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DOUBLE-TRACK SYSTEM IN POLISH CRIMINAL LAW. POLITICAL AND CRIMINAL ASSUMPTIONS, HISTORY, CONTEMPORARY REFERENCES

Abstract

The authors of the penal code of 1932 modelled their reaction measures on the best contemporary standards. The system of criminal response was based on a double-track model, in German called *zwei Spuren*, in Italian – *doppio binario*, in which, along with penalties, there were also preventive measures. This system grew out of certain political and criminal assumptions of the sociological school, expressed most fully in the works of Franz von Liszt. Return in contemporary law, to the wide use of preventive measures, post and pre-penal, forces us to return to the sources and to critically examine the assumptions of the indicated approach, including the idea of an incorrigible criminal who should be isolated, not in relation to what he did, but because of who he is. Tracing the history of regulations, in particular their practical application should be a lesson for modern lawmakers.

Keywords: prison, double-track system, detention, therapy, resocialization

I

INTRODUCTORY REMARKS

The title of this *Acta Poloniae Historica* volume: ‘The history of prison regimes in the Polish territory in the nineteenth and twentieth centuries’, obviously refers to the fundamental for the history of the prison system Jeremiah Bentham’s idea of Panopticon,¹ presented in his twenty letters from Russia in 1787. Bentham’s work was groundbreaking and analysed many times. It was a work which suited its time – the Age of Enlightenment – and thus a broad, visionary study, cut off from the narrow perception of the prison space known so far.

¹ Cf. Jeremy Bentham, *Panopticon; or, The Inspection-House* (London, Mews-Gate, 1787), next quotes from the edition of Dodo Press from 2008.

On the other hand, as Janet Simple² correctly notes, the Bentham's Panopticon is a project full of contradictions and ambiguities. The prison, which is located in the centre of the philosophical work of the scholar, directed by the Overseer, was presented in the literature as both a ruthless capitalist enterprise and the symbol of a utilitarian state. In the most general sense, Panopticon seems to foretell a gloomy future, especially twentieth-century totalitarianism.

Both the idea and main goals of panopticism were perfectly presented by Michel Foucault. It was a matter of arousing in the inmates a conscious and lasting conviction about their visibility, after all *panopticon* means to see everything,³ a conviction that guarantees automatic functioning of authority. The Bentham's project is generally presented in the shape of a ring, with a tower in its centre, and with wide windows overlooking the inner facade of the ring. The circular building is divided into prison cells. From the tower there is a free view of each of the cells. Inmates do not know whether they are being watched or eavesdropped. In his original design, Bentham proposed a pipe system with which the acoustic supervision of the target could be carried out. The authority is to be visible and unverifiable. Visible, because from each cell you can see the tower from which you are spied. Unverifiable, because a prisoner will never know whether he is currently being watched.⁴

Bentham was negotiating with the British government for a long time to build his ideal prison. Until the age of 64 he had an ambitious plan to become an administrator himself and to introduce his own ideas about penal policy and office management. He wanted to use his 'genius for legislation' for the daily functioning of the institution and play an important role in criminal reform not as a philosopher but as an apprentice. He did not live up to an implementation of his plans. Nevertheless, the prisons based on the Bentham's plan actually came into being. The Presidio Modelo prison in Cuba built in 1926–8 is considered the closest to original. But there are others: Autun prison in France, Dutch prisons Breda and Arnhem of 1884,

² Cf. Janet Simple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Oxford, 1993), 1 ff.

³ Greek: *pan* = all; *optikos* = see. The name may also refer to the mythological giant Panoptes, who had many eyes.

⁴ Cf. Michel Foucault, *Discipline and Punish: the Birth of the Prison* (New York, 1977).

as well as Haarlem of 1901, and e.g. Stateville Penitentiary of 1919, established in Illinois, US.

