GLOSSAE
European Journal of Legal History

ISSN 2255-2707

Citation

Paulina Kamberov, "The issue of the insane offender at the beginning of 20th century in Poland", *GLOSSAE. European Journal of Legal History* 20 (2023), pp. 235-265 (available at http://www.glossae.eu)

The issue of the insane offender at the beginning of 20th century in Poland*

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Received: 05.03.2023
Accepted: 18.05.2023

Abstract
The purpose of this article is to investigate the institution of insanity and the provisions on insane offenders in the Polish Penal Code of 1932. Developing those norms was part of a major and lengthy legislative process of state penal reform in the first part of the 20th century. Poland was a rising state at that time, having just regained independence after more than 100 years of being incorporated into its neighbouring countries. Thus, the paper will examine the insane offender issue in a broader context in relation to general penal reform, the state of the society and the level of legal culture of the country under transition. Similarly to all of Europe, Poland was affected by a clash of the classical and positivist schools of law. The aim of the article is to examine the ideological and axiological base for insane offender regulations and to investigate whether the positivist notions making waves in Europe at the time influenced the Polish Penal Code, and if so, to what extent. Whether they prevailed and insanity was treated from a modern perspective or they remained rather conservative. This article will also touch upon the topic of foreign impact on the Polish Penal Code and certain country-specific provisions. It is worth mentioning that regulations from the Code of 1932 lay at the base of current legal solutions in the area of criminal liability of mentally impaired offenders.

Keywords
Insane offender, diminished sanity, criminal responsibility, criminal positivism, penalties and precautionary measures

1. Introduction

At the turn of the 20th century, the world's legal systems underwent a major transformation. Poland was no exception. On the wave of that evolution, amongst many, came a reflection on the usefulness of an old concept of guilt and punishment in criminal law. With crime rates soaring, the role of those two concepts came under question. The

* This work has been undertaken in the context of the International Seminar organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and financed by the Groupe Européen de Recherches sur les Normativités (GERN), the University of Saint-Louis (Bruxelles), and the University of Valencia (in the context of the research project entitled "Tradición e influencias extranjeras en la Codificación penal española: contribución de la jurisprudencia en la evolución de la Parte Especial (1870-1995)" (PID2019-105871GB-I00), financed by the Spanish 'Ministerio de Ciencia e Innovación') and as a part of the project "Fundamentals of Polish criminal law in the Second and Third Republic of Poland" financed by the National Science Center under contract No. 2020/39 / O / HS5 / 01079 supervised by Michal Galedek (University of Gdansk).

classical views on those topics were found outdated and were slowly disintegrating. They were no longer suitable to face the challenges of the times. The year 1918 was the starting point for a long process of changes in Polish law. It was when the country regained independence after more than 100 years of being incorporated into its neighbouring states. Due to the geo-political turmoil that Poland was part of, there was no one unified codification of criminal law that would be binding for the whole territory. All national pieces of codification originated from the pre-World War I period and thus were archaic and of no use for a modern society and its needs. Besides, the newly formed country was a aggregation of three different lands, not only in an administrative sense but also in terms of cultural, educational, economic and legal systems. Hence, there was a need, if not urgency, for unification. Contemporary jurists and legal scholars faced the great challenge of creating nationwide criminal legislation which would be acceptable to everyone, applicable to the needs of society and respond to present-time troubles. On the wave of that matters, the beginning of the 20th century was a time when a new category of an offender was named – the incorrigible offender. It was a result of soaring crime rates. On top of that, prison statistics showed a phenomenon of returning to crime. These were proofs that, so far, the criminal law had not met expectations. It neither fulfilled the social justice role nor eliminated dangerous individuals from society. There was a need to find a different approach to crime. Although four different criminal law codifications were binding on Polish territory (the Russian so-called Tagatsev Code of 1903, the German Reichsstrafgesetzbuch 1871, Austrian Franciscana of 1852 and the Hungarian Penal Code of 1879), they had a common trait. All of them were based on the ideas of a classical school of law.

While the issue of the incorrigible offender is well-researched in Polish legal studies,[1] the subject of the insane offender is not that well described. Although insanity is one of the elements that could possibly lead to a return to a crime, the issue of the insane offender was left outside of the scope. This work aims to examine, using historical and comparative methods, the development of the insane offender issue at the beginning of the 20th century in Poland. It explores the ideas standing behind the introduced provisions, the paths that the Polish criminal law followed, and lastly, those that were abandoned in the legislative process. It also touches upon foreign influences and traces the nation-specific notions of criminal law with an analysis of some case studies.

The study starts with depicting the main ideas behind already binding legislations dating back to the 19th century, which were all anchored in classical ideas on law (2), followed by a reception of ground-breaking ideas on criminal law making waves across Europe and reflecting on a Polish scholarly debate with a main focus on insane offender issues (3). The next part examines the process of choosing the method of assessment of the mental state of the offender, which is also a picture of the inseparable merge of psychiatry into criminal proceedings and the whole legal system, which established the division of power of deciding on an offender's fate, between lawyers and medics. The abovementioned shaped the legal doctrine and thus determined the efficiency of the legal system (4). The fifth part describes the final legal provisions regarding the matter of the insane offender that were introduced in the Polish Penal Code of 1932 as a result of the national and transnational debate on criminal law. The main aim of this section is to analyse the basic concept of guilt introduced by the Code of 1932, along with insanity, sanity and the variety of states of mind of the offender, the criminal liability and the

[1] Zalewski W., *Przestępca „niepoprawny" – jako problem polityki kryminalnej*, Gdańsk 2010.

punishment system with precautionary measures applied to insane offender cases (5). That is followed by a short examination of the contribution of foreign factors in the legislative process (6). The next part is devoted to research on the national trends of codification that spun around the topic of the insane offender topic and is accompanied by some case studies (7). The penultimate part (8) discusses the adjudication of penalties and precautionary measures regarding insane offenders and offenders with diminished sanity. Finally, the conclusion summarises the influence of a clash of schools of law on insane offender provisions implemented in the Polish Penal Code of 1932 and the path chosen by legal specialists in the process of social engineering and relentless attempts to combat the phenomenon called crime (9).

2. Classical concepts

As one of the most influential lawyers of the 20th century Juliusz Makarewicz said, the "laws don't pop out of codifier's heads, but are rather the fruit of the culture of the whole nation."[2] Therefore, a prerequisite to examining the law is to be aware of its social and axiological background at the turn of the 20th century. As mentioned before, in the year 1918 Poland regained its independence following a century-long period of partitions. Each part of Polish territory was governed by different laws originating from four different legal cultures.[3] Their common ground, however, was the classical school of law. The classical view of crime and punishment was based on what was believed at that time to be the driving force of human behaviour - free will. Besides that, the main goal of punishment was retribution. These were the biggest weaknesses of the classical school of law, which left little, if any, room for the analysis of the mental state of the offender's mental state, its gradation, complexity and influence on committing a crime and on the criminal proceedings.

To call an act of the individual a crime, according to another leading legal scholar Edmund Krzymuski, there must have been a moral relationship, a parallel drawn between an act and the actor that would allow to claim a moral responsibility of an actor for an action. This was a classical idea of guilt that prevailed in legal scholarship and doctrine throughout the 19th century. This lawyer was known for his strong conservative views originating from the classical school of law, referring in his writings to the principles of Immanuel Kant's philosophy. Moreover, he was educated in accordance with the Austrian Penal Code.[4] Krzymuski defined a crime as an external act of a human being, contrary to the law and prohibited by it under threat of punishment, as long as the relationship between a moral state and the action of the offender could be traced. According to this jurist, the crime was an expression of individual free will, independent of all external conditions.[5] The emphasis he put on punishment as a form of retaliation applied by the state for the crime committed was characteristic of his views. According

[2] Grześkowiak, A., "Słowo wstępne", *Prawo karne w poglądach profesora Juliusza Makarewicza*, (A. Grześkowiak, ed.), Lublin 2005, p. 12.

[3] Gałędek, M., "The beginning of the debate on the codification of Polish law after the World War I: The issue of the Codification Commission autonomy in the light of political declarations*", Studia Iuridica LXXX.*, p. 119.

[4] Kuźmicz, K., *I. Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918-1950*, Białystok 2009, p. 109.

[5] Kuźmicz, K., *I. Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918-1950*, pp. 110-111.

to Krzymuski, the improvement of the offender cannot be the essence of the punishment. It can only be the result of it.[6] Therefore, the classical world was monotheistic, differentiating only two states, either insanity or sanity. There was nothing halfway.[7] As a result, the definition of sanity was based on what was considered the cognitive ability of the human mind (awareness, recognition of social obligations and actions related to them) and autonomy of the will (as an ability to decide which action to take). Only the presence of both traits could lead to the conclusion that an individual is sane.[8]

The classical school of law rejected the idea of diminished sanity and did not put too much attention on the variety of states of mind of the offender and their root causes. The punishment was to be proportionate to the crime committed.[9] The Russian and German penal codes incorporated the classical approach–the same situation, although with one difference, was with the Austrian Penal Code. If the mental state of an offender at the moment of committing a crime could not be, with any doubt, claimed as "normal", the offender was classified as sane, and it could be considered a mitigating circumstance. As a result, it could lessen the culpability of a criminal act, and therefore, could have been grounds for decreasing the severity of a penalty, permitting leniency. Krzymuski presented the same approach. The decision on culpability and deciding whether the mental state of an offender at the moment of committing a crime influenced their acts were left up to the judge's discretion. Moreover, the punishment was to be consistent with the individual's ability to recognise their actions, meaning being criminally responsible for it. Even though Krzymuski acknowledged that psychiatry distinguishes states of mind between sanity and insanity and that such solutions are incorporated in other, foreign pieces of codification, like the drafts of the Swiss penal code, he stood his ground. In his belief, introducing diminished sanity was a mistake made by wrongly combining criminal liability and a punishment that could be adjusted to it.[10] In his writings, he introduced an institution called "minimised guilt" which he later embedded into the Penal Code draft of 1918 that he prepared on the eve of Poland regaining its independence.[11] It was supposed to be a national, original solution reflecting on cases of diminished sanity and diminished responsibility that were widely discussed in Europe at the time. Krzymuski proposed an institution called "conditional sanity," which should have been pronounced by the judge after careful analysis of the offender's mental state during the criminal act in each case. In his belief, conditional sanity could be pronounced in case of deafness (as long as an offender was born deaf or became deaf in early childhood), "cretinism" (understood as the lack of ability to mature) and "wildness" (as a consequence of living in seclusion thus not possessing the ability to undergo a socialising process) and minimise an offender's guilt.[12] That was quite a casuistic approach to the idea of sanity and criminal responsibility. The language of the

[6] Zalewski, *Przestępca „niepoprawny*, pp. 146-148.

[7] Zalewski, *Przestępca „niepoprawny*, pp. 146-148.

[8] Krzymuski, E.*, System prawa karnego: ze stanowiska nauki i trzech kodeksów, obowiązujących w Polsce. I. Część ogólna*, Kraków 1921, p. 105.

