Bogusław Janiszewski

On "Rationality" in Criminal Law[1]

Questions regarding the most desirable criminal policy and the reform of criminal law constitute one of the fundamental aspects of the rule of law. In answering them, both professionals and non-professionals argue that criminal law and criminal policy (with respect to both law enactment and application) should be rational and effective. This comes as no surprise if it is borne in mind that rationality and effectiveness are among the principal criteria for assessing any social activity. Moreover, citing "rationality" and "effectiveness" in social practice has become one of the most powerful means of persuasion, and the charge of irrationality in making a decision, similar to the charge of non-sequitur in drawing conclusions, is one of the strongest rhetorical arguments.[2] More important than their persuasive power, however, is the fact that the two concepts are used to legitimate enacted law. Regardless of what can be said about the ambiguity of the concept of rationality and its inadequacy for legal phenomena, it must be remembered that

> […] the directive which states that when describing someone's behaviour, or the products of their activity, one must assume that this behaviour is

1 Translated from: B. Janiszewski, *Rozważania o "racjonalności" w dziedzinie prawa karnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1996, 4 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe*, Toruń 1988, p. 51.

> rational from a human point of view, is a methodological directive common to much of the humanities. What is more, it is posited that this assumption is a distinguishing factor for the humanities.[3]

The argument that law is in need of "rationalising", which has been made in Poland with particular insistence since 1989, obviously concerns not only criminal law, but also the legal system and legal policy as a whole.[4] When applied to criminal law, however, it is associated with some very specific problems. From among all the legal disciplines, it is in criminal law that any shortcomings in rationality and effectiveness become particularly pronounced. Paradoxically, as Karl-Ludwig Kunz—the Austrian criminal law expert—stresses, it is in this field that such requirements are formulated in the strongest possible terms.[5]

Undertaken from the perspective of criminal law expertise, the following considerations attempt to assess the necessity and feasibility of evaluating criminal law and criminal policy by using the criterion of rationality. The attempt is conducted with an awareness of the controversies currently associated with the understanding of "rationality", and of the issues presently animating the development of philosophical and legal thought.

2. In the explanatory memoranda to the successive versions of the draft criminal code which have been published in recent years, mention is often made of the need to develop a "rational criminal policy". The 1995 memorandum reads: "… the draft designs the penal consequences of a prohibited act and principles for sentencing, taking into account the needs of a rational criminal policy, in order … that the court will be able to make a rational choice of punishment or criminal

3 Z. Ziembiński, *Metodologiczne zagadnienia prawoznawstwa*, Warszawa 1974, p. 115. Cf. K. Szaniawski, *Racjonalność jako wartość*, "Studia Filozoficzne" 1983, no. 5–6.

4 S. Wronkowska in: A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa*, Warszawa 1993, p. 164 ff.

5 K. L. Kunz, *Einige Gedanken über Rationalität und Effizienz des Rechts*, in: *Strafgerechtigkeit, Festschrift für Arthur Kaufmann zum 70. Geburtstag*, ed. F. Haft, Heidelberg 1993, p. 192.

policy measure”.[6] Some of the statements made by the drafters suggest a rather “procedural” understanding of rationality, in the sense that the authorities which apply the law should adhere to the rules of efficient operation. Other statements, in turn, refer to the evaluative plane, such as the sentence: “the draft provides for a system of sanctions helping the pursuit of a rational criminal policy which will be in line with contemporary tendencies”.[7] It is widely-known, however, that special sentencing principles and guidelines, and even penal sanctions themselves, contain axiological declarations. Moreover, sanctions implicitly indicate what weight is attached to a protected interest. The explanatory memorandum to the draft clearly states that the draft provisions on the term and degree of punishment “… differ radically from those in the 1969 Criminal Code, which were an expression of a different penal philosophy; one inconsistent with the spirit of a democratic state ruled by law”.[8] As can be seen, regardless of how “rationality” is understood, the draft applies this concept to different components of criminal policy, in other words to legislative decisions, and to decisions taken at various stages of criminal law enforcement. On this level of generality, the requirement that law be rational can hardly be treated in any other way than as a general guideline; it would be equally difficult to reconstruct its deeper meaning here.