It is commonly accepted that Bentham's idea inspired the Quakers, who created a separate system of seclusion, and thus the foundation of modern penitentiaryism. One, however, is theory, and another is prison practice, rarely approaching the model pattern. The history of prison is a history of struggle for the rights of convicts. A classic panopticon understood as a prison in Poland was not created. However, attempts at maximum control of the detainees in the Polish lands, of course, were made; fortunately, with variable success, and ultimately unsuccessfully. It seems that panopticism, understood as permanent control of prisoners, can be found most fully in the double-track system introduced in Poland in the twentieth century. The idea of continuing the control of a convict after serving a sentence is part of the idea of making him 'seen' and supervised by the authorities. Ex-convict was and is also supervised today after leaving the prison by means of preventive measures differing from the penalties (at least in assumption). Nowadays, the Bentham's Supervisor returns, like the Orwellian 'Big Brother', in many forms, e.g. in the electronic surveillance system, registers of convicted persons' personal data from which they are never removed and are available via the Internet, in the monitoring of streets, squares, buildings, in crime prevention through spatial management, therapeutic detention, etc.

This work focuses on a double-track system, because it has the longest history and the future is drawn in front of it, because the history of criminal law seems to circle again, or as others say, 'the pendulum is back'.⁵

II

AT THE SOURCE OF THE MODERN PRISON SYSTEM. AMSTERDAM IMPROVEMENT HOUSE (1596)

It is widely known that the history of a prison dates back to the sixteenth century, when it became a basic punishment in the arsenal of the fight against crime. Previously, it was only a side penalty (*Nebenstrafe*),

⁵ On the unbearable repetition of criminal policy in the historical perspective, see Philip Goodman, Joshua Page, and Michelle Phelps, *Breaking the Pendulum. The Long Struggle Over Criminal Justice* (Oxford, 2017).

or a preventive measure precluding escape from a proper execution. The prison was perceived as too weak, too mild, to be a vengeance. It was necessary to change the awareness of societies, change the understanding of the punishment, which had to stop, in the general sense, to be a manifestation of violent retaliation, to take on a wider goal that the prison could become a separate punishment.⁶

The change took place in the Netherlands, in the Hanseatic Amsterdam, a city rich enough to witness positive changes. The Netherlands at the time were distinguished by dynamic industrial development. It wielded *das wirtschaftliche Primat*, which required social peace and control of pathology, especially the vagrancy plague.⁷ In addition, the prisoners were a reservoir of manpower, worthy of being used as means of production. The decision was made on 19 July 1589 by city councillors, who were taken over by the plight of adolescent perpetrators who were threatened with severe corporal punishment and even death. The case of Evert Jans turned out to be a breakthrough, as a result of which a request was made to establish an institution, an improvement house, in which bums, beggars, juvenile delinquents could be disciplined, through work, but also human living conditions.⁸ The opening of the house, separately for men and separately for women, took place in 1596.

The Amsterdam idea quickly spread to continental Europe, mainly of course in coastal, rich Hanseatic cities. In the Polish-Lithuanian Commonwealth there were – reminiscent of the Amsterdam facilities – houses of improvement in Gdańsk (1629)⁹ and Toruń (1629), as well as an improvement house organized in 1733 in Warsaw. Gdańsk Zuchthaus was founded during the so-called first wave of the construction of modern prisons in Bremen, Hamburg and Lübeck. Later

⁶ Cf. Leon Rabinowicz, *Podstawy nauki o więziennictwie* (Warszawa, 1933), 2 ff.

⁷ *Ibidem*, 7 ff.

⁸ For more, cf. Pieter Spierenburg, *The Prison Experience: Disciplinary Institutions and Their Inmates in Early Modern Europe* (Amsterdam, 2007), 41 ff. Jans did not live to see the house of improvement. For his actions (thefts) he was finally punished in the old way – the penalty of flogging and 6 years of hard work.