[9] Zalewski, W., "Niepoczytalność, poczytalność zmniejszona – garść wątpliwości, co do konstrukcji instytucji w kontekście najnowszych rozwiązań wobec „niepoprawnych" przestępców*"*, *Gdańskie Studia Prawnicze*, t. XXXIII, 2015, p. 478; Janicka, D., *Nauka o winie i karze w dziejach klasycznej szkoły prawa karnego w Niemczech w I połowie XIX wieku*, Toruń 1998, pp. 164.

[10] Krzymuski*, System…,* p. 118.

[11] Krzymuski*, System…,* p. 118.

[12] Krzymuski*, System…,* p. 122.

draft that he presented was descriptive and revolved around the idea of crime as an act of an individual's free will.

Although Krzymuski was trying to move away from the Kantian idea of guilt by introducing states like "conditional sanity" or "minimised guilt," he argued that punishment as a reaction of the state to a crime should be a revenge of the society for an act of disobedience and that it is impossible to imagine a society that does not follow the rule of revenge and retribution. That could lead, in his opinion, to an unacceptable, arbitrary assessment of human conduct, depending solely on the will of the assessor, that should be avoided.[13]

The core of Krzymuski's beliefs were "A little more abhorrence of crime and less abhorrence of punishment, a little more reasoned sympathy for the victims of crimes, and less thoughtless sentimentality for those who commit them-that is what the legislator should try to instil in our society, which indeed already there is little respect for the law and too much pity for its violators."[14]

3. Positivists. Between "not yet a penalty" and "no longer a penalty"

The most prominent opponent of Krzymuski's project was Juliusz Makarewicz. He entered a polemic with Krzymuski on the proposals presented in the abovementioned Penal Code draft of 1918. In his article "Lex Krzymuski," Makarewicz as a proponent of creating a native Polish code from scratch, criticised Krzymuski for copying solutions characteristic of the Austrian Penal Code. He blamed his fellow lawyer for lack of originality, in addition to misunderstanding the needs of the Polish society and ignoring the achievements of contemporary science in regard to new disciplines emerging in the context of criminal law in Europe.[15] Makarewicz, by making a very detailed comparative analysis of Krzymuski's code with the Austrian Code, detected a very strong influence of Austrian solutions on it.[16] While Makarewicz was inclined to search for inspiration "outside the tight borders of partitioners" but rather in societies that exposed higher cultural development, like Switzerland, Norway or Belgium.[17] Therefore, it was not only a conflict on the fundamentals of criminal law but also on how to create it. The criticism undertaken by Makarewicz went hand in hand with European notions in legal thought and the emerging auxiliary sciences that influenced the discourse on crime during the era under examination.

Already on the eve of forming the Codification Commission, there was a concern about how the clash would affect the Commission's work. "When examining the problems of the general part of criminal law, serious scientific disputes will arise between representatives of the classical, sociological and other schools with regard to determining the purpose of punishment. It should be stated that not so much the establishment of types

[13] Janicka, D., *Spór o teorie winy i kary w dobie klasycznej szkoły prawa karnego na ziemiach polskich i niemieckich w XIX wieku*, Polska Akademia Umiejętności, 2000, p. 123.

[14] K. E., "Z Komisji Kodyfikacyjnej", *Czasopismo Prawnicze i Ekonomiczne*, 1920, nr 1-4, p. 181.

[15] Makarewicz, J., "Lex Krzymuski", *Przegląd Prawa i Administracji*, LXVII, 1922, pp. 2-18.

[16] Makarewicz, J., "Lex Krzymuski", pp. 2-18.

[17] Makarewicz, J., "Z Komisji Kodyfikacyjnej", *Przegląd Prawa i Administracji*, LXVI, 1921, pp. 4-5.

of penalties, but the manner of their implementation, especially the formation of the prison system, will best serve the purposes of penalties."[18]

If one were to classify, one of the biggest supporters of the positivist approach was Aleksander Mogilnicki. According to him, punishment should be completely free from elements of revenge, retribution and retaliation. Besides having the power of creation and aiding citizens, should act as a protector of society. Some of this protection could be manifested in a reaction of the state against the crime, which was considered as simple and organic as actions taken by the state during crisis management, like building dams or treating contagious diseases. While exercising its power, the state must follow reason and purposefulness only and cannot be driven by feelings like hate or revenge that are attributed to society. In Mogilnicki's opinion, to design the criteria for deciding the fate of an offender, it was the level of dangerousness of the individual to the public that should be taken into account in the first place rather than an abstract concept of guilt understood as a moral relation between an act and an actor.[19] Then, there was Emil Rappaport, who proclaimed himself as being in the middle between the classical and positive views and said that it is neither right nor necessary to choose just one purpose of punishment, either revenge or the protection of society. In his opinion, it was a methodological mistake, especially from a legislative point of view.[20] He believed that a compromise between old and modern views was the best solution. In light of those beliefs, he was a proponent of the idea that a perpetrator's responsibility based on guilt and sanity should not be totally abandoned; hence the punishment should remain a means of repression and prevention. Its main goals were to maintain societal order (implemented by punishment as a form of payback and deterrence of random and petty criminals), retribution, education and correction. Punishment should be used to discipline compulsive, habitual criminals if there was any chance to improve them. As for habitual criminals who did not give hope for improvement, protective and elimination measures should be applied, in accordance with an offender's social responsibility, anti-social disposition and motives. Such assumptions aligned with a principle of individualism that later became one of the fundamentals of Polish criminal law. It was understood not only in the sense that an individual approach to the offender should be undertaken in reviewing every case that would allow adapting a punishment to an individual's criminal profile but also in terms of considering the criminal responsibility of an individual. Additionally, protective measures should be adjudicated not only based on one's responsibility for a particular crime but based on thorough analyses of the offender, their environment and prognosis for the future. Rappaport, therefore, proposed a compromise system of penal and protective measures consisting of a division of penalties. Firstly, an ordinary penalty, subject to the possibility of a conditional suspension or forgiveness, called "not yet a penalty," applied to petty and accidental criminals. Secondly, an educational and correctional penalty, fulfilling a retaliatory and protective function, applied to compulsive, habitual criminals if there is a likelihood of the offender's improvement. Finally, the third one - indefinite internment, called by the author "no longer a penalty."

[18] Fierich, F., "Rzut oka na najważniejsze zadania prac kodyfikacyjnych", *Kwartalnik Prawa Cywilnego i Karnego*, 1919, nr 2, pp. 470-472.

[19] Rappaport, E., "Zagadnienia kodyfikacji prawa karnego w Polsce", *Kwartalnik Prawa Cywilnego i Karnego*, 1920, R. 3, p. 105.

[20] Rappaport, "Zagadnienia kodyfikacji…" p. 106.

The views of both of the abovementioned scholars laid a foundation for the penal code draft they co-authored and published in 1916.[21]

The influence of the positivist school was the strongest in Wacław Makowski's writings. Twenty years before the Code of 1932 was enacted, he introduced the idea of creating special units, separate and different from prisons, with the number of sections equal to the number of categories of dangerous criminals for incorrigible offenders, recidivists with diminished sanity and those, whose life addictions made them permanently dangerous. The state executive bodies would order Placement in those units as a precautionary measure. He also proposed to launch a social campaign to prevent crime and develop so-called patronage for not only those offenders who were either on probation or got released from prisons but also those who were displaying behaviour considered dangerous to society, even before committing a crime. In Makowski's opinion, the participation of society in the form of patronage at the stage preceding the unlawful act could be used to prevent crime. At the same time, such patronages should be involved in organising and managing the aforementioned units.[22] However, the ideas of patronage remained in the sphere of scholarly considerations.

Makowski also claimed that illness and the psychological sphere ought to be treated differently by the justice system, and, therefore, insane offenders should not be punished. Ideally, when it comes to illness, this approach led to the belief that social wrath should be replaced by compassion during the adjudication of a penalty. He was a proponent of ordering rather precautionary, therapeutic measures instead of punishment.[23] He defined punishment as the legal equivalent of social wrath, while precautionary measures as protecting society against criminals. Therefore, he claimed that both of them should exist in parallel and be ordered based on individual assessments conducted in each case, taking into an offender's mental state, behaviour and prognoses for the future. Only the coexistence of those two measures: punishment and precaution, creates a chance for criminal law to meet societal expectations and be a utilitarian expression of the state-power.[24] Makowski's idea to fight dangerous criminals was to apply precautionary measures to isolate incorrigible offenders and thus prioritise the safety of society. He aimed to separate precautionary measures from the idea of retribution or the correction of an offender. The same goals regarding insane offenders were set up by Makarewicz for offenders with diminished sanity or addiction to drugs or alcohol. This scholar also envisioned the isolation of the abovementioned classes of offenders in order to protect society. However, he perceived precautionary measures as primarily serving therapeutic goals, aiming to restore mental balance or curing the offender, as side-effects of isolation, but not the central part of it. According to him, the duration of isolation could be pronounced for an indeterminate period. Dangerous offenders must be isolated as long as they pose a threat to society.[25] Makarewicz distinguished the category of the "abnormal offender," by which he meant offenders who

[21] Mogilnicki, A., Rappaport, E., "Projekt kodeksu karnego dla ziem polskich", *Gazeta Sądowa Warszawska*, 1916, nr 16, pp. 181-182.

[22] Makowski, W., "Środki ochronne wobec recydywistów i przestępców anormalnych", *Przegląd Prawa i Administracji*, 1911, pp. 851-852.

[23] Makowski, W., "Kara, a środki ochronne", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1926, nr 2., s. CXXVIII.

[24] Makowski, "Kara ...", p. CXXXV.

[25] Ciepły, F., "Środki zabezpieczające według koncepcji J. Makarewicza", Prawo karne w poglądach Profesora Juliusza Makarewicza, (A. Grześkowiak, ed.), Lublin 2005, pp. 291-292.

were not criminally responsible for their actions due to a lack of cognitive abilities. The latter was understood as a lack of recognition of the weight of an act, and to this category belonged the insane offender. Another type of offender described by this scholar was the "partially abnormal offender" (*defective delinquent*) whose criminal responsibility could be reduced due to diminished sanity. Their culpability was lessened, yet they remained dangerous to society. Makarewicz's concept corresponded to what Makowski wrote about separating social wrath from addressing insane offender issues. Both of them believed that a solely punitive approach towards insane offenders or those whose sanity was diminished was not justifiable due to the illness they suffered.[26] Hence, such individuals should be placed, by the court's decision, into separate therapeutic institutions, which should be formed within psychiatric clinics and divided based on the level of criminal responsibility of offenders.[27]

> "Safeguarding measures are manifested either in the form of clearly therapeutic measures with the participation of professional psychiatrists, spiritual regeneration carried out by experienced psychologists, or finally in a radical form (without great hopes for the future) of eliminating a dangerous individual from social life. The precautionary measure is not a punishment, nor it is fundamental… In some cases, it is even supposed to be good for him [the offender], like forced labour houses that teach work. This considered an absolute necessity for a man in modern society, giving foundations for spiritual health. In others, the point is simply to prevent the individual from assassinating social goods."[28]

Makarewicz's views were obviously affected by the newly emerging auxiliary sciences such as criminal policy, sociology and criminal anthropology. He expressed them in 1896 in the article "Classicism and positivism in criminal science."[29] According to Makarewicz, Lombroso's and Ferri's époque of an individual born as a criminal was over and, after a period of popularity, they turned out to be shallow and not scientific. However, Makarewicz did not rule out genes and environment as factors shaping an individual and making one prone to a criminal lifestyle. He also acknowledged the influence of the season of the year or day of the week on crime rates. In winter, the rates of theft were high, and in summer, the rates of sexual crimes were higher than others. Furthermore, more crimes were committed on weekends due to higher consumption of alcohol. He also saw a relationship between economic factors and crime. Yet, he claimed that those findings did not require a revolution in criminal law. Rather than that, they were important for constructing a social policy to prevent poverty or cover the lack of proper upbringing.[30] Makarewicz predicted that criminal anthropology would evolve from a domain focused on the anthropological type of the offender towards the biological conditions destining people for criminal behaviour. Acknowledging that did not have to wreck the entire fundamentals of criminal law created by the classical school of law. Moreover, the abovementioned knowledge could not have been appropriated by the positivists, since references to biological traits and the social background of the offender

[26] Ciepły, "Środki zabezpieczające…", pp. 291-292.