In Polish criminal law scholarship, Lech Gardocki subjects the question of rationality to a broad analysis when focusing on the issue criminalisation. He believes that criminalisation is effected for rational reasons (“is rational”) when it expresses the legislator’s intention to bring about certain effects, which does not mean that such criminalisation can indeed bring about these intended effects, or that such effects

6 Draft criminal code, unpublished explanatory memorandum. Warszawa 1995, pp. 21–22. “This recognition is, however, limited by Constitutional principles and axiology expressed in principles and directives concerning the term and amount of punishment and other means”.

7 Ibidem, p. 36.

8 Draft criminal code with an explanatory memorandum, 1994, p. 35.

must meet with society's approval.[9] For instance, the purposes of rational criminalisation may include: protecting a legal interest, reinforcing moral attitudes, relieving social tensions, symbolically confirming certain values, disciplining society, and stressing the idea of social justice. Thus, for example, Gardocki expresses the view that witch trials were, according to the knowledge held at that time, an example of rational criminalisation.[10]

In contrast, according to Gardocki, irrational reasons for criminalisation include various emotional ones, in the invoking of which the legislator appeals to intuitions that a certain type of behaviour is reprehensible. Today, however, the real, emotional reasons for criminalisation are sometimes concealed under the guise of rational justifications. Gardocki claims that emotional criminalisation is based on punishing "because" (a crime has been committed) and not on punishing "in order to" (achieve a goal). As an example of emotional criminalisation (which can be fully approved), he includes the criminalisation of any sexual acts between adults and children.[11]

In this last assertion, Gardocki clearly refers to the juxtaposition of the criminal law based on retribution to that geared to prevention, in other words, the juxtaposition of the demands of justice with those of the effectiveness of punishment. The choice between these approaches and tasks is a fundamental moral choice present in the legal discipline in question, in both the legislative and judicial domains.[12] Additionally, it is worth mentioning in this regard that, according to today's understanding of this issue, punishing "because a crime has been committed" does not only involve emotions related to retribution. Punishment implementing the idea of justice has been used as a regulator of certain

9 L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa 1990.

10 Ibidem, p. 53 ff. The subject of this work is, in the words of its author, a descriptive and not a normative study of criminalisation.

11 Ibidem, p. 83.

12 Cf. W. Sadurski, *Teoria sprawiedliwości. Podstawowe zagadnienia*, Warszawa 1988, p. 267.

social and individual types of behaviour; hence, it has important goals to fulfil.[13] In practice, various compromises are obviously made between these two approaches.[14]

3. Among criminal law experts, it seems that the common-sense understanding of "rationality" is quite widespread: meaning the selection of appropriate means for achieving previously set goals, taking into account up-to-date scientific knowledge and commonly recognised values, including human rights.[15] If such an understanding were adopted, other meanings of "rationality" could be ignored and the discussion could be limited to the rationality of the goals and means. The point is, however, that the meanings of "rational" depend on the object being assessed, to which they refer, while such objects vary within law.

The definition of a criminal law system, Marian Cieślak writes, is a result of two factors. First, of rational thought that seeks to adjust optimally a given system to the current criminal policy so that criminal law becomes an efficient means for achieving the social ends that have been set for it. Second, it results from the "gravity of historical tradition and the inheritance of legal forms and patterns".[16] Unfortunately, there is no agreement in legal studies as to either the goals set or the proposed means, which is evident from the fact that jurists holding quite divergent views on the same issue claim that their individual proposals are the only rational ones. These complications arise because of the natural pluralism, so to speak, of goals in criminal law, which are observable in both general and individual perspectives. There are, however, also other reasons for these complications. A careful examination of the textbook definitions of punishment leads to the conclusion that the fundamental

13 Cf. U. Klug, *Skeptische Rechtsphilosophie und humanes Strafrecht, vol. II, Materiälle und formälle Strafrechtsproblemmme*, Berlin 1981; L. Lerneil, *Podstawy nauki polityki kryminalnej*, Warszawa 1967.

14 W. Sadurski, op.cit., p. 230 ff.

15 H.-D. Schwind, *"Rationale" Kriminalpolitik als Zukunftsaufgabe*, in: *Festschrift für Günter Blau zum 70. Geburtstag*, H.-D. ed. Schwind, Berlin, New York 1985; H. Zipf, *Kriminalpolitik*, Heidelberg 1980, p. 53.

16 M. Cieślak, *Polskie prawo karne, zarys systemowego ujęcia*, Warszawa 1994, p. 43.

question of whether a criminal law response constitutes a condemnation of an act or of the perpetrator is currently not clearly formulated, and this leads to a plethora of consequences.