⁹ It must be pointed out that the Gdańsk City Council, an economic centre dynamically developing at that time, supported the proposal – craftsmen and traders, five years earlier, on February 15, 1624, it issued an ordinance on raising funds for the construction of the House of Improvement in Gdańsk, amounting to 1,000 marks a year, for more, see Dariusz Kaczor, 'Dom poprawy (Zuchthaus) w Gdańsku w XVII-XVIII w.', *Rocznik Gdański*, lvi (1996), 43–63.

in the Polish capital, quite modern, for those times, a penitentiary institution called 'the Marshal's Prison' (1767) was organized.¹⁰ All these establishments were to a greater or lesser extent duplicating foreign patterns. What was even worse, they also repeated their defects, which unfortunately prevailed. For example, the Gdańsk improvement house – Zuchthaus has never performed full corrective functions. It was a textile manufactory for a long time. The work was not particularly difficult, almost anyone could master it. Nevertheless, it is estimated that in the seventeenth century, for almost half (48 per cent) of prisoners forced labour was primarily a corporal punishment without educational ambitions.¹¹

III AMERICAN PENITENTIARY EXPERIMENTS AND THEIR IMPLICATIONS IN THE POLISH LANDS (NINETEENTH CENTURY)

After the partitions, in the following century, the inspiration for Polish reformers and writers dealing with prison problems were American and British solutions. Often quoted in the works of Polish authors of this time, of course, was Englishman John Howard, but also William Blackstone and Jeremy Bentham.¹² It was not, however, the English 'great men', as Aleksander Moldenhawer called them, who set the tone for the reforming epoch of the nineteenth century, but the Americans, especially the creators of prisons in Pennsylvania and New York.

From the beginning, the American penitentiary treatment was distinguished by a kind of propaganda of success, and the creators of the system tried to, as Gordon Crews and Wayne Gillespie put it: "overcome facts with words". 'The words for the facts' were recognized especially by the French, including Alexandre Frederic La Rochefoucauld-Liancourt, who after returning to Europe became a follower of the Pennsylvania model, followed by subsequent European reformers. Meanwhile, it should be remembered that the model –

¹⁰ Cf. Józef Rafacz, *Więzienie marszałkowskie w latach 1767–1795* (Lwów, 1932).

¹¹ Cf. Dariusz Kaczor, *Przestępczość kryminalna i wymiar sprawiedliwości w Gdańsku w XVI-XVIII wieku* (Gdańsk, 2005), 341 ff.

¹² Cf. Aleksander Kożuchowski, *O więzieniach zagranicznych* (Warszawa, 1825), 13 ff.; Aleksander Moldenhawer, *O przeprowadzeniu odosobnienia w zakładach więziennych*, vol. 1 (Warszawa, 1866), 59 ff.

Walnut Street Jail – was the only state prison in all of Pennsylvania, and there were not only convicts, but also bums, debtors and detainees waiting for the trial not only in Philadelphia but also in the surrounding counties. In this state of affairs, it is not surprising that the prison was permanently overcrowded and the conditions so bad that in 1803 the Philadelphia Society for Alleviating the Miseries of Public Prisons asked the authorities to build more facilities.¹³

New York prisons initially imitated the Pennsylvania ones. Such was Newgate built in 1797, and then, at least initially, the facility in Auburn. However, the latter quickly took on a different shape. The system adopted there was called the congregate system because the prisoners were not alone in their cells, which was clearly cut off from the Bentham roots. Initially, the convicts were assumed to improve, but there was no evidence for it. There were also differences in the philosophical and religious approach. The Pennsylvania Quakers believed in ‘inner light’ in every person, in the fact that everyone is good inside. New Yorkers presented the Calvinist attitude of original sin and human depravity, as well as the concept of predestination. It soon turned out that in Auburn it is not about ‘improvement’, but about discipline and order, as well as hard work in silence, which goals were determined by economic efficiency.¹⁴

At the beginning of the nineteenth century the dispute between these two approaches was vividly reported in Poland. When talking about the overseas Pennsylvania model, Julian Ursyn Niemcewicz wrote enthusiastically in 1818:¹⁵ “Knowing the innate vivacity of our people, it can be clear that if in America Prison Cells of Solitude are capable of restraining restless, unruly, brash people, an unequivocally stronger influence would it have on the minds of the people, so disliking being apart, so sociable as our people are”. Similarly, other authors approached the matter.¹⁶ Fryderyk Skarbek had an outstanding

¹³ Cf. Gordon Crews and Wayne Gillespie, ‘A Brief History of Corrections in America’, in Stephen Stanko, Wayne Gillespie and Gordon Crews (eds.), *Living in Prison: A History of the Correctional System with an Insider’s View* (Westport, Connecticut and London, 2004), 44–6.