[27] Ciepły, "Środki zabezpieczające…", p. 295.

[28] Makarewicz, J., "Prawo karne i prawa obywatela, Odczyt wygłoszony dnia 20 stycznia 1936 w Auli Uniwersytetu J. K. we Lwowie w czasie Akademji w związku z 275-tą rocznicę założenia Uniwersytetu J.K.", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1936, nr 1, p. 97.

[29] Makarewicz, J., "Klasycyzm i pozytywizm w nauce prawa karnego", *Przegląd Prawa i Administracji*, 1896, t. 21, z. 8-9, p. 869.

[30] Makarewicz, "Klasycyzm i pozytywizm…", p. 850.

were already known in penology and prison management.[31] In his belief, there was a need for a new approach to analysing the topic of crime and punishment.

According to his theory, this new notion could be called criminal realism, based on classical views, although enriched with the recent achievements of auxiliary sciences.

Yet, he was against categorising scholars and their views and opposed calling him a positivist. He criticised the main positivists of the era under investigation, such as Liszt, for not examining the issue of the core of crime in-depth. He defined a crime as an unlawful act harmful to the whole society. He advocated for considering crime from such a societal point of view. Hence, he looked at crime as a sociological phenomenon, where society was a group of individuals united in protecting common values. Following this understanding of a crime as breaking societal rules, therefore causing harm to society, the definition of an offender was created by Makarewicz. The offender was an individual who was posing a threat to society. Individuals committing crimes were to be divided into groups, like incorrigible and corrigible; also, criminality was to be classified as either rough or chronic. Then, the level of danger should be assessed and serve as a point of reference for estimating the degree of guilt and adjudicating the punishment. He could not agree that an incorrigible, dangerous offender committing a minor crime should be convicted for this crime only, regardless of their motives and prognosis for the future.[32] Such an individual approach to the offender led to an analysis of their character and social context, which could be seen as an obstacle to keeping the retributive role of the punishment as the dominant one. On this matter, the difference between the classical and positivist schools of law was the most vivid. However, Makarewicz referred to some compromise solutions between the classical and positivist views on this issue, in particular to Birkmeyer, Kohler, Liszt and Stooss (who he compared himself to, as one who was against calling himself a positivist).[33] Another difference between the classicists and positivists was the idea of what crime is and how it should be treated. The classicists defined it in a juridical manner and positivists in a broader context as a sociological phenomenon. For the first group, a punishment's main goal was retribution for an individual act ("retribution knows only sanity, the rest is meaningless"),[34] deserved by an offender. For the latter group, a punishment was a tool of social engineering and had to be proportional to the crime, adjusted to the character of the offender and their personal conditions.[35]

Makarewicz was a proponent of unifying all the newly emerging schools and doctrines into a foundation of one modern idea of criminal law,[36] which he emphasised by referring to the statement of Prof. Nyssens, "I am a classicist, despite being a positivist."[37]

The article stating his views was published in 1896. Although Makarewicz was only 24 years old at that time, his opinion paved the way for future codification work.

[31] Makarewicz, "Klasycyzm i pozytywizm…", p. 851.
[32] Makarewicz, "Klasycyzm i pozytywizm…", pp. 853-854.
[33] Makarewicz, "Klasycyzm i pozytywizm…", pp. 853-854.
[34] Makarewicz, "Klasycyzm i pozytywizm…", p. 862.
[35] Makarewicz, "Klasycyzm i pozytywizm…", p. 862.
[36] Makarewicz, "Klasycyzm i pozytywizm…", pp. 868-869.
[37] Makarewicz, "Klasycyzm i pozytywizm…", pp. 866-867.

Moreover, his views did not change much and were passed on to the Polish Penal Code of 1932, which was colloquially called Makarewicz's Code.

Since science came to the conclusion that there were other means of battling crime besides punishment, in order for the latter to remain within the criminal law system, it had to be redefined or changed at the very base. First and foremost, it should be purposeful and utilitarian[38]. There had to be a division between two elements of punishment: revenge and retribution versus protection and safeguarding. Moreover, the latter was understood in a dual way, as the protection of society against crime and the protection of an individual's freedom. Therefore, precautionary measures should be applied to cases where punishment could not be ordered, like an insane offender case or a case of diminished sanity. The adjudication of such cases should lay within the discretional power of the judge, either instead of or simultaneously to the punishment. Precautionary measures belong to the administrative power of the state; they are not about exercising justice. Nevertheless, the decision about applying them should be made by the court only.[39] Makarewicz said after Liszt: the penal code is the *magna carta* of an offender.[40]

4. The method

The issue of sanity was becoming a more and more problematic part of justice system after World War I. At that time there was a growing number of court cases where psychiatric assessment was ordered. It was caused by armies trying to "get rid of" the criminal element from its ranks. To do so, army offenders were pronounced mentally ill and expelled as a consequence. This trend was later used by those former soldiers as a defence strategy in their subsequent criminal cases, which resulted in growing numbers of assessments being ordered by courts.[41] Moreover, under the rules of the partitioners' codes, there was a strong influence of psychiatry on court rulings. Forensic psychiatrists opinions were, quite often, a base for mitigation of punishment within judicial discretion without any deeper consideration of the offender's mental state, which led to the belief of individuals and even whole societies that unlawful acts committed under influence of alcohol or other substances would grant them leniency.[42]

Fruitful discussions on the core ideas on criminality, the essence of crime and punishment and exchange of ideas on how contemporary criminal law was failing, left scholars with a question, how to distinguish which offenders were not criminally liable for their actions, and which measures should be applied to them.

Lack of distinctions between a variety of states of mind of an offender was the key problem to be addressed by representatives of legal and medical world. While some legal scholars still had conservative views on this topic, psychiatrists claimed that there

[38] Makarewicz, "Prawo karne i prawa…", pp. 95-96.

[39] Makarewicz, Prawo…, pp. 99-100.

[40] Makarewicz, Prawo…, p. 118.

[41] Wachholz, L., Psychopatologia sądowa na podstawie ustaw obowiązujących w Rzeczypospolitej Polskiej, Kraków 1923, p. 6.

[42] Czerwiński, S., "Ustawodawstwo w walce z przestępczością na tle alkoholizmu", *Głos Sądownictwa: miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym*, 1938, nr 7-8, p. 534.

is no clear division between mental health and illness. "There is no clear border. There is only a slow transition"[43] between what is considered a normal and abnormal mental state.

According to Leon Wachholz,[44] sanity should still be understood in a classical manner as an ability to be criminally responsible. That said, what should not be transferred from the classical school of law was the core of the notion of sanity: free will. As a medic, he proposed that criminal legal acts should list states, regardless of their nature, mental or physical, age or mental disorder, where sanity is ruled out. He also supported the idea of diminished sanity.[45] His views were known to Krzymuski, who acknowledged them in his monograph (*System prawa karnego: ze stanowiska nauki i trzech kodeksów, obowiązujących w Polsce. I. Część ogólna*, Kraków 1921), but in his draft of the code from 1918, he still opted for the idea of conditional sanity (explained above) rather than diminished sanity. Wachholz's handbook for psychiatrists and lawyers was published in 1923. This was the first book with a scientific approach aimed to incorporate the use of psychiatry into the justice system. According to the author, a forensic medicine specialist should be required to obtain some knowledge of the law and, conversely, a judge, prosecutor or lawyer to gain a basic knowledge of psychiatry. Wachholz recognised a separate domain emerging within psychiatry. It was called forensic psychopathology, addressing psychiatric problems in legal matters. There was a key difference between ordinary, clinical psychiatry and forensic psychiatry. The psychopathologist must remain aware of attempts to fake the symptoms of illness by offenders to avoid punishment. Wachholz also noted that punishment, as it was at that time, did not protect society from crime. After all, when the punishment was borne for the time specified in a sentence, the offender was free to return to society. It appeared necessary to take punishment back from the concept of revenge to the idea of it fulfilling a therapeutic goal. On top of that, a judge should be obliged to order the professional assessment of each offender displaying symptoms of insanity. Such an assessment should be carried out by a forensic psychopathologist to address criminal liability issues and explain the influence of the offender's mental state on their actions to a judge, who was considered an amateur throughout this medical assessment.[46]

To combat those contemporary societal problems, the Codification Commission[47] proceedings on insane offender issues took place in May 1921. The members of the Commission invited leading Polish psychiatrists to participate in the proceedings and give their opinion on how to define insanity. Hence, natural scientists were first ones who were not only permitted but even asked to be a part of criminal proceedings. This way the law became inseparably connected to medicine and other sciences, a connection that lasts to the present day.

[43] Wachholz, Psychopatologia …, p. 12.

[44] Wachholz was a forensic physician and a scholar, one of the leading Polish psychiatrists, initially influenced by Lombroso's views on individual factors causing a person to become a criminal, to later evolve towards positivism and sociological school.

[45] Wachholz, *Psychopatologia*…, pp. 2-3.

[46] Wachholz, *Psychopatologia*…, pp. 2-3.

[47] The Commission was established in 1919 to prepare legal acts, unifying law after the partitions and adjusting it to the needs of the newly created Polish state and its society. It gathered the best legal specialists in civil and criminal law: representatives of the doctrine of law, as well as practitioners: lawyers and judges.