In criminal law, as in other branches of law, there are normative, instrumental, axiological and social elements.[17] What makes this branch of law special, however, is its satisfaction of goals pertaining to justice, protection, guarantees and cooperation (consensual agreement in solving a conflict arising as a result of a crime). Taking into consideration all four different goals at the same time may lead to conflicts and in practice calls for making choices that may be assessed according to the criterion of rationality. Criminal policy, as Günther Kaiser writes, fits between criminological, criminal-law and political rationality.[18]

4. To answer now the question about the admissibility and adequacy of gauging law with the measure of rationality, it appears necessary to have a closer look at how this concept is understood in relation to law. There are two fundamental questions. The first concerns the object—what can be sensibly referred to as "rational" within the scope of law; while the second pertains to the subjectivisation of this concept.

As regards the latter issue, it is indisputable that the truth of a sentence or the rightness of a moral judgment does not depend on the person uttering it. However, in the case of the term "rational", the situation is quite different. The convictions that one has and the behaviour based on them are rational when there are "good reasons" for considering them true, morally right, etc. Yet, the truth and moral rightness, etc. of some convictions are not necessary conditions, and perhaps not sufficient conditions either, for considering them rational. A conviction may be rational even if it is false. This could be the case when an individual in a given situation has sufficient grounds for believing something is true and right. And vice versa, the rationality of a conviction may be

17 J. Wróblewski, *Teoria racjonalnego tworzenia prawa*, Ossolineum, 1985, p. 179.

18 G. Kaiser, *Perspektiven einer rationalen Kriminalpolitik*, "Kriminalistik" 1992, no. 12, p. 737.

questioned when, despite it being true, the individual has no grounds for accepting it.[19] It is obvious that this understanding of rationality comes down solely to the assessment of the decision-making process of the person making the decision and concentrates on its formal side.

It is also pointed out that there is a close connection between “rationality” and responsibility. Bernhard Peters observes that convictions, assertions or types of behaviour that can be described as rational are ones that a person can be responsible for, that can be somehow justified, or that lend themselves to being explained.[20] With regard to the object being assessed, Peters says that we tend to make statements about the rationality of behaviour or convictions when we adopt the role of observers, or when we look at our own activity with the benefit of hindsight. According to Peters, when we assume the role of “participants” we do not argue about “rationality”, but rather about the truth or rightness of convictions, assertions, etc.[21] However, it is difficult to agree with this assertion, because it is decision-makers that often try to make others consider their decisions rational.

Let us return to the first question—about the object, or what can be sensibly referred to as rational within law and a legal policy. Taking a broader view, it turns out that various scholarly disciplines have their specific research objectives, methods, criteria of judging effects and standards of criticism. Therefore, in a descriptive sense, there is talk of various “rationalities” or even various “logics of conduct”, including juridical and political rationality.[22] What appears particularly important but also highly problematic is relating rationality to moral norms and judgments.

19 B. Peters, *Rationalität, Recht und Geselschaft*, Frankfurt am Main 1991, p. 176; cf. Z. Ziembiński, *Metodologiczne zagadnienia.*…, op.cit., p. 116; L. Morawski, op.cit., p. 59.

20 B. Peters, op.cit., p. 172.

21 Ibidem, pp. 178, 217 ff.

22 Ibidem, p. 183.

In these considerations on the concept of rationality, our interest is primarily focused on decisions, in particular decisions relating to enacting and applying law. The rationality of such decisions is confirmed by two kinds of arguments: those expressing the decision-maker's knowledge and those expressing the preferences (values) they share.[23] The study of the questions of rational law-making has produced the concepts of internally and externally rational decisions.[24] Let us recall that internal rationality means a decision is supported by specific arguments and by the adopted rules of justified reasoning. The rationality of a decision thus understood is therefore its formal property, as it does not concern the content of arguments or the rules of reasoning. In turn, a decision is externally rational if, in addition, its premises are judged to be sound. Such a judgment involves a comparison of the decision-maker's knowledge and preferences with those held by the person judging the decision. When knowledge and preferences are found to be consistent with each other, also with respect to the ordering of values, a legislative decision is judged to be externally rational; if not, it is judged externally irrational. If the judging person cannot find any justification at all for a given decision and the legislator has not formulated one either, then, in the opinion of Jerzy Wróblewski, the decision is simply irrational.[25] This division of the rationality of legislative decisions seems to be an elaboration on the distinction between formal and substantive rationality attributed to Max Weber.[26] Looking at this from the perspective of criminal law, one can express the conviction that stopping at the internal rationality of the decision would be far from satisfactory.