¹⁴ *Ibidem*.

¹⁵ Julian Ursyn Niemcewicz, *O więzieniach publicznych, czyli domach pokuty, rzecz krótka, powst. 1816, wyd.* (Warszawa, 1818).

¹⁶ Cf. Fryderyk Skarbek, ‘O poprawie moralnej winowajców w więzieniach’, in *Pamiętnik warszawski, wydawany przez Kaz. Brodzińskiego, Fr. Hr. Skarbka, J. K. Skrodz-*

contribution to the propagation of the Pennsylvania model. He perceived prison problems on a wide social background. Thanks to the positions he held,¹⁷ he was able to convert the theory into action. He saw the causes of crime in the social system, including poverty.¹⁸

There were, however, voices against the Pennsylvania system.¹⁹ Xawery Potocki wrote skeptically in his *Uwagi* [Notes] that “A separate closure distances people from destruction among others, draws them to reflect on themselves and induce grief, and hence the desire to improve. But if it lasts for a long time, it loses its salutary effect and pushes the lonely person into insensitivity, despair or confusion”.²⁰ Mirosław Henryk Nakwaski²¹ was the staunchest opponent of loneliness, rejecting both American models in a series of magazines and supporting the wide acceptance of agricultural colonies. In this idea, he was not original, he creatively developed the concept, created in Berlin at the Kopff Institute.²² The advocate of the slow progression system, rather than of separate and control system, was Count Adam Zamoyski, who strongly agreed with the Irish model.²³ Zamoyski especially liked the idea of an indirect prison.

Modern prison system in Poland began to develop with the beginning of the nineteenth century. Four initial documents are often

kiego z Towarzystwa Król. Przyjaciół Nauk, ii (1822), 170–99; cf. Kozuchowski, *O więzieniach*, 270 ff.; Aleksander Moldenhawer, *O przeprowadzeniu odosobnienia w zakładach więziennych* (Warszawa, 1866), 59 ff.

¹⁷ Fryderyk Florian Skarbek held numerous functions and held many prominent positions, including a member of the Congressional Kingdom Council, senator, Head of the President in the Government Commission of Justice in 1856, member of the Administrative Council of the Congress Kingdom, legal secretary and others. For more, cf. Jerzy Wojtowicz, *Fryderyk Florian Skarbek: uczoney, pisarz, patriota* (Toruń, 1980).

¹⁸ For more: Jan Haytler, *Fryderyk hr. Skarbek jako penitencjarysta, 1792–1866* (offprint: Warszawa, 1935).

¹⁹ Cf. Xawery Potocki, *Uwagi do projektu ogólnego i szczególnego polepszenia stanu i administracji więzień w Królestwie Polskim* (Warszawa, 1819).

²⁰ Cf. Potocki, *Uwagi do projektu*, 24.

²¹ Cf. Mirosław Henryk Nakwaski, *Etudes sur les divers systèmes pénitentiaires et projet d'un Congrès International en Suisse dans le but de traiter cette question* (Genève, 1860), a contemporary edition in 2010. More about the views of this author: Jan Haytler, ‘Mirosław Henryk Nakwaski jako penitencjarysta (1800–1976)’, *Przegląd Więziennictwa Polskiego*, 2 (1937), 246 ff.

²² Haytler, *Mirosław Henryk Nakwaski jako penitencjarysta*.

²³ Cf. Adam hr. Zamoyski, *System Więzień Poprawczych Irlandzkich* (Lwów, 1870).

indicated: The draft of the prison ordinance of the Grand Duchy of Warsaw (arranging national prisons),²⁴ Penal Code for the Kingdom of Poland of 1818,²⁵ The Project of General and Special Improvement of the Condition and Administration of Prisons in the Kingdom of Poland of 1819,²⁶ and the Prison Instructions of 17 September 1823.²⁷ It has long been aptly pointed out in the legal-historical literature that although there is extensive literature discussing the next nineteenth-century codifications, organization of judiciary and prisons in Polish territories, its use is sometimes confusing, as the authors focus on discussing the main provisions and draft laws, less frequently on practice. So it is not always clear which of the provisions remained a dead letter and which came into effect,²⁸ and so how did the prisons function in reality.