When working on legal solutions to the issue of insanity in 1921, the vast part of a debate was dedicated to how to estimate the mental state of an offender during a criminal act, specifically which method to use. The discussion panel included two leading Polish psychiatrists, Prof. Piltz and Dr Radziwiłłowicz, working alongside leading Polish lawyers and members of the Codification Commission, such as Makarewicz, Mogilnicki, Rappaport and others. The psychiatrists were invited to share their insight on the issue of insanity and to share their opinion on the construct of the insane offender matter in the penal code. Prof. Piltz saw crime as a symptom of disease. In his opinion, as he explained during the course of the proceedings, certain criminal acts were either the direct consequence of mental illness or some kind of mental impairment or could have been their symptoms. Based on his medical experience he linked certain mental diseases to a type of crime that those affected by it tended to commit. He linked depression to infanticide; mania to insult, bodily harm or property damage; epilepsy to bodily harm, property damage or murder; pathological drunkenness (a state Prof. Piltz assumed to be characteristic of psychopaths and epileptics) to murder; paranoia and dementia *paranoides* to murder; dementia *senilis* to paedophilia; epileptic dementia to insult, bodily harm, murder, or sexually motivated murder; mental retardation to fraud or theft; *psychopatia* to fraud, theft, robbery, murder and sexual crimes; alcoholism to insult, bodily harm, fraud and theft.[48] According to his medical expertise, a mental impairment that causes a specific mental state which, as a "logical consequence," leads an individual to commit a crime.[49]

While it was clear that the offender's mental state at the time of perpetrating a crime should be subject to examination, it was also known that having a mild form of mental illness was not enough to pronounce the offender insane. Moreover, the experience of forensic psychiatry showed that healthy, sane people were prone to commit unlawful acts under certain circumstances such as intoxication, danger, threat, hypnosis or heat of passion. The presence of such conditions in normally healthy people could affect the severity of punishment. Therefore, Prof. Piltz proposed that the institution of insanity should be built on two pillars. First, mental diseases and second, manifestations of the "mental life" of healthy people, which led to the conclusion that besides a lawyer and psychiatrist, there was also a need for a psychologist to take part in the assessment of the mental state of the offender at the moment of committing a crime. The proposed solution was called a mixed method of pronouncing insanity. Furthermore, in the name of the whole medical community, he proposed that the definition of insanity in the future penal code should be built out of three components: legal, psychiatric and psychological.[50]

In contrast to the psychiatrists who mostly supported a solely psychiatric or at least a mixed (psychiatric and psychological) method of assessing the offender's mental state during a criminal act, Juliusz Makarewicz's position was quite different. He thought that the psychological approach would grant judicial discretion to a judge. Applying this method would oblige a judge to use the achievements of modern science to decide on the

[48] "Protokół XXIV posiedzenia Sekcji prawa Karnego Materialnego Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej odbytego dnia 10.05.1921 r.", Komisja Kodyfikacyjna RP, Dział Ogólny, tom I zeszyt 3, Warszawa 1922, pp. 1-3.

[49] "Protokół XXIV posiedzenia Sekcji prawa…", pp. 1-3.

[50] "Protokół XXIV posiedzenia Sekcji prawa…", p. 4.

matter of an offender's guilt.[51] According to Makarewicz, an assessment carried out by psychiatric method exclusively had a lot of disadvantages. One was that it put the weight of responsibility for a verdict on the psychiatrist and the second was that it was limited from the very beginning by the stage of the development of medical science. Listing all the mental disorders that affect sanity in a legal provision would make it casuistic and highly impractical due to constant changes in psychiatry.[52] As a way to broaden the outlook and convince his colleagues during Commission proceedings on the method of pronouncing insanity, Makarewicz referred to what he called "modern codifications." He claimed that they usually opted for the mixed method, with the rare exceptions of codifications solely using the psychiatric method, such as the Norwegian, Spanish or Chinese codes. When it came to the Austrian Code, he expressed his doubts in respect of the method. But according to his research, the Japanese Code was certainly using only the psychological method.[53] However, there was a strong opposition against using the psychological method exclusively. The majority of psychiatrists were against it.[54]

Leon Wachholz was a typical example of the psychiatrist's position on the method of pronouncing insanity, which is expressed in his writings. According to him, relying solely on the psychiatric method in criminal proceedings was the most reliable solution. He proposed to define sanity by simply listing all the states that exclude it. In Wachholz's eyes, the superiority of this method lay in putting aside the aspect of free will and making it easy to introduce diminished responsibility, even though he was aware that the psychiatric method puts the fate of the defendant into the hands of a medical expert. There was a fear amongst jurists that the psychiatrist would be the one diagnosing the offender as insane, thus indirectly pronouncing the offender as not guilty, almost forcing a verdict that would exempt the offender from punishment. However, Wachholz claimed that there was no difference in a doctor's level of responsibility for an individual's fate, regardless of the method. The medical expert was always the one who was diagnosing the offender's condition and therefore had a direct influence on an adjudicated sentence. Simply because a judge usually lacks the necessary professional knowledge and life experience in this regard. Wachholz believed that the decision on the degree of sanity should remain in the hands of the psychiatrist and the judge. In this method, determining the source of insanity, in the sense of a mental disorder, would be in the hands of a doctor, and a judge would determine the traits of insanity. According to him, applying a mixed or solely psychological method could have brought back the notion of free will that should be left behind already. Moreover, it lied on a false assumption that a judge has psychological experience, which was not the case. Eventually, regardless of the method, the judge determines insanity based on a doctor's opinion and does not have to agree with them. If the expert's opinion seems unfair to the judge, he could reject it and not consider it while handing out the sentence.[55]

The essential problem of choosing the method was about the power of pronouncing an offender sane, therefore guilty and criminally responsible, or the opposite. This issue was largely about the ambition of the two groups, doctors and

[51] "Protokół XXIV posiedzenia Sekcji prawa…", p. 7.

[52] "Protokół XXIV posiedzenia Sekcji prawa…", p. 7.

[53] "Protokół XXIV posiedzenia Sekcji prawa…" p. 7.

[54] Wyrok Sądu Najwyższego z dnia 7 listopada 1938, III K 2936/37, OSN(K) 1939/6/150.

[55] Wachholz, *Psychopatologia*…, p. 20.

lawyers, both considered part of the national intellectual elite. Both of them became involved in criminal proceedings and the process of serving justice at the beginning of the 20th century. If the whole process were not balanced, it would have led to a conflict between those two groups that would have spread into courtrooms and beyond. That would put the newly introduced legislation at risk of failure. During the final voting, the solely psychological method was supported by two members of the commission (Makarewicz, Makowski, against three members: Nowodworski, Miklaszewski and Rappaport). Eventually, during further voting, the mixed method was supported by four voters to one[56]. Even though the psychiatrists were supporters of the psychiatric method, or at least the mixed method, while Makarewicz the psychological method, a compromise was reached, and the mixed method prevailed.

However, in his comment to the Penal Code Draft, issued in 1930, Makarewicz wrote that the psychological method itself would be sufficient to define the conditions of criminal responsibility by emphasising the ability to recognise the meaning of an act (intellect) or to pursue an action (will). This "pure" method was unknown to the partitioners' and lacking in their codes. All of them referred to mental illness. Therefore, to provide the courts with a reference point to already known legal norms, there was a need to refer to a familiar psychiatric method in some way, at least; though upgraded by modern explanations of the reasons why an offender does not have an average will or intellect, also by giving the reasons for this condition (mental illness or another disturbance of mental activity).[57] Throughout his legal career, Makarewicz stressed that the mixed method was a temporary compromise until a better solution was discovered. The choice of the method was inseparably connected to the nature of the provisions regarding insane offenders in the Penal Code of 1932.

5. Final Provisions

The debates between representatives of the legal and medical world resulted in precise code provisions. During the commission proceedings, each part of a legal standard on insanity was discussed by representatives of both groups to reach a compromise eventually.

The Penal Code of 1932 was proclaimed on 11 July 1932 by a Decree of the President of Poland. This non-democratic way of introducing the legal act was to make it a result of the work of leading legal minds, "unpolluted" by political influence, nor by the voice of non-professionals.

The first 1932 edition of the Code includes commentary by Juliusz Makarewicz. It also contains an introductory chapter on the "Principles of the Polish Penal Code," which would be treated as an interpretation guide for scholars and practitioners. According to this document, the Code was based on several principles. The first one was individualism and subjectivism, which focused on the individual responsibility of an offender for a criminal act committed. The second important factor was the skillful application of punitive measures adopted to modern views, following the idea of

[56] Protokół XXIV posiedzenia Sekcji prawa …, p. 15.

[57] "Projekt Kodeksu Karnego, w redakcji przyjętej w drugim czytaniu przez Sekcję Prawa karnego Komisji Kodyfikacyjnej R.P. Uzasadnienie części ogólnej", Komisja Kodyfikacyjna RP, Dział Ogólny, tom V zeszyt 3, Warszawa 1930.

punishment as a reaction of the society against a crime. All punitive measures should facilitate a return to society of those who could be corrected by putting them aside and isolating the rest. The code's third aim was to protect society against a modern social phenomenon: professional and habitual offenders, often due to the offender's psychophysical development. Standard punishment failed to combat these types of criminals. The code responded to a need to find a new way to fight such social pathologies. Subjectivism in exercising criminal responsibility was to lead to humanitarianism in adjudicating punishments, which was reflected in the possibility to, e.g. mitigate a punishment. However, it could not lead to a lack of protection of society against crime. Therefore, subjectivism and humanitarianism had to be supplemented by precautionary measures that should be ordered based on offender's intellectual capacity and their ability to control and direct their will. In addition, calling for these measures should be preceded by an assessment of the offender's general mental condition. The precautionary measures could either supplement or replace punishment.[58]

The rule of subjectivism was the most visible in the offender's standing during criminal proceedings. The beginning of the 20th century and the implementation of the 1932 Code led to considering the offender from a comprehensive perspective. During criminal proceedings and the adjudication of punishment, the environmental, biological and psychological factors mattered on the side of what we know today as a criminal prognosis, which back then was known as an estimation of the offender's future criminal behaviour.

According to Art. 17 § 1, there were two core elements that insanity was based on. Firstly it was the mental state of the offender, and secondly - the ability to recognise and control the will and the behaviour by the offender. This definition provided judges with a list of states affecting both the recognition of and control over one's action. The list included mental underdevelopment, mental illness or another disturbance of mental activity. According to this provision, it was enough to detect just one factor, either a lack of recognition (intellectual impairment) or a lack of ability (disease of will) to control and control the behaviour to pronounce insanity. Since the institution of insanity was built on two factors: biological (the cause of abnormal mental state) and psychological (how it manifests itself), hence, the judge and the forensic specialist had to analyse the offender in both dimensions. The psychological base of insanity manifests itself in the ability to recognise the meaning or significance of an act and to control one's actions. The biological-psychiatric base of insanity, in turn, in mental underdevelopment and disturbance of mental activity. Exemplary cases of mental diseases were listed in the doctrine.[59]

When it came to insanity, the Code introduced a mixed method of pronouncing it (based on the biological-psychiatric and psychological methods) in order to equip the judge with all the tools to interpret and exercise the new law. The final provision on insane offender cases was "He is not subject to punishment, who at the time of the act, due to mental underdevelopment, mental illness or other disturbance of mental activity, could not recognise the meaning of the act or direct his behaviour" (Art. 17 § 1 Penal Code of 1932).

[58] Makarewicz, J., *Kodeks karny z komentarzem*, Lwów 1932, pp. 31-32.

[59] Makarewicz, *Kodeks*, p. 73.