5. Rationality in law has been much discussed in German scholarship, primarily due to the philosophical traditions and the need to

23 J. Wróblewski, *Rozumienie prawa i jego wykładnia*, Ossolineum 1990, p. 109.

24 Ibidem; J. Wróblewski, *Teoria*…, op.cit., p. 161 ff.

25 J. Wróblewski, op.cit., p. 164.

26 Cf. K. Eder, *Zur Rationalisierungsproblematik des modernen Rechts*, in: *Max Weber und die Rationalisierung sozialen* Handelns, eds. W. M. Sprondel, C. Seyfarth, Stuttgart 1881, pp. 157 ff; B. Peters, op.cit., pp. 114–118.

overcome the irrationality of law during the Nazi period. The German author Bernhard Peters, citing Jürgen Habermas, distinguishes three types of rationality: (1) cognitive-instrumental, (2) moral-practical, and (3) evaluative-expressive.[27]

The most important standard of the first type is truth. The second is related to adopting the point of view of rightness and the appropriate criterion of justification. The third has an entire gamut of standards, such as beauty, dignity, pleasure, etc. Furthermore, emphasis is rightly put on the difference in meaning between the “rationality” of human activities (for instance, decisions) and such concepts as the truth (of statements, for example), the moral rightness (of some norm or assessment) or appropriateness or validity (of some extra-moral values). All this supports the conclusion that “rationality” is by no means a hypernym for all these terms.[28] However, the key point is that the kind of division that Habermas and Peters adopt, which clearly refers to the old distinction between the rationality of aims and values (*Zweck*- and *Wertrationalität*), appears to be adequate to the study of legal phenomena, especially because the first two *types* of rationality are distinguished.

Doubts arise, however, with regard to Peter’s stance on the relationship between the three distinguished types (dimensions) of rationality. Specifically, he does not allow for the possibility of a conflict between empirical-cognitive rationality and normative (moral, evaluative) rationality. In his opinion, the attribution of empirical-cognitive rationality only entails that the decision was based on the best knowledge available. However, knowledge alone is not supposed to provide any recommendations as to the course of action to be taken; all it does is inform about possible courses of action and their expected consequences. Whereas the goals that Peters describes as moral may in fact be conflicting, for empirical reasons. All the three types (aspects) of rationality mentioned earlier are, according to Peters, independent conditions of the

27 B. Peters, op.cit., p. 186 ff.
28 Ibidem, p. 171.

"global rationality" of some type of behaviour, decision or norm. A lack of rationality in one of these dimensions cannot be made up for by its presence in another dimension. Hence if only one of them is judged to be "below the threshold of rationality", the entire behaviour or decision cannot be justified, and is thus entirely irrational.[29]

It appears that both of Peter's positions as set out above are incorrect. First, a possible conflict between cognitive-empirical rationality and normative rationality may arise because when we speak of rationality we have in mind the relationship between a decision made by taking advantage of knowledge and a decision made following some norms, and not the abstract relationship of objective knowledge alone to these norms. Second, it is for this reason that various kinds of rationality are distinguished: to be able to relativize the concept of rationality itself. Thus, the proposal to introduce yet another concept of global rationality may, perhaps, increase the regime of rationality, but at the same time increases the ambiguity of this concept. In such a general sense, a decision could possibly be judged optimal.

In analyses of the concept of rationality, reference is often made to the distinction between formal and substantive rationality mentioned earlier. Peters situates formal rationality "across" the three dimensions of rationality he distinguishes,[30] because he believes that formal criteria

29 Ibidem, pp. 193–197. The global rationality of some behaviour would be the greater, the higher are the values of individual dimensions of rationality. It follows that one should choose such manners of behaviour that bring about the optimum of rationality in all the three dimensions. Ibidem, p. 193. Cf. R. Dreier, *Irrationalismus in der Rechtswissenschaft*, "Rechtstheorie Beiheft. Juristische Logik, Rationalität und Irrationalität im Recht" 1985, vol. 8.