Before the regaining of independence by Poland, various regulations of partitioning powers were in force. Russian Code of 1845, as the Code of Main and Correctional Penalties, from 1848, in some parts, valid until the end of the partitions, in a substantial part, it was replaced in 1917 by the Tagancev Code of 1903, Austrian Code of 1852, and the German Code of 1871.²⁹ The implementing rules were mainly based on the so-called 'separate model', i.e. solitary confinement.

²⁴ Jerzy Śliwowski, 'Urządzenie więzień krajowych', *Przegląd Więziennictwa*, 2–9 (1959).

²⁵ Cf. Jerzy Śliwowski, *Kodeks Karzący Królestwa Polskiego (1818 r.). Historia jego powstania i próba krytycznej analizy* (Warszawa, 1958).

²⁶ Cf. Xawery Potocki, *Projekt ogólnego i szczególnego ulepszenia stanu i administracji więzień w Królestwie Polskim* (Warszawa, 1819).

²⁷ The manual was issued by the Interior Minister Tadeusz Mostowski, more about this period: Jerzy Górny, *Elementy indywidualizacji i humanizacji karnania w rozwoju penitencjarystyki* (Warszawa, 1996), 88.

²⁸ See Władysław Sobciński, 'Ze studiów nad historią prawa karnego (uwagi historyczno-prawne w związku z książką Jerzego Śliwowskiego, *Kodeks Karzący...*)', *Czasopismo Prawo-Historyczne*, 2 (1959), 201 ff., also Elżbieta Kaczorowska, *Człowiek przed sądem. Społeczne aspekty przestępczości w Królestwie Polskim (1815–1914)* (Warszawa, 1994), 95 ff.

²⁹ Summary and discussion of all the regulations in force in Poland after 1918, the reader will find, for example, Władysław Makowski, *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej na ziemiach b. zaboru rosyjskiego z dodaniem: przepisów przechodnich i ustaw zmieniających i uzupełniających postanowienia kodeksu, odpowiednich przepisów Kodeksu Karnego Niemieckiego i Ustawy Karnej Austriackiej obowiązujących w pozostałych dzielnicach Rzplitej oraz Komentarz i orzeczeń Sądu Najwyższego*, i–iii (Warszawa, 1921).

For example, § 37 of the German Prison Ordinance of 1898 stipulated that the imprisonment can be carried out for the whole duration as well as for part of the time of punishment in the separate closure. The stay in prison began with separation and was recommended.³⁰

IV

A DOUBLE-TRACK SYSTEM IN GERMAN CRIMINAL LAW. ORIGIN AND EVOLUTION (NINETEENTH/TWENTIETH CENTURY)

As for the double-track system announced in the title, it arrived late in Poland. Polish prison system, as formed after 1918, came mainly from Germany. This is where the so-called sociological school was born.³¹ As it is well known, the German Penal Code of 1871 was originally based on classical assemblies. The end of the nineteenth century, and then the beginning of the twentieth century, brought proposals for increasingly radical changes that were implemented only after the Nazis came to power in 1933, in the form of a penal code amendment.³² It is worth, at least briefly, to trace this evolution.

The starting point for changes in German law were the views of Cesare Lombroso and the Italian positive school of criminology. Hans Kurella,³³ Lombroso's student, wrote about the importance of *scuola positiva* for German learning. However, one can not underestimate the influence of Lombroso on the views of Franz von Liszt, who emphasized: "the principle that a criminal, not an abstract idea of crime should be punished, was not an original idea of the Italian school, but it was the Italians who reminded us what Kant, Hegel, Fichte, Herbart, Schopenhauer and Hartmann made us forget, about the fundamental goal of penal sciences. The Italians took us out of the metaphysical dream and from the embrace of our paralysing

³⁰ Cf. Ludwik Langer, *Ordynacja więzienna oraz dodatkowe rozporządzenia* (Warszawa and Poznań, 1922), 15 ff.