The most striking in this provision is that the codifiers did not define insanity per se. The Code only described the states that excluded sanity and the ways to diagnose it. Then, the first part of a description of insanity ("[He] is not subject to punishment.") reflects the decision of the codifiers to leave deliberations on the issues of guilt, criminal responsibility and criminality of an unlawful action aside. So, deciding if an act was criminal or an element of guilt could be assigned to an offender, and, if so, what was the degree of it, was skipped. In his comment to the Code, Makarewicz did not attempt to define insanity, but Wacław Makowski did. He acknowledged that it is very difficult to define insanity due to the difference between the legal and medical approaches, so his definition was very general. According to Makowski, insanity was the state of not being sane. The involvement of psychological processes during the act of an offender was a condition of criminal responsibility. Where the psychological process does not occur, there is no criminal responsibility. The lack of an adequate psychological element was caused by defective psychological processes.[60] Criminal law should create its own definition of insanity in accordance with psychiatric and psychological sciences but not fully subordinate to them. He claimed this was included in the new Penal Code.[61]

The construct "[He] is not subject to punishment" did not determine if the act of an individual was criminal, unlawful, which was significant for civil law, procedure and criminal law. This part of the definition emphasised the core of the insane offender issue, meaning that the act committed was considered a crime but did not deserve punishment due to extraordinary circumstances, leaving other problems like civil responsibility open.[62] If the provision were "does not commit a crime," it would have meant that an individual could not be a culprit. To illustrate the importance of this issue, Makarewicz gave an example of an instigator who provoked an insane offender to commit a crime. If the act had not been considered a crime, there would be no perpetrator. Since the main principle of the Code of 1932 was subjectivism in addressing criminal liability, then the instigator and the offender had to be judged based on their actions separately. The insane offender was not subject to punishment and the instigator was judged and sentenced for their intentions.[63]

When it comes to determinism versus indeterminism as the base of human behaviour, Makarewicz's position was to leave those problems to the domains of philosophy or religion to decide but not to criminal law or the penal code.[64] He was talking about the "basic properties of spiritual life," consisting of three elements. The ability to correctly understand the outside world, properly recognise circumstances and sensitivity to stimuli (such as being prone to positive or negative motivations of human behaviour and the ability to follow the set of societal norms) reflected on the issue of insanity.[65] A lack of any of those elements implied a state of insanity due to the "abnormal development of a spiritual life."[66] The first condition, the correct perceiving and understanding of the external world, is impaired in individuals who suffer from idiotism, dementia (*dementia paralytica*) or hallucinations. When it comes to the second condition,

[60] Makowski, W., Kodeks karny 1932: komentarz 1, część ogólna, Warszawa 1932, p. 70.
[61] Makarewicz, *Kodeks*, p. 72.
[62] Makarewicz, *Kodeks*, p. 72.
[63] Makarewicz, *Kodeks*, p. 73.
[64] Makarewicz, *Kodeks*, p. 71.
[65] Makarewicz, *Kodeks*, p. 70.
[66] Makarewicz, *Kodeks*, p. 71.

the key factor is the ability to make the right conclusions based on a correct perception of reality. The example given in the Code refers to a man who interprets a short glance of a woman as a great passion for him, as being delusional, which was common for the state called *folie erotique.* Wrong conclusions were also noted in other mental diseases, like paranoia, especially of a maniacal nature (mania of greatness or persecution mania). The last condition, the sensibility to a stimuli referred to a personal feature of the character, a resistance to temptation that could be taken into account while analysing all motives of the perpetrator.[67] Among them were natural stimuli like hunger, sexual drive, vanity or vindictiveness. As a part of society, individuals were given social stimulants, like religion, ethics, aesthetics and laws, to counter and resist these drives. "Society seeks to show that a certain type of behaviour is not recommended because it is a sin, an immoral act or an ugly one from the aesthetic point of view or, ultimately, that the law forbids it. An individual who is absolutely immune to social incentives is equally abnormal, equally deviates from the mean as an individual with hallucinations or delusions. Resistance to external stimulus could be a symptom of ill moral health (moral insanity)."[68] However, the decisive factor for estimating if the offender is prone to social stimulus, and thus sane, is not just a particular criminal act committed but an individual's "general state of the spirit." As an example, Makarewicz referred to the case of a political offender who had repeatedly been committing criminal acts. His actions only showed a resistance against the State while the acts themselves did notdid not necessarily mean that an offender was inaccessible for social stimulus or values like patriotism or altruism. It was always the broader context that mattered while analysing an insanity issue.[69]

Makarewicz distinguished two causes of resistance to a social stimulus. One was a lack of understanding by the offender that neither human life nor property can be taken due to, e.g. an unhealthy morality that he called moral insanity; the second was a lack of a strong will despite having full recognition of one's actions. Not having the strength to resist temptations caused the inability to act in accordance with social or legal norms. Meaning that being fully aware of those norms, the offender took action against them. Such an offender was driven by low instincts like sensual impulse or greed. The author of the comment to the Code struggled with the question, "How does it happen that an offender having a theoretical freedom of choice between social and antisocial stimulus (according to indeterminism) succumbs to a morbid limitation of this freedom or always succumbs to a mechanical struggle between social and antisocial stimulus (according to the principle of determinism), has to follow antisocial ones due to the morbid sensitivity of his psyche."[70] That led to the final conclusion that "this matter should be decided between determinism and indeterminism. . . which was also a philosophical and religious matter, thus impossible to solve. For a penal act, solving this issue is neither necessary nor recommended."[71] Therefore, the problem of the choice-making process of an individual should be left outside of the Code. Besides moral insanity, Makarewicz also distinguished a state of temporary "paralysis of the will causing the inability of an individual to act in accordance with his own standards, e.g. an individual acting under hypnosis. An offender acts under an order received during a state of hypnosis, even though it does not coincide with his personal views. This is an example of a temporary

[67] Makarewicz, *Kodeks*, p. 71.
[68] Makarewicz, *Kodeks*, p. 71.
[69] Makarewicz, *Kodeks*, p. 71.
[70] Makarewicz, *Kodeks*, p. 71.
[71] Makarewicz, *Kodeks*, p. 71.

paralysis of will. On the other hand, when there were doubts as to the presence of a permanent paralysis of the will, the estimation of it was left for a psychiatrist to examine.[72]

Given this, the comment to the Code guided lawyers that "insanity could be pronounced in a case of lack of sanity due to abnormal spiritual life development,"[73] which involved a lack of either proper recognition of the external world or normal reasoning, or resistance to social norms and stimulus.[74]

To assign criminal responsibility for an act to the offender, Art. 17 § 1 of the Code specified that the assessment of their mental state must be considered in reference to the moment of committing an act. The comment to the Code contained an explanation that there were a variety of states of mind that could have affected the offender's cognitive abilities. During the committing of the offence, an individual could have been insane due to a permanent, chronic mental impairment or a temporary one, such as a short mental disturbance limited to the duration of the crime.[75] According to Makarewicz, temporary loss of cognitive abilities that he described as unconsciousness could be a result of illness (e.g. a fever) or an episode of a chronic disease (e.g. epileptic seizures). It could also be a manifestation of a regular, typical body function (like a dream) or the result of drug or alcohol use, an artificially created, temporary disturbance of consciousness. Since the perpetrator could not recognise the ethical value of an act, it was considered a misbalance of the spiritual life. Therefore, in principle, an offender could not be criminally responsible.[76] However, the codifiers acknowledged the issue of alcoholism in the post-war reality and regulated the matter of the criminal responsibility of an individual for crimes committed in a state of intoxication separately. More on this topic further in the article.

Lawyers and medics both agreed on the existence of various states of mind between sanity and insanity, which gave rise to the problem of deciding on criminal responsibility. Article 18 of the Code of 1932 stated that if, at the time of committing the crime, the ability to recognise the significance of the act or to control the action was significantly limited, the court could apply extraordinary leniency.[77] In reference to cases of diminished sanity, the Code introduced the institution of diminished responsibility. It was the third degree between full criminal responsibility and a lack of it. A case of diminished responsibility could appear as a result of the general psycho-physical state of the offender that could classify them as a partially abnormal individual. Also, such a state could result from temporary intoxication or an illness (such as a fever).[78] The state of diminished sanity due to acute emotional distress was incorporated by jurisprudence with regard to Article 18. Moreover, being in "emotional distress" at the moment of a crime was not did notequal to a state of an "acute emotional distress" that could lead to granting leniency if the level of the distress was so high that it would cause a significant

[72] Makarewicz, *Kodeks*, p. 71.

[73] Makarewicz, *Kodeks*, p. 71.

[74] Makarewicz, *Kodeks*, p. 71.

[75] Makarewicz, *Kodeks*, p. 73.

[76] Makarewicz, *Kodeks*, p. 72.

[77] Makarewicz, J., *Kodeks karny z komentarzem*, Lwów, 1938, (Grześkowiak, A., Wiak, K., eds.), Lublin 2012, p. 94.

[78] Makarewicz, J., *Kodeks karny z komentarzem*, Lwów, 1938, p. 94.

impairment of the offender's cognitive abilities (the ability to recognise the meaning of an act or to control behaviour).[79] The judge was given the judicial power to grant leniency at his discretion.[80] The power of the judge was tightened by Article 59 of the Code, listing the ways of executing extraordinary leniency. The judge could have exercised his power by imposing a prison sentence of more than five years instead of the death penalty or life imprisonment, by imposing a prison sentence of up to five years or a detention order instead of a prison sentence of over five years, by imposing detention instead of imprisonment for up to five years and by imposing a fine instead of detention.[81]

It is in the provisions regarding states of diminished sanity, diminished responsibility, and the judge's discretional power that the positivist and modern influences were reflected the most.

6. Foreign influences

During the interwar period, there was a noticeable turn to comparative research within the Polish intellectual elite. "In each historical moment, the belief that there existed a certain universal canon of modern principles triggered a search for external patterns in countries that, as was assumed, had achieved a higher level of legal development to help build a new legal system in Poland."[82] This approach "to create a new legal order based on the extensive and diverse experiences linked to Poland's direct contacts with other legal systems and cultures, combined with the deeply rooted conviction of its own national uniqueness embedded in Old-Polish traditions and distinct cultural heritage"[83] created a platform for in-depth comparative legal research.

Since the law was "supposed to satisfy societal needs" and "be a result of free national creativity, the expression of yearnings and needs of the nation," scholars had to acknowledge the processes that were occurring within the European legal community while Poland was under partitions and, hence, left behind.[84] Special attention was devoted to the Norwegian Penal Code, a translation of which was published in Poland in 1916, with commentary by Waclaw Makowski. The publication sparked a debate and showed which aspects of criminal law were the most desirable for Poles and which were considered suitable to transplant into the Polish legal culture. What mainly drew the scholars' attention was the division of crimes into two categories and the leaving of minor offences in the domain of the administrative system, outside of the scope of the penal code. Another thing was considering a crime from the social perspective as an act of conscious disobedience, sometimes negligence for the rules of the community. The rule of social interest as a dominant in this penal code did not go unnoticed, nor did an individual approach to an offender. All those factors were provided as an example to

[79] Wyrok orz. Z 17.07.1933 zb. Nr 182/33; zb. Nr 103/33, Makarewicz, J., Kodeks…, Lwów 1938, (Grześkowiak, A., Wiak, K., eds.), pp. 94-95.

[80] *Ibid*, p. 95.

[81] *Ibid*, p. 214.

[82] Gałędek, M., "Remarks on the methodology of comparative legal research in the context of the history of law in Poland", *Acta Universitatis Lodziensis*, 2022, nr 99, p. 76.