30 B. Peters, op.cit., p. 197 ff. Both the concepts of formal and substantive rationality, and the functions they have been given in jurisprudence have a rich history. They also played a practical role in countries whose legal systems witnessed a sharp turn from totalitarianism to democracy. The result of the evolution of views in post-war Germany is summed up by A. Kaufmann as follows: "Beklagenswerterweise hat aber auch hier wieder einmal unser Nationalcharakter bewirkt, dass die Dinge bis ins Extrem gesteigert wurden, nämlich bis zu einem völig inhaltsleeren Formalismus und Funktionalismus, dessen 'Reinheit' so steril geworden ist, dass sie nach nichts mehr schmeckt (Maihofer nennt diese Reinheit eine 'formalistische Amputation' des Rechts)" A. Kaufmann, Recht und Rationalität, Gedanken beim Wiederlesen der Schriften von Werner Maihofer". A. Kaufmann, E.-J. Mestmäcker,

play a specific role in justifying all three kinds of rationality: empirical, moral and evaluative.

In Polish legal theory, Lech Morawski views the concept of "rationality" from another perspective, by relating it to the main objectives of efforts to transform reality by means of law.[31] In his opinion, decisions involved in enacting or applying the law may concern either increasing the acceptability of the social order constituted by them or broadening communication—free from repression and founded on ethical norms—in social relations. To varying degrees, all these goals are actualised in the context of the fundamental functions of criminal law. Referring to these three ideas, Morawski distinguishes different corresponding models of reasoning: (1) epistemic-technological, (2) rhetorical-topical, and (3) communicative. The first can be reduced to the question of the goals set and the means approved. In the second, every argument is related to a specific audience, and the type of audience decides which arguments are to be considered relevant and which are not. The communication model, in turn, may be linked to criminal law primarily when its role is taken into account in the cooperation aiming to resolve a conflict between the perpetrator and the victim of a crime.

Morawski writes:

> Each of these models takes a different view of what rational law is and how social interactions ought to be rationalised by means of law. Consequently, each adopts a different conception of enacting and applying law, has a different understanding of what law interpretation is, and the problem of establishing the factual state of affairs […] each of these models draws on a different ideology of enacting and applying law.[32]

H.F. Zacker eds, *Rechtsstaat und Menschenwürde, Festschrift für Werner Maihofer zum 70. Geburtstag*, Frankfurt am Main 1988, p. 27.

31 L. Morawski, op.cit.

32 Ibidem, p. 8.

A major claim made by Morawski is that a decision that is rational from the point of view of one model of reasoning does not have to be rational from the point of view of another model. As Morawski emphasizes, it is doubtful whether the idea of an effective order could replace the idea of a socially accepted order. These two kinds of rationality are simply different, and each may prove to be irrational from the point of view of the other, but this is no reason to eliminate one in favour of the other.[33]

6. According to Kunz, as a component of social practice, law is entangled in such diverse relationships that it cannot be defined strictly in accordance with the criterion of rationality.[34] For law is a relatively autonomous social medium, based on counterfactual normative assumptions ("dogmas") and subordinated to formalised procedural rules. Hence, an autonomy is manifested that prevents any direct shaping of social reality in accordance with the demands of effectiveness. In criminal law, in Kunz's opinion, we are faced with a flight from scientific-empirical analysis. This legal discipline uses many concepts that make empirical knowledge unnecessary and impossible to avail oneself of in the decision-making process. They include such evaluative terms as "social harm", "legal interest", "sufficient suspicion of commission of a prohibited act", etc.[35] The point is that, as Arthur Kaufmann stresses, the concepts of norm, duty and law are not free from references to values and, therefore, do not lend themselves to a strictly empirical approach.[36]

33 Ibidem, p. 62.

34 K.-L. Kunz, op.cit., p. 188.

35 Ibidem, pp. 189, 195. Another example of "resistance to experience" discussed by K.-L. Kunz is general positive crime prevention. In the conclusion of his critical remarks on the insusceptibility of criminal law to empirical verification, he asserts that administration of justice may be treated more as an institution for administering crime than combating it. Ibidem, pp. 192, 194.

36 A. Kaufmann, E.-J. Mestmäcker, H.F. Zacker eds, *Rechtsstaat und Menschenwürde, Festschrift für Werner Maihofer zum 70. Geburtstag*, Frankfurt am Main 1988, p. 27.