³¹ For more: Marek Wąsowicz, *Nurt socjologiczny w polskiej myśli prawnokarnej* (Warszawa, 1989), from foreign literature, see Richard F. Wetzell, *Inventing the Criminal. A History of German Criminology, 1880–1945* (Chapel Hill, London, 2000).

³² *Die Gewohnheitsverbrechergesetz* adopted on November 24, 1933.

³³ Cf. Hans Kurella, *Cesare Lombroso und die Naturgeschichte des Verbrechers* (Hamburg, 1892).

theoretical jurisprudence; the awakening was unpleasant and too loud, but it gave a lasting effect".³⁴

The discussion in German science was livened up by representatives of the doctrine from other countries within the Germanic circle. For example, Professor Carl Stooss, a co-founder of the Swiss Criminal Code of 1937, pointed to the necessity of multi-directional impact by means of criminal law on various categories of perpetrators.³⁵ Stooss, from the beginning of his academic and legislative activity, attached great importance to what he called 'crime veterans' (*die Veteranen des Verbrechens*), which should be eliminated from society, and in the process of execution of the punishment, isolated from other categories of prisoners.³⁶ The Swiss project of the unified penal code of 1908, influenced by Stooss, met with favourable response in the academia. The boldness of penalties, in particular for repeatedly punished offenders, was emphasized. A group of perpetrators showing a tendency to crime, debauchery (*Liederlichkeit*) or work disgust, could, according to the project, be sentenced by the court for the last offense not for imprisonment, but for isolation in a security facility serving only for this purpose. Juliusz Makarewicz emphasized that "it is in this approach ... the security is not to contain punishment, but instead goes to the place of punishment".³⁷ The Swiss project also offered the possibility of keeping the recidivist on the raw punishment (Article 55).

In Germany, Franz von Liszt had a clear view on 'incorrigible' criminals. He stated that "trying to improve them in expensive prisons it is just plain nonsense, to let them free after some time, like wild animals, so that after three or four new crimes, they would be again imprisoned and again 'corrected', this is more than nonsense".³⁸ In another place, Liszt wrote that "In general, the starting point for further

³⁴ Franz von Liszt, *Strafrechtliche Aufsätze und Vorträge* (Berlin, 1889), 307.

³⁵ As Leon Radzinowicz wrote about it: "If Italy is honored to be the first to give criminal law a new orientation – Switzerland has the glory of the first practical application of the new rules. I am referring to the criminal law project of Carl Stooss", Leon Rabinowicz, *Kryzys i przyszłość prawa karnego* (Kraków, 1929), 17.

³⁶ Carl Stooss, 'Welche Anforderungen stellt die Kriminalpolitik an ein eidgenössisches Strafgesetzbuch?', *Zeitschrift für Schweizer Strafrecht* (hereinafter ZStrR), 4 (1891), 245–67.

³⁷ Juliusz Makarewicz, 'Nowe zjawiska w karnym ustawodawstwie', in *Z księgi pamiątkowej ku czci Bolesława Orzechowicza* (Lwów, 1916), 47–8.

³⁸ Franz von Liszt, 'Der Zweckgedanke im Strafrechte', *Zeitschrift für die gesammte Strafrechtswissenschaft*, 3 (1883), 38.

consideration could be the following division: 1) correction (*Besserung*) of perpetrators who can be corrected and who need the correction, 2) deterrence (*Abschreckung*) of criminals who do not need correction, 3) neutralization (*Unschädlichmachung*) of criminals who cannot be corrected”.³⁹ Liszt’s thought can be expressed briefly: neutralization of the incorrigible, improvement for those who can be corrected.