[83] Gałędek, "Remarks on the methodology…", p. 76.

[84] Makowski, W., *Nowy kodeks karny norweski, przekład części ogólnej, przegląd postanowień szczegółowych i uwagi*, Warszawa 1916, pp. 3-6.

follow, or at least to consider, while working on a native penal code. Another attention-deserving legal solution, according to Makowski, was the punishment system. The Norwegian Code differentiated two main kinds of punishment, fines and special isolation, applicable to the most serious cases. Besides them were also additional penalties. All those punitive measures gave a judge quite a wide range of tools to discipline, punish or isolate the offender, depending on the individual case, its external circumstances and the motive.[85] Another thing that drew the attention of Polish scholars was the state of exceptional danger of the offender to society. In such cases, a protective measure of even up to 15 years of internment could be assigned after already suffering the punishment.[86]

Another inspiration came from Switzerland. In 1937, the Swiss Penal Code was issued following a long codification process, with the first draft introduced to parliament in 1918. The code was highly appreciated by Juliusz Makarewicz. Although it was created in a country with a different political and administrative background, its main ideas, reflected in the drafts, served as a point of reference during the Codification Commission proceedings. Similarly to the Polish experience, the period of work on the code was very long. As a federal state, Switzerland delayed the introduction of a single penal code common to all cantons. Swiss society was divided into two camps, supporters and opponents of the unification of criminal law, and the approval for the introduction of the unified code, expressed in a referendum, was obtained with a slight majority of votes.[87] The Swiss Code introduced precautionary measures in addition to punishment. When the Code was enacted in 1937, preventive measures were no longer innovative solutions compared to the rest of Europe, but when work on them began, they were pioneering.[88]

7. Novum: actio libera in causa, intoxication, crimes of passion and diminished responsibility

Reflections on the use of alcohol and its impact on human behaviour were common for the lawyers and psychiatrists of the interwar period. L. Wachholz, amongst others, analysed this phenomenon. Alcoholism was considered an important factor in determining criminality and shaping it directly and indirectly. It was common knowledge that abusing alcohol and the state of drunkenness directly suppresses the ability of an individual to control their behaviour, leading to hallucinations that could push an individual to commit a crime. In addition, the offspring of alcoholics were at risk of developing certain health conditions and prone to committing crimes.[89] Alcohol was considered humanity's biggest poison,[90] directly affecting crime rates, which was

[85] Makowski, *Nowy kodeks karny*…, pp. 28-30.

[86] Makowski, *Nowy kodeks karny*…, p. 29.

[87] Koredczuk, J., "Znaczenie kodeksu karnego z 1932 r. dla rozwoju nauki i prawa karnego w Polsce w XX wieku", *Zeszyty Prawnicze*, UKSW, 11.2, 2011, p. 58.

[88] Szwajcarski kodeks karny z dnia 21 grdunia 1937 r. według stanu prawnego na dzień 1 grudnia 1959 r, tłumacze O. Chybiński, W. Gutekunst, (Świda, W., ed.), Warszawa 1960, p. 4.

[89] Widacki, J., "Leon Wachholz jako kryminolog", Rozważania o przyczynach zbrodni (Wachholz, L., ed.), w wyborze i z przedmową J. Widackiego, Kraków 2008, p. 8.

[90] Wachholz, L., "Alkoholizm a przestępstwo", Kraków 1927, Rozważania o przyczynach zbrodni, (L. Wachholz, ed.) w wyborze i z przedmową J. Widackiego, Kraków 2008, p. 69.

reflected in the statistics of alcohol consumption and the number of crimes committed within a State.[91]

Alcohol was well known for its properties of depriving an individual of consciousness as well as leaving them only partly cognisant. The latter state was the cause of a majority of crimes committed under the influence of alcohol. One of the achievements of then-contemporary psychology was discovering the influence of alcohol on the intellect. Even small alcohol consumption leads to impairment of the memory and thinking process, abnormal, excessive activity, irritability, that occurs faster than usual and without a thinking process, among other effects.[92]

Makarewicz even distinguished "alcoholic crimes, committed in a state of intoxication, such as damage to property, resistance to authority, bodily harm and sexual violence." He noted that those acts "were performed with greater intensity on certain days of the week and resulted from the bad habits of people who did not appreciate alcohol-free entertainment. Until now, the judiciary practice has treated all cases of 'alcoholic excitement' as a mitigating circumstance. Wrong."[93] Scholars acknowledged the partitioners' regulations. The Austrian Code accepted alcohol abuse as wrongdoing on the one hand. but on the other hand, such an offender was not criminally responsible unless they caused their state of drunkenness deliberately. Then, according to the German Code, crimes committed in a state of drunkenness were not subject to punishment.[94] Hence, for many offenders and those planning to commit a crime, being under the influence of psychoactive substances or in a state of drunkenness was a way to avoid criminal responsibility. Given those facts, the legislative bodies had to include alcohol as a crime factor and incorporate it into legal acts. Therefore, the members of the Codification Commission aimed to restrict extraordinary mitigation of punishment in such cases. Eventually, the institution of mitigating punishment was applied neither to habitual drinkers nor to alcoholics.[95] "A human being who knows from their or others' experience how bad advisor alcohol is, does not deserve the mercy of a judge to mitigate the punishment. Everyone acts on their own responsibility and has to face the consequences."[96]

It is worth mentioning that Article 17 § 1 of the Code of 1932, which says that an offender, who at the time of an act, due to mental underdevelopment, mental illness or another disturbance of mental activity, could not recognise the meaning of an act or control their behaviour was not subject to punishment, did not apply to cases when an offender purposefully put himself in a mental state that caused him to commit a crime (17 § 2). This way, the codifiers attempted to differentiate between offenders who were sane when planning the crime but mentally impaired during the act due to alcohol intoxication. Such individuals were treated by the law as fully sane at the moment of the crime, thus responsible for their actions and subject to punishment.[97] The 1932 Code also dealt with cases of the criminal responsibility of individuals who were in a position of guarding

[91] *Ibid*, p. 63.
[92] Makarewicz, *Kodeks*…, Lwów 1932, p. 72.
[93] *Projekt Kodeksu Karnego*…, Warszawa 1930.
[94] Wachholz, "Alkoholizm …", p. 69.
[95] Czerwiński, "Ustawodawstwo …", p. 535.
[96] *Projekt Kodeksu Karnego*…, Warszawa 1930.
[97] *Ibid*.

public safety and displayed a high degree of negligence by drinking alcohol, such as an automobile driver or a coachman who could cause a disaster in a state of drunkenness. They were considered guilty of succumbing to alcohol, despite the great responsibility related to their occupation. Putting themselves in such a state was already reprehensible, and the level of culpability varied depending on the consequences of such an action.[98]

The Polish Supreme Court, in its verdict No. II K 2752/37 from 12 October 1938 ruled that an offender, while committing a crime of vandalism, breaking windows, was, in fact, under the influence of alcohol. Since the use of the substance occurred voluntarily, not by e. g. forceful, insidious intoxication, the offender could not be granted extraordinary mitigation of a punishment for his act.[99] With this sentence, the Supreme Court dismissed the cassation appeal of the accused.[100]

There were a number of crimes committed by people who did not display any abnormality prior to the act; however, at the moment of the crime, their behaviour and physical state suggested a lack of the ability to control their actions and an absence of sanity. They were acting in a state of acute emotional turmoil. The Code of 1932 paved the way for an institution known today as a crime of passion. When a crime was committed in a state of strong emotional distress, affecting an individual's cognitive abilities and causing diminished sanity, it could have resulted in mitigated punishment.

In 1933, in sentence 3 K 111/33, the Supreme Court wrote that recognition of acute emotional distress could be a cause for pronouncing a state of insanity of an individual during the crime as long as it resulted in an inability to recognise the meaning of an act or control the behaviour.[101]

In sentence 1 K 1075/34 of 6 February 1935, the Supreme Court ruled that the Code of 1932 distinguished a mental disorder from "other disturbances of mental activity.". The latter encompassed all cases of temporary cognitive dysfunction that originated not from mental disease but from factors like intoxication, youth, pregnancy, scenic and asthenic affection, anger or extreme fear. However, a punishment could be mitigated only if those factors were strong enough to cause a significant deficit of intellect or will, leading to an inability to recognise the meaning of the act or to control the behaviour.[102]

Later, in sentence 2 K 122/57 of 24 April 1957, the Supreme Court ruled that an offender was not criminally responsible not only when his sanity was ruled out due to a mental disorder or mental retardation but also due to other disturbances of mental activity caused, e.g. by a high degree of intoxication, mental abnormality in a fever, etc., unless the offender voluntarily put himself in this state to commit a crime.[103]

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[98] Makarewicz, *Kodeks*…, Lwów 1932, p. 74.

[99] Wyrok Sądu Najwyższego z dnia 12 października 1938 r., II K 2752/37, OSN(K) 1939/5/123.

[100] Ibid.

[101] Kozielewicz, W., "Pojęcie niepoczytalności w doktrynie prawa karnego i orzecznictwie Sądu Najwyższego", *Palestra*, 2007, nr 1-2, pp. 78-79; Zbiór orzeczeń Sądu Najwyższego. Orzeczenia Izby Karnej. Rok 1933, z. V, poz. 102, pp. 188-189.

[102] Kozielewicz, "Pojęcie…", pp. 78-79; Zbiór orzeczeń…, pp. 2-3.

[103] Kozielewicz, "Pojęcie …"78-79; Orzecznictwo Sądów Polskich i Komisji Arbitrażowych, 1963, z. 11, p. 639.

In its ruling, the Polish Supreme Court summarised the achievements of the Codification Commission. In a verdict from 1935, the Supreme Court described the main direction of penal reform at the beginning of the 20th century. The court stated that the aim of the penal reform was to fulfil the utilitarian goal of criminal law by assigning a social purpose to a punishment. The Supreme Court directly referred to the achievements of the positive school of law, in which the main purpose of fighting criminality was to protect society against dangerous individuals. This was accomplished by introducing precautionary measures to the Code of 1932. The dangerous individuals category consisted of insane offenders, offenders with reduced sanity, criminals from alcoholism, criminals out of aversion to work, recidivists, professional criminals and habitual criminals. An insane individual's criminal responsibility was either excluded or diminished. The main emphasis of the utilitarian approach to criminal law was put on obliging procedural bodies to look at a criminal individual from a broad perspective. The outcome of the penal procedure should include the weight of a crime, the personal characteristics of an offender and the degree of dangerousness to society. Of particular interest to the court should be the person of the offender, not a balance between the crime and the punishment anymore. The abovementioned assumptions showed the individualisation of punishment and the purposefulness of sanctions against crime in the Polish Penal Code of 1932.[104]

A Supreme Court sentence from 1938 set aside a judgment under appeal on the grounds of wrongful evidentiary process. The reason for this was that the lower court did not order evidence from an expert psychiatrist before pronouncing the offender insane. The court ruling on insanity should have had solid grounds: the opinion of two medics specialising in psychiatry. The court should have ordered this ex officio in case of any doubt regarding the sanity of the offender.[105] It highlighted the significance of professional, medical opinion in the evidentiary process in insane offender cases.