In the current criminal law scholarship, it is not uncommon for authors to draw attention the limitations that the law supposedly reveals with regard to the requirement of rationality, which is usually understood in an empirical sense. Criticism is sometimes levelled at criminal law itself for its failure to adapt to the modern canons of science. The discussions of such crucial problems as the concepts of acts and guilt, or the goals behind the severity of punishment, reveal the entire history of such disputes. On the other hand, the criterion of rationality is itself held to be inadequate for evaluating the law.[37] To bring some order to these discussions, it could prove helpful to refer to the paradigms of legal dogmatics currently in place and use the criterion of rationality in a properly relativised manner, so that the object under evaluation and further evaluative criteria adequate to it would remain clear. Furthermore, it is equally important to make certain ontological assumptions with respect to the values themselves.

Let us recall some fundamental issues: in the theory of law, attention is given to two models which serve as points of departure for the discussion on the nature of jurisprudence. One is designated as empirical, while the other as humanistic.[38] The subject-matter of the former is the description of reality. In turn, the subject-matter of jurisprudence as a humanistic discipline is the understanding of facts, consisting in ascribing a sense, meaning or value to the material substrate of the facts. This is done through statements that are not necessarily true or false sentences. If the statements of humanistic disciplines are not sentences, they are subject to justification in terms of the adopted epistemic and axiological premises.[39] In the study of law, both approaches—empirical and humanistic—maintain their relevance, but they are often wrongly

37 K.-L. Kunz, op.cit.; C. v Mettenheim, *Recht und Rationalität*, Tübingen 1984, p. 62 ff.; H. Schüler-Springorum, *Kriminalpolitik für Menschen*, Frankfurt /M. 1991, pp. 174 ff.

38 Cf. K. Opałek, J. Wróblewski, *Prawo, metodologia, filozofia teoria prawa*, Warszawa 1991, pp. 36 ff.

39 Ibidem, p. 37.

considered equivalent in practice. Furthermore, the methods they use are not properly distinguished.

7. Criminal policy, like many other social activities, requires effectiveness to be placed on an equal footing with rationality. Without going into the various meanings of the former, it is observed that "effectiveness is a condition of rationality". "Rational law-making is by assumption enacting effective law," Wróblewski writes, but adds: "Effectiveness is necessary, but does not suffice, since a rational lawmaker must also implement other values".[40] Moreover, in relation to the application of law, one can also speak of the rationality of goals, means and the results achieved. In order to avoid misunderstandings, it is necessary to specify exactly what effectiveness is at stake and in accordance with what dimension of rationality we formulate our assessments.

The effectiveness of law, meaning its ability to achieve set goals, is considered one of the principal reasons for criminalisation. Of course, before an act is criminalised, it is only possible to make predictions, while an empirical study of effectiveness can be carried out *ex post*.[41] The effectiveness of criminal law can be assessed in terms of its principal functions, which were mentioned earlier. Furthermore, the effects of criminalisation are sometimes discussed under the following three categories: protective, symbolic and educational.[42] They are variously ranked in importance, depending on the matter to which they refer, and are problematic when it comes to assessments according to the criterion of rationality. Gardocki draws attention to this issue.[43] For instance, with respect to the protective effect, he stresses that the notion of "legal interest" is prone to manipula-

40 J. Wróblewski, *Teoria.*…, op.cit., p. 250; "Legal rules […] are also assessed not in terms of goals they promote, but various fundamental axiological values that a given system of law implements (e.g. justice…). Thus, effectiveness must not be made a fetish—effectiveness is neither the only one, nor, as one could presume, the highest assessment criterion of the law in force". Ibidem, p. 241. Cf. Z. Ziembiński, *Metodologiczne.*…, op.cit., pp. 244 ff.

41 L. Gardocki, op.cit., pp. 149 ff; H. Zipf, op.cit., pp. 54 ff.

42 M. Delmas-Marty, *Analiza systemowa polityki kryminalnej*, "Państwo i Prawo" 1985, vol. 11.

43 Ibidem, p. 162 ff.

tion. It is facilitated by the difficulties with empirical verification caused by its very general or even ostensible formulation. In turn, "… owing to the ingenuity of interpreters, almost any provision may have an object of protection assigned to it, provided it is formulated sufficiently generally and obscurely".[44] As regards the symbolic effect, this involves passing an emphatically negative judgement on an act through its criminalisation, in spite of the fact that it may prove ineffective as far as prosecution and punishment are concerned. In this case, the general-educational goal of law may be achieved, despite the commonly held opinion that the criminalisation of acts that cannot be prosecuted depreciates the value of law and results in demoralization. The stance adopted with regard to this effect of criminalisation seems to depend on the weight of the interest to be protected and the preferences of the legislator.

