (see Wlodarczyk-Madejska & Wzorek in this volume). This is an inordinately long time, during which a lot can change in a person’s life. The paradox of this situation with regard to the sense of justice was something that one of our respondents commented on:

Punishment should be inevitable. But also, from what I remember, it should be immediate. So this is where I think we are a bit inconsistent.

(Prison Officer, ENA_E14)

The convicts mentioned this problem as well. It was well captured by Karol, who did not question his guilt or his sentence. Rather, he spoke generally about his expectations of the entire justice system:

Maybe I’ll start by saying that I would like the justice system to be fair, just. It sounds so strange: for the justice system to be just. I’m not allowed to judge . . ., but I can express an opinion that some sentences are really unjust. On the other hand, when it comes to the question of whether we should bring people to Poland, I’m absolutely for it. Only that it should be done in the normal way: that is, quick extradition and not detention of people. . . . A quick guilty verdict, and that these sentences are really appropriate to those, to the offences committed.

(Karol)

This is an excellent summary of the previous discussion. Everything is captured in this quote: an appeal to justice that comes quickly and is proportional to the deed.

Participation in transnational justice brings another important change from the perspective of justice. Judges begin to see the differences in how courts function in other countries and what punishments they hand out. In theory, it is fairly obvious to say that such differences exist, but it is one thing to know something in a general theoretical sense, and quite another to come across it in one’s own practice. This is especially true when a ruling issued by a Polish court is subject to some kind of evaluation by a judge in another EU country, and this court, for example,
reprimands Poland’s repressive justice system. These differences in how punitive the judiciary is, and how stringent the Polish courts are, are also seen by other people who participate in international cooperation, including people who work with convicts and the convicts themselves.

Our clients serve sentences [in Poland] which are . . . really out there. In England, they would get a suspended sentence for this offence or just get out after a short while. And here they serve 6 years, for example.

(NGO social worker, ENA_E11)

In other countries, the justice systems are more liberal. They’re not as harsh as in Poland, where they lock you up and punish you for any crime. You can do – I don’t know – substitute punishments, and not immediately [go to prison].

(Wojciech)

In the UK it’s like this: A sentence is pronounced, you serve half the sentence and you don’t write any letters to the court, requests – nothing. You just automatically get out of half your sentence right away. And here I am long past half my sentence and I still have a little more than 6 months to go and still nothing. I’m still locked up here for no purpose. I don’t have a job, or anything gainful to do. What am I doing here?

(Marek)

These quotes show that differences in the functioning of the justice system occur at the level of criminalisation for certain offences (or the lack thereof), the length of the sentence, the rate of mandatory imprisonment and the operation of the imprisonment system. These differences demonstrate once again that justice and the concept of justice are fluid, or perhaps differently understood by different people and by the justice systems in different countries. This leads to the great difficulty of trying to standardise these practices and develop some sort of common platform and ground on how to respond to criminal acts (or to even create a common list of such acts). And this difficulty occurs even among countries as ostensibly similar as the EU states.

Conclusions

The interpretation of the concepts of ‘justice’ and ‘just punishment’ within transnational proceedings is quite complicated. There are a number of reasons for this: these terms are decoded differently in national justice systems; each country has different degrees of punitiveness and a general approach to sentencing and punishment. The problem is the very definition of a common catalogue of criminal acts, not to mention the severity of punishments for particular ones (combining both what is contained in the laws and their application in practice) or the manner and form of executing punishments (e.g. resulting from the design and operation
of prisons), which has a massive impact on the severity of the punishment that is imposed and executed (Hayes, 2016, 2018).

When we think about just punishment, we basically go back to Beccaria’s guidelines, which focus on how fast the punitive response is and how appropriate it is to the crime committed. However, he makes an important addition to this theory, namely the need for statutes of limitations:

in less considerable and more obscure crimes, a time should be fixed, after which the delinquent should be no longer uncertain of his fate. For in the latter case, the length of time, in which the crime is almost forgotten, prevents the example of impunity, and allows the criminal to amend, and become a better member of society.

(Beccaria, 1872, pp. 112–113)

It seems that this premise is especially relevant for the research we have conducted and people who were prosecuted transnationally many years after they committed a criminal act, especially if it was not a serious one.

Another important element emerges from Beccaria’s discussion, in my opinion: seeing beyond a rigid understanding of the law and paying attention to its objective and social function. This is where the role of judges in interpreting the law in accordance with the purpose it is intended to fulfil is especially important. Unfortunately, the formalism that Polish judges exercise in applying the law distorts its purpose. They choose formalism because it is easier to apply in practice, as it requires only a simple, almost literal understanding and application of a provision to an event, without the need for deeper inquiry into it. This way of looking at the application of the law is fundamentally bureaucratic. Proponents of this approach insist that such easy-to-apply regulations, which limit the judge’s discretionary power, lead to standardised practice and more uniform sentences. This, however, does not seem to be true (if only considering the far-reaching discrepancies in the rulings of Polish judges [Klimczak et al., 2020]). This is because in the sentencing process it is necessary to have recourse to legal principles, and thus it is indispensable to leave some discretionary power to the judge. The role of judges’ discretion is to prevent the law from being unjust (Thomas, 2003). As a matter of fact, the judge should be, as it were, forced to refer to these principles (or at least to consider them) when making any rulings. After all, this is what gives them the opportunity to implement the principle of justice and the rule of law (Matczak, 2018).