The Supreme Court, in its verdicts, referred to the Code of 1932 and the rules of criminal law, doctrine and psychiatry. Consequently, the verdicts were coherent with the code provisions. In one of the rulings, the Supreme Court revoked a judgment on an accused who was pronounced insane and therefore not responsible for a crime without the court previously ordering a medical examination *ex officio*. The decision was based on the fact that the lower court had not exhausted an evidentiary process needed for making a non-defective decision. According to this judgment, a court could not decide on such an important matter as insanity based neither on general knowledge nor even on the professional knowledge of the judge gained by experience. Insanity could be pronounced only based on expert evidence, preferably two independent medical experts in psychiatry. The decision on insanity had to be well-grounded.[106] The significance of professional medical opinion in the evidentiary process in insane offender cases cannot be overlooked.

The most famous criminal court case of the interwar period was that of Rita Gorgonowa. She was a young woman who was accused of the murder of her stepdaughter in 1931. The evidence was only circumstantial, yet she was pronounced guilty and sentenced to death. Due to the defence's appeal, the Supreme Court overturned the decision on the grounds of procedural shortcomings and referred the case back to the

[104] I K 932/34, lex nr 1638356.

[105] III K 2936/37, OSN(K) 1939/6/150, lex nr 75443.

[106] I K 932/34, lex nr 1638356.

court for reconsideration. During the process of appeal, the Code of 1932 was enacted. Eventually, in 1933, she was found guilty of manslaughter, committed under strong emotional distress and sentenced to eight years in prison under the new penal code.[107] The newly introduced institution of diminished sanity provided a gateway for avoiding the death penalty.

One of the factors that determined the success of the new legislation was the application of those newly introduced norms. Their implementation depended on breaking the conservative views of practitioners, who tended to be more rigid than the scholars. Therefore, it was important to convince the practitioners, the juridical body, to apply the rules of the new code in their practice in real life.[108] Courtroom experience built over the years, the active participation of medical specialists in shaping regulations on insanity and cooperation between lawyers and medics led to universal penal solutions, and furthermore, a unity of jurisprudence. Due to the meticulous work of the commissioners, hand in hand with psychiatrists, the courts were provided with clear borders of judicial discretion and a clear interpretation line.

8. Adjudication of penalties; precautionary measures

Article 54 of the Code of 1932 set up rules for adjudicating a punishment. The court was supposed to impose the penalty on all types of the offenders at its discretion, limited by the provisions of the Code. While doing that it should focus primarily on the perpetrator's motives, manner of acting, attitude towards the victim, the level of mental development and character of the perpetrator, his life so far, and his behaviour after the offence had been committed.[109] The purpose of this provision was, while giving discretionary power, also "to draw the judge's attention to the ethical value of the offender."[110] The article emphasised the offender's individual properties[111] and forced the judge to consider an individual in a broad context.

To review the case, the judge had to examine the degree of an individual's mental development and consider a state of partial underdevelopment as a circumstance that could reduce the perpetrator's liability. This would reduce the severity of a penalty. The judge was obliged to assess the perpetrator's character and ability to control his actions. The "weak character" of the perpetrator, understood as being prone to different kinds of influence like general mood or spirit at the moment of a crime, had to be considered as a mitigating circumstance.[112] Considering all the aspects of the offender's mental state, alongside criminological prognosis, was supposed to help a judge to adjust the penalty.

[107] Użarowska, M., "Sprawa Gorgonowej. Czy była winna?", Rzeczpospolita 23.06.2019, https://www.rp.pl/historia/art9303081-sprawa-gorgonowej-czy-byla-winna, dostęp dnia 22.08.2022. 2; Łazarewicz C., Koronkowa robota. Sprawa Gorgonowej, Wołowiec 2018, pp. 34-35; Dubois, J., Sprawa Gorgonowej, https://www.edukacjaprawnicza.pl/sprawa-gorgonowej/, dostęp dnia 31.10.2022.

[108] Koredczuk, J., Wpływ nurtu socjologicznego na kształt polskiego prawa karnego procesowego w okresie międzywojennym (Les classiques modernes), Wrocław 2007, p. 12.

[109] Makarewicz, *Kodeks* …, Lwów 1938, p. 205.

[110] Makarewicz, *Kodeks* …, Lwów 1938, p. 205.

[111] Wyrok orz. Z 27.01.1933, zb. Nr 61/33; Makarewicz J., *Kodeks*… Lwów 1938, p. 208.

[112] Makarewicz, *Kodeks*…, Lwów 1938, p. 208.

Within its power, the judge could not only mitigate, conditionally suspend the punishment but also extraordinarily increase it.[113]

In the light of Article 79 of the Code of 1932, if the perpetrator of an act prohibited under the penalty was deemed criminally irresponsible, and his remaining free would have posed a threat to the legal order, the court was obliged to order the placement of such an individual in a confined facility for the mentally ill. Not criminally responsible were those offenders who met the criteria of Article 17 (the perpetrator could not recognise the meaning of an act nor direct their behaviour due to mental retardation, mental illness or other disturbance of mental activity). Therefore, the conditions for placement in a therapeutic facility were: committing an unlawful act, being permanently criminally irresponsible (not while committing a crime) and posing a threat to society.[114]

However, if the offender was deemed to have a diminished volitive ability (the ability to control and direct one's actions) and his remaining free would pose a threat to the legal order, the court could (as opposed to cases of insane offenders, where the court was obliged to) ordered a placement in a confined facility for the mentally ill (Article 80 of the Code of 1932). It is worth mentioning that the Code used different terms in those two provisions. In the first one, concerning insane offenders, the Code defined them as "perpetrators of an unlawful act;" the second, concerning offenders with diminished responsibility, who the Code referred to as "offenders" to stress the existence of criminal responsibility, although a lessened one. In the eyes of Makarewicz, an author of the 1938 issue of the Code, a partly abnormal individual could not be a subject of the same intensity of a social reaction as an individual whose mental capacity was unaffected. Thus, such offenders should be punished to a lesser extent. However, if they pose a danger to society, they should be isolated in institutions after serving their sentence for an unspecified period of time.[115]

According to Article 81 of the Code of 1932, the period of isolation in the abovementioned facilities could not be specified in advance. The court could not order the dismissal from the facility earlier than after one year since the offender had been placed there. This provision did not specify the maximum time of internment of the offender. It expressed a contemporary belief that a criminally irresponsible offender should be isolated and subject to therapeutic treatment as long as he remains dangerous to society. The danger originating from a broken psyche was considered too serious to be cured in a short time. Before ordering a release, the judge should consider the opinions of the board of the facility with regard to the mental state and behaviour of the offender.[116]

Measures against individuals committing crimes under the influence of alcohol or other intoxicating substances were listed in Article 82 of the Code of 1932. A judge could order the placement of such an offender in an appropriate therapeutic institution for a period of two years, after serving his sentence first. This measure aimed to satisfy the social sense of justice by suffering a punishment and then curing alcoholism before

[113] Makarewicz, *Kodeks*…, Lwów 1938, p. 206.
[114] Makarewicz, *Kodeks*…, Lwów 1938, p. 259.
[115] Makarewicz, *Kodeks*…, Lwów 1938, pp. 260-261.
[116] Makarewicz, *Kodeks*…, Lwów 1938, pp. 262-263.

returning the offender back to society. When the goal was reached, and the offender was deemed cured, the judge could order an earlier release[117].

These solutions sparked criticism, especially the idea of indeterminate sentencing. By some, the facilities for the incorrigible were considered an exceptionally punitive measure.[118] Imprecisely defining dangerousness and giving discretional power to the judge could lead to arbitrariness. Regulations on protective measures brought conflict between the interest of society versus the interests of the individual and the protection of human rights.[119]

9. Conclusions

At the beginning of the 20th century in Poland, a group of leading lawyers: practitioners and scholars faced the challenge of unifying and modernising law. Criminal law was a particular struggle. The local regulations coming from the pre-partition period were archaic; post-partition codes, not deeply rooted in society and giving small, if any, chances of obedience, were enforced. Society was at a peculiar stage, insensitive after the ravages of war, with no faith in the legal system. And yet, as Makarewicz summarised, with a strong punitive spirit. The jurists aimed to create a national code from scratch. The idea was to examine the trends in other European legal cultures to see how certain issues were solved and simultaneously adjust the code to the spirit of the nation and the needs of society.

There were two main concepts on how to build a criminal law and what was the widespread, although vague term of the "spirit of the society." One was based on the German law school, where societal supremacy was on the rise, and another, the French one, just the opposite, where the individual's freedom was prioritized.[120] Even though there was a belief amongst some lawyers that Poles were the "French of the East,"[121] the punitive nature of the Polish society, caused by many factors, such as previous codes, war and partitions, reflected on the Penal Code of 1932. There were widespread ideas that personal freedom and freedom in shaping life and legal relations that were dominant in the 19th century should give way to the collective interest., also in criminal law.[122] Consequently, the Polish criminal law of the early 20th century was a reflection of both aforementioned ideas. As Makarewicz concluded: "Polish law did not violate the principles passed on by the freedom movements of the late eighteenth and mid-nineteenth

[117] Makarewicz, *Kodeks*…, Lwów 1938, pp. 263-267.

[118] Radzinowicz, L., "Uwagi o zakładzie zabezpieczający, dla niepoprawnych przestępców", *Gazeta Sądowa Warszawska*, 1937, nr 19, pp. 276-280.

[119] Makowski, W., "Środki ochronne…", *Przegląd Prawa i Administracji,* 1911, p. 844.

[120] *Ibid*, p. 841.

[121] Sumorok, L., "W obliczu germanizacji polskiej myśli prawniczej", Głos Sądownictwa, 1938, nr 1, p. 13:"Our culture was shaped under the overwhelming influence of classicism; we have a deep love for tradition, a strong sense of justice that has always been outstanding, even in relation to dissidents, and finally, the fact that we are the French of the East, there can be no room for doubt that the French mentality is closer to us than any other and that it is advisable to turn to the achievements of French scholarship, and to turn away from the trappings of the nearest West, which threaten to corrupt the Polish soul and mind".

[122] Fierich, *Rzut* …, pp. 470-472.

century. The traditional love of individual freedom is too strong…"[123] Yet, the retributive role of punishment to fulfil the idea of social justice remained.

It can be observed that the prevailing theme in the debates of lawyers at the turn of the 20th century was the nature of crime and punishment. However, later on, interest moved towards precautionary measures. "In the interwar period, disputes over the goals of punishment significantly weakened in favour of the discussion on prison reform and the introduction of precautionary measures."[124]

The issue of the insane offender was a scene, where modern disciplines reflected on legal solutions. The leading minds of the époque acknowledged the achievements of criminal anthropology, criminal sociology, criminal positivism *et al*. There was a visible shift from the classical views of the law. The aim of punishment progressed from revenge, through retribution, to having the social purpose of correcting an individual and protecting society. The solutions introduced in the Polish Penal Code of 1932 had all the prerequisites to be called modern and groundbreaking at the time.