8. Certainly, the most interesting question—and at the same time the most difficult one—concerns the rationality of the values on which law rests, and which are also to be protected by law. Legal theorists emphasise that a major controversy of axiological studies is connected with the philosophical determination of an adopted methodology. The familiar issue here is the recognition or refusal to recognise the existence of objective values, and thus their cognisability. For this reason, Kazimierz Opałek and Wróblewski argue that we have to contend with various models of scientificality, and thus of rationality.[45] As Marek Piechowiak writes, to understand the foundations of law (not only its formal requirements, but also the basis of the content of just law), before we ask what is valuable we need to tackle the problem of what values are, and how they exist. The way in which the problems, foundations, content and goals of law are viewed depends on the answers to questions such as these.[46]

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44 Ibidem, p. 51.

45 K. Opałek, J. Wróblewski, op.cit., p. 44. Cf. S. Wronkowska, op.cit. V. also a statement by Ziembiński on the consequences of the position of emotivism: *O pojmowaniu pozytywizmu oraz prawa natury*, Poznań 1993, pp. 21 ff.

46 M. Piechowiak, *O wartościach i sprawiedliwości prawa* paper delivered at the conference *Justice, Ethics, Law—present-day dilemmas*, Katowice 1992.

Yet another issue is the possibility of considering the value of law as a social institution, either generically or specifically. On the one hand, as Ziembiński emphasises, the arguments that are considered the most convincing are tied up with seeking approval for the social system law is supposed to serve. On the other hand, these are discussions of the axiological justification of the particular institutions or norms of the legal system by appealing to the moral judgements of acts or the social results of acts indicated in these norms.[47]

This article is limited to the question of the results obtained by the application of the rationality criterion to the moral choices underpinning legal norms and others that are made in the course of applying the law. Here two directions of this reflection can be outlined, reflecting the formal and substantive understandings of rationality.

In the context of rational law-making, rationality is a formal value in the strict sense.[48] This entails, within the scope under discussion, the demand that the system of values on which the legislator relies when making decisions should be properly ordered. Moreover, the values must first be formulated precisely enough and working out the principles of their preferential character. In sum, the model of rational law-making developed by legal theory is said "…to be useful in every review of a specific ideology or a specific normative law-making model".[49] Rationality, as a formal value of law, is independent of the substantial goals it implements.

The formal values of law are instrumental in character: they are valuable on account of their usefulness in achieving specific substantive values. However, the rationality of law-making does not make law or its particular norms substantively rational. The question arises of whether, when addressing the axiological problems of the foundations of law, we can stop at appealing to the axiology of a democratic state ruled

47 Z. Ziembiński, *O stanowieniu i obowiązywaniu prawa zagadnienia podstawowe*, Warszawa 1995, p. 94.

48 J. Wróblewski, *Teoria.…*, p. 165.

49 Ibidem. Cf. S. Wronkowska, op.cit., p. 173. The author says that the values on which the lawmaker rests its decisions can be described as either substantial or formal.

by law, along with the indeterminate concept of rationality, as did the drafters of the criminal code in the successive explanatory memoranda in the early 1990s. It is worth noting that the formal understanding of rationality makes it possible to recognise the legal norms which realise the values adopted under the plebiscite procedure as rational. In this context, it will be worthwhile citing Ernst-Wolfgang Böckenförde”s opinion as a criticism of the conception of the axiological grounding of law. He argues that they invoke a changeable, temporary factor, an ethical consensus that in a pluralistic society undergoes frequent change and gives no guarantee of rightness. This conception abandons any verification of the consensus against external criteria and adopts it rather as an unquestioned benchmark. In this way, the axiological grounding of law surreptitiously succumbs to a new kind of positivism—a positivism of popular evaluations.[50] What is more, they can be very easily legitimated by referring to the criterion of rationality, which is after all understood subjectively. Hence, we are dealing with, in Böckenförde”s words, a sociological or socio-cultural justification of law, rather than a philosophical one. “Invoking values and the concept of value is thus not a sufficient response to the indefeasible question, arising out of the very essence of law, about its meta-positivist reason and foundation”.[51]

Considering the question of the axiological foundations of criminal law, gives rise to the thought not only of the rational creation of criminal law, but also of the creation of rational law, which in fact must be assessed according to different criteria, and which will not be touched upon here. The issue is a statutory law that is an “instrument of justice” and not its source, while the attained social (political) consensus is not the ultimate foundation of law. “There are rational grounds for question-