Radbruch takes a similar view, noting the necessity of applying the law of clemency to some people in order to be able to alter the punishment that has already been imposed. The purpose is precisely to restore justice.

The purpose of clemency, then, is to ensure the triumph of justice over positive law, so that the purposiveness of law, which mandates that a person be treated as an individual, overrides the impersonal proceduralism of compensatory justice (schematische Gerechichkeit).

(Radbruch, 2012, pp. 186–187)
Radbruch’s claim can be extended beyond the formal right of clemency to an injunction for judges to use various types of instruments (including, for example, the principle of proportionality) in executive proceedings so as to see the human being and adjust the criminal response to their situation, especially if a certain amount of time has passed since the verdict. This is by no means to say that the punishment should be completely waived in every instance. However, another form of its execution should be contemplated, such as serving it abroad or giving one more chance for the convict to fulfil the obligations that were previously imposed on them. But for this, it is necessary to end bureaucratism and see the individual behind the documents (Fiss, 1983, p. 1443). This is very difficult in the Polish system of sentence enforcement, although it is possible when issuing EAWs, if only by applying the principle of proportionality. However, this principle is very rarely used by judges.

Although this study deals with the Polish practice of applying the transnational justice system, it says a lot in general about the criminal justice system in Poland and the Polish system of sentence execution. And sadly, it reflects very poorly on this system. The excessive formalism, legalism and bureaucracy of this system often lead to a negation of justice. This can be clearly seen in international proceedings, as I have tried to show in this chapter. However, the same rules apply to all executive proceedings in Poland when suspended sentences are revoked without any contact with the people convicted, and people are sent to prison many years after committing a crime – sometimes even when they are on the right track of desisting. This system makes the desistance more and more difficult, but afterwards the convicted person is blamed for its failure. And no one recognises (or takes responsibility for) the contribution of the justice system to the situation in which the convict finds themselves (Carlen, 1994; Klaus, 2023).

The findings I outlined earlier show another highly interesting point, which is a typically Polish issue. For many years, studies of forced migration and the expulsion of people from one country to another have paid attention to the role of criminal law and the justice system in this process. Most often, however, it is the justice system of the receiving state that makes considerable efforts to first criminalise unwanted migrants and then have them expelled from its territory, which is sometimes a form of punishment, but more often a convenient excuse to get rid of these people (Franko, 2020). Increasingly, these actions also affect EU citizens, especially those from Central Europe, including Poles (Brandariz, 2021; Klaus et al., 2021). But our research shows a very different context for these migratory movements. It is the Polish courts bringing back such large numbers of their citizens to the country (on a scale of more than 20,000 in the past few years) that contribute immensely to their forced mobility. It is the Polish courts which, as a result of their actions, can shut down the path for these people to return to other European countries (which do not want to ‘host’ criminals or ex-criminals). This contribution of the judiciary of the country of origin to the forced migration of its citizens is a unique phenomenon worldwide. The question of the purpose and meaning of these actions remain open in the vast majority of cases.
The meaning of ‘just punishment’

Notes

1 The research team for the project, besides the author of the text, included Justyna Włodarczyk-Madejska and Dominik Wzorek. The research presented in this chapter is part of the project ‘Experiences of Poles Deported from the UK in the Context of the Criminal Justice System Involvement’, funded by the National Science Centre, Poland, under Grant No. UMO-2018/30/M/HS5/00816.

2 Polish justice system consists of three types of courts: district courts (318), regional courts (46), appeal courts (11), ultimately overseen by the Supreme Court (GUS, 2022, p. 83).

3 A separate issue is how much a previous criminal record should influence the increase in sentence (as mentioned by the interviewee) and how this practice affects the desistance from crime (Klaus, 2023; Schinkel et al., 2019). The result of these measures is that quite serious punishment is being imposed for petty offences.

4 The official Polish name of this penalty is ‘a penalty of restrictions of liberty’, but it mirrors to a large extent a community service in other jurisdictions.

5 In general, in our research, officers from various enforcement agencies were eager to talk about their work and its challenges but avoided making general assessments of the system or judging the performance of other institutions, particularly the courts. One person put it bluntly: “I will tell you this: I am the last person who will evaluate the functioning of the judiciary. . . . Because it is not within the scope of my duties” (Police officer, EAW_E2).

References