Addressing the insane offender issue with such precision would not be possible without bringing medicine to the scene. The way that the issue of the insane offender was shaped in the Code of 1932 was the epitome of compromise. The interest of the State and the newly-forming legislation was put above differences in opinion. However, it would be a simplification to say whether the offender suffered from a mental disability became solely a medical issue for a psychologist or psychiatrist to decide and no longer fell within the exclusive purview of a judge. The issue of the insane offender demonstrated the full cooperation of psychiatrists and judges, with a broad discretional power of the judge provided by the Code of 1932. It was eventually up to the court to decide on the issue of insanity, relying not only on a psychiatrist's opinion but also on the judge's life experience within the limits of the legal provisions provided by the Code.

The clash between schools of law in the 19th and 20th centuries was quite remarkable across Europe. It is said that in Poland, the clash between those two schools was not as major as in Italy or Germany,[125] but was this really the case? After all, the clash affected the debate in legal journals, the Commission's proceedings and eventually the shape of provisions of the Penal Code, which were later blamed as being eclectic.[126] It was a similar scenario to other European countries. It was a typical two-track code. It combined the classical idea of crime and the sociological idea of punishment, probation, social protection and prevention. The final shape of the Code was affected by Makarewicz, who sometimes fiercely defended his point of view in polemical articles full of ideas and throughout analyses of foreign regulations. The ideas of the sociological school prevailed, but not absolutely. Makarewicz was aware of the legal culture and traditions of Polish society. A vision of punishment as retribution had long roots. It would not be possible to introduce a penal code with only precautionary measures, without

[123] Makarewicz J., Prawo karne i prawa obywatela, Odczyt wygłoszony dnia 20 stycznia 1936 w Auli Uniwersytetu J. K. we Lwowie w czasie Akademji w związku z 275-tą rocznicę założenia Uniwersytetu J. K s. 118.

[124] Janicka, D., "Rozkwit doktryny prawa karnego w Polsce w dwudziestoleciu międzywojennym - ośrodek, uczeni, idee", *Studia z dziejów Państwa i Prawa Polskiego*, 2019, nr XXII, p. 192.

[125] Rappaport E., "Zagadnienia kodyfikacji prawa karnego w Polsce", *Kwartalnik Prawa Cywilnego i Karnego*, 1920, R. 3, s.

[126] More on this: Wąsowicz, *Nurt*...

punishment. So, on the one hand, even though the Code was under the influence of Prussian and Austrian law, on the other, it adopted other, modern solutions. Scandinavian patterns managed to infiltrate the Polish legal culture to some extent.

When we look at the debate around the codifications from a contemporary legal history point of view, we can say that the Polish scholars of the 20th century were transnationalising the law and legal history. They showed excellent scholarly skills in their in-depth comparative research and analysis of the history and philosophy of law. Their work, the Code, resulted from, sometimes, a heated debate in the press and reflected in their writings. The Codification Commission's protocols also depict this flow of ideas, documenting more than ten years of sessions on criminal law reform.

Assuming that legislation's success lies in its universality and application in life, the 1932 Penal Code was quite a success. In its verdicts, the Polish judiciary kept the line of the Code. Another thing worth mentioning is that the legal solutions to the issue of the insane offender have not changed much. The main ideas standing behind the insane offender institution are still in use, just as the mixed method of pronouncing insanity. What was supposed to be a temporary, compromise solution until a better one, relying solely on the psychological method, was invented is still present ninety years after the promulgation of the Code. It might be quite symptomatic to follow Makarewicz's words that "criminal law is, as if a photograph of the political system and social relations prevailing in a given society at a given moment. It is simply an exact cinematographic film reflecting reality…"[127]

Bibliographical references

Ciepły, F., "Środki zabezpieczające według koncepcji J. Makarewicza", *Prawo karne w poglądach Profesora Juliusza Makarewicza*, (A. Grześkowiak, ed.), Lublin 2005.

Czerwiński, S., "Ustawodawstwo w walce z przestępczością na tle alkoholizmu", *Głos Sądownictwa: miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym*, 1938, nr 7-8.

Fierich, F., "Rzut oka na najważniejsze zadania prac kodyfikacyjnych", *Kwartalnik Prawa Cywilnego i Karnego*, 1919, nr 2.

Gałędek, M.,

- "Remarks on the methodology of comparative legal research in the context of the history of law in Poland", *Acta Universitatis Lodziensis*, 2022, nr 99.
- "The beginning of the debate on the codification of Polish law after the World War I: The issue of the Codification Commission autonomy in the light of political declarations", *Studia Iuridica LXXX*.

Grześkowiak, A., "Słowo wstępne", *Prawo karne w poglądach profesora Juliusza Makarewicza*, (A. Grześkowiak, ed.), Lublin 2005.

Janicka, D.,

- *Nauka o winie i karze w dziejach klasycznej szkoły prawa karnego w Niemczech w I połowie XIX wieku*, Toruń 1998.
- "Rozkwit doktryny prawa karnego w Polsce w dwudziestoleciu międzywojennym - ośrodek, uczeni, idee", *Studia z dziejów Państwa i Prawa Polskiego*, 2019, nr XXII.
- *Spór o teorie winy i kary w dobie klasycznej szkoły prawa karnego na ziemiach polskich i niemieckich w XIX wieku*, Polska Akademia Umiejętności, 2000.

Koredczuk, J.,

[127] Makarewicz, J., *Prawo karne i prawa obywatela*, 1936, p. 112.

- *Wpływ nurtu socjologicznego na kształt polskiego prawa karnego procesowego w okresie międzywojennym (Les classiques modernes)*, Wrocław 2007.
- "Znaczenie kodeksu karnego z 1932 r. dla rozwoju nauki i prawa karnego w Polsce w XX wieku", *Zeszyty Prawnicze*, UKSW, 11.2, 2011.

Kozielewicz, W., "Pojęcie niepoczytalności w doktrynie prawa karnego i orzecznictwie Sądu Najwyższego", *Palestra*, 2007, nr 1-2.

Kuźmicz, K., *I. Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918-1950*, Białystok 2009.

Krzymuski, E., *System prawa karnego: ze stanowiska nauki i trzech kodeksów, obowiązujących w Polsce. I. Część ogólna*, Kraków 1921.

Łazarewicz, C., *Koronkowa robota. Sprawa Gorgonowej*, Wołowiec 2018.

Makarewicz, J.,
- "Klasycyzm i pozytywizm w nauce prawa karnego", *Przegląd Prawa i Administracji*, 1896, t. 21, z. 8-9.
- "Z Komisji Kodyfikacyjnej", *Przegląd Prawa i Administracji*, LXVI, 1921.
- "Lex Krzymuski", *Przegląd Prawa i Administracji*, LXVII, 1922.
- *Kodeks karny z komentarzem*, Lwów 1932.
- Prawo karne i prawa obywatela, Odczyt wygłoszony dnia 20 stycznia 1936 w Auli Uniwersytetu J. K. we Lwowie w czasie Akademji w związku z 275-tą rocznicę założenia Uniwersytetu J. K", R*uch Prawniczy, Ekonomiczny i Socjologiczny*, 1936, nr 1.*Kodeks Karny z komentarzem*, Lwów 1938, (Grześkowiak A., Wiak K., eds.), Lublin 2012.

Makowski, W.,
- *Kodeks karny 1932: komentarz 1, część ogólna*, Warszawa 1932.
- *Nowy kodeks karny norweski, przekład części ogólnej, przegląd postanowień szczegółowych i uwagi,* Warszawa 1916.
- "Środki ochronne wobec recydywistów i przestępców anormalnych", *Przegląd Prawa i Administracji*, 1911.
- "Kara, a środki ochronne", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1926, nr 2.

Mogilnicki, A., Rappaport, E., "Projekt kodeksu karnego dla ziem polskich", *Gazeta Sądowa Warszawska*, 1916, nr 16.

"Projekt Kodeksu Karnego, w redakcji przyjętej w drugim czytaniu przez Sekcję Prawa karnego Komisji Kodyfikacyjnej R.P. Uzasadnienie części ogólnej", *Komisja Kodyfikacyjna RP, Dział Ogólny*, tom V zeszyt 3, Warszawa 1930.

Protokół XXIV posiedzenia Sekcji prawa Karnego Materialnego Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej odbytego dnia 10.05.1921 r.

Radzinowicz, L., "Uwagi o zakładzie zabezpieczający, dla niepoprawnych przestępców", *Gazeta Sądowa Warszawska*, 1937, nr 19.

Rappaport, E., "Zagadnienia kodyfikacji prawa karnego w Polsce", *Kwartalnik Prawa Cywilnego i Karnego*, 1920, R. 3.

Sumorok, L., "W obliczu germanizacji polskiej myśli prawniczej", *Głos Sądownictwa*, 1938, nr 1.

Szwajcarski kodeks karny z dnia 21 grdunia 1937 r. według stanu prawnego na dzień 1 grudnia 1959 r, tłumacze O. Chybiński, W. Gutekunst, (Świda, W., ed.), Warszawa 1960.

Użarowska, M., "Sprawa Gorgonowej. Czy była winna?", *Rzeczpospolita* 23.06.2019, https://www.rp.pl/historia/art9303081-sprawa-gorgonowej-czy-byla-winna, dostęp dnia 22.08.2022.

Wachholz, L.,
- "Alkoholizm a przestępstwo", Kraków 1927, *Rozważania o przyczynach zbrodni, (*L. Wachholz, ed.*) w wyborze i z przedmową J. Widackiego*, Kraków 2008.
- *Psychopatologia sądowa na podstawie ustaw obowiązujących w Rzeczypospolitej Polskiej*, Kraków 1923.

Wąsowicz, M, *Nurt socjologiczny polskiej myśli prawnokarnej*, Warszawa 1989.

Widacki, J., *Leon Wachholz jako kryminolog* [w:] L. Wachholz, *Rozważania o przyczynach zbrodni, w wyborze i z przedmową J. Widackiego*, Kraków 2008.

Zalewski, W.,

- *"*Niepoczytalność, poczytalność zmniejszona – garść wątpliwości, co do konstrukcji instytucji w kontekście najnowszych rozwiązań wobec „niepoprawnych" przestępców*"*, *Gdańskie Studia Prawnicze*, t. XXXIII, 2015,
- *Przestępca „niepoprawny" – jako problem polityki kryminalnej*, Gdańsk 2010.

Wyrok Orz. Z 27.01.1933, zb. Nr 61/33, Makarewicz J., *Kodeks karny z komentarzem*, Lwów 1938, (Grześkowiak, A., Wiak, K., eds.), Lublin 2012.

Wyrok I K 932/34, lex nr 1638356.

Wyrok III K 2936/37, OSN(K) 1939/6/150, lex nr 75443.

Wyrok I K 932/34, lex nr 1638356.

Wyrok Sądu Najwyższego z dnia 7 listopada 1938, III K 2936/37, OSN(K) 1939/6/150.

Wyrok Sądu Najwyższego z dnia 12 października 1938 r., II K 2752/37, OSN(K) 1939/5/123.

Wyrok, orz. Z 17.07.1933 zb. Nr 182/33; zb. Nr 103/3

Zbiór orzeczeń Sądu Najwyższego. Orzeczenia Izby Karnej. Rok 1933, z. V, poz. 102.

https://www.edukacjaprawnicza.pl/sprawa-gorgonowej/, dostęp dnia 31.10.2022.