50 E.-W. Böckenförde, *Prawo i wartości, o krytyce idei aksjologicznego ugruntowania prawa*, “Znak” 1992, no. 11, p. 67.

51 Ibidem. In the conceptions of axiological grounding of law, in E-W. Böckenförde’s opinion, moral values lack any rational grounding also in this sense that their foundation is non-discursive: a discussion is an exchange of views on what is considered right and not on what the grounds for considering something right are.

ing the will of a majority. Allowing for such a possibility is necessary if one is serious about human rights".[52] From the perspective of conceiving values in the philosophy of action "… human rights […] are not a proclamation of one of many (broadly equivalent) systems of values, but they have their meta-positive justification, reaching all the way to who a human being is".[53] Ziembiński writes:

> Without adopting a specific ontology of the human being, without eschatological assumptions as to what the sense, purpose, tasks of h man life are, what its destiny is and other assumptions of this kind, many disputes about moral values may be actually irresolvable or, in the undisclosed absence of common assumptions, may lead to only apparent settlements.[54]

Let us add here that such settlements, in accordance with a commonly held understanding of rationality, may actually be considered rational.

9. Analysis of the concept of rationality makes one realise the extent to which this concept is misused in the colloquial understanding of enacted law and its application. The concept is in danger of taking on the role of a "code" or "cipher" which will ultimately shift its meaning to the opposite of rationality. We will be then dealing with a "modernist *façon de parler*" or a "modern-day rationality delusion".[55]

In the domain of criminal law, the understanding of "rationality", as many other issues, has been developed "on its own terms". Kaiser associates it with a planned, non-self-contradictory, "moderate" shaping of criminal-law social control. It takes into account the recognised principles of criminal-policy and, in addition, meets the conditions of trans-

52 M. Piechowiak, op. cit.

53 Ibidem.

54 Z. Ziembiński, *O stanowieniu.…*, p. 95. V. a critical statement by Ziembiński on the discussions held by criminal law theorists and views expressed in judicial decisions on this question: *Etyczne problemy prawoznawstwa*, Wrocław 1972, pp. 188–189.

55 H. Schiiler-Springorum, op. cit., p. 177. "Among even serious scholars, calling some behaviour rational in a given situation, is sometimes considered an expression that does not require any relativisation". Z. Ziembiński, *Metodologiczne.…*, op.cit., p. 118.

parency and verifiability, satisfies the duty to provide a justification, and can be corrected.[56] Heinz Zipf, in turn, counts "rationality" among the three principal requirements underpinning any criminal policy, alongside "practicality" and "effectiveness". By "rationality", he means a "judicious" implementation of a basic concept in the fight against crime, together with the "component elements" of such a concept. Zipf also recalls a well-known but ignored truth, namely that criminal-law dogmatics does not lend itself to being defined as an aim in itself, but rather all its pronouncements ought to be judged in the light of the overall conception of criminal policy.[57] However, as Kaiser emphasises, a "holistic" theory or conception of a rational criminal policy has yet to be developed, and the prospects for creating such a conception are viewed as bleak.[58] Stratenwerth comes across as downright pessimistic, since he writes that whenever a scientifically credible answer is sought in a matter of importance for criminal law, it transpires that most of the time such an answer still does not exist, and may never be provided with sufficient accuracy.[59] However, in a way, this is arguably a natural state of affairs. For instance, nobody can estimate the extent of actual damage caused by a single offence. In this situation, Stratenwerth maintains, all we can do is to "retreat in shame towards common sense, which, as a matter of fact, is hard to come by".[60] Indicating the limitations in the application of scientific arguments, Stratenwerth comes up with a highly pertinent reflection: We can certainly draw scientific conclusions as to what norms must be protected by criminal law in order to preserve a given social order, but science will be of no help to us in the attempt to answer the fundamental question of whether this order deserves to be supported in the first place.[61]

56 G. Kaiser, op.cit., p. 742.
57 H. Zipf, op.cit., pp. 53–54.
58 G. Kaiser, op.cit., p. 742.
59 G. Stratenwerth, *Leitprinzipien der Strafrechtsreform*, "Arbeitsgemeinschaft für Forschung des Landes Nordrein-Westfalen" 1970, vol. 162, p. 21. Cit. per L. Gardocki, op.cit., p. 101.
60 Ibidem.
61 Ibidem.

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