The creator of the German *moderne Schule* F. von Liszt did not attach great importance to the designation of a strict border separating the preventive measures from punishment. Albin Eser indicates that it was not until 1911 when Liszt considered this problem more thoroughly, in the 18th edition of his textbook.⁴⁰ However, his conclusions did not indicate a categorical contrast between the measure (*Maßregel*) and the punishment (*Strafe*). Conversely, he pointed out that “Wenn eine sichernde Maßnahme eine strafbare Handlung geknüpft sei, nehme sie das Wesen der Strafe in sich auf”. So he recognized that if a precautionary measure is associated with a specific act, it absorbs a kind of punishment, literally: “it takes the essence of punishment in itself”.⁴¹ According to Liszt, the relation between the means and the punishment can be presented on the diagram in the form of two intersecting circles. Liszt demanded a stronger consideration of the ‘internal way of thinking’ (*inneren Gesinnung*) of the perpetrator in relation to the outcome of the act, but not the motives of the act (*die Tatmotive*), but the ‘anti-social’ (*antisoziale*) way of thinking, about the perpetrator’s character (*Charakterzug des Täters*) which appears in the act. Hence, the postulate to adjust the criminal law to the perpetrator (*Täterstrafrecht*), instead of the act (*Tatstrafrecht*). For this reason, Liszt criticized the original regulation of the recidivism of the German Penal Code of 1871, which did not give the opportunity to deal more harshly with the non-promising correction perpetrators of the first crime. As summarized by Albin Eser: “ein (unverbesserlicher) Ersttäter davon nicht erfaßt werden könne”.⁴²

It was representatives of the German classical school who advocated a strict separation of penalties from preventive measures, as

³⁹ Franz von Liszt, ‘Der Zweckgedanke im Strafrecht (1882)’, in *Strafrechtliche Vorträge und Aufsätze* (Berlin, 1970), 173.

⁴⁰ Franz von Liszt, *Lehrbuch des deutschen Strafrechts* (1911¹⁸), 251 ff.

⁴¹ Albin Eser, ‘Zur Entwicklung von Maßregeln der Besserung und Sicherung als zweite Spur im Strafrecht’, in Guido Britz (ed.), *Grundfragen staatlichen Strafens: Festschrift für Heinz Müller-Dietz zum 70. Geburtstag* (München, 2001), 213–36.

⁴² *Ibidem*, 222.

evident in the work on the proposed reform of German criminal law of 1909, which was the result of the joint work of representatives of opposing schools. The project was considered a successful compromise (*gelungener Kompromiß*). The classics saw danger, in particular, in blurring the limits of punishment and the measure. They spoke in favour of a clear delimitation of the competence of the judge and the administrative authority, and at the same time, they believed the judges should not be entrusted to impose preventive measures. Their objective was to maintain the purity of criminal law and punishment (*Reinhaltung des Strafrechts und der Strafe*).⁴³ Karl Binding was particularly skeptical about the sociological school. He stated that the ideas of its creators cannot be consistently carried out. Binding opposed identifying the role of the punishment with that of a preventive measure. He acknowledged the existence of chronic offenders (*Gewohnheitsverbrechern*), but he believed that instead of preventive measures, stricter punishments should be applied. The lack of punishment could be read as allowing for the evil. Binding, by hook or by crook, referred to supporters of the sociological school as “dilettantes” and “legal dissenters”.⁴⁴ Later, the burden of fighting with Liszt was taken over by Karl Birmeyer, who “replaced the former leader, the Leipzig ‘veteran’ – Binding” – as Emil Stanisław Rappaport wrote.⁴⁵

V

THE POLISH MODEL OF THE DOUBLE-TRACK SYSTEM (1932–9). INSPIRATIONS, SOLUTIONS, INSTITUTIONS AND CRITICISM (WITOLD ŚWIDA, STANISŁAW BATAWIA)

Echoes of German disputes were heard in Poland.⁴⁶

The penal code as formulated by the Codification Commission under the leadership of Juliusz Makarewicz contained, to a large

⁴³ *Ibidem*, 224.

⁴⁴ Karl Binding, *Grundriss des deutschen Strafrechts. Allgemeiner Teil* (Leipzig, 1907), I ff., he spoke about them: ‘Dilettanten und juristische Apostaten’.

⁴⁵ Cf. Emil St. Rappaport, *Walka o reformę prawa karnego w Niemczech* (Warszawa, 1909), 10 ff.

⁴⁶ See Danuta Janicka, *Spór o teorię kary w dobie klasycznej szkoły prawa karnego na ziemiach polskich i niemieckich w XIX wieku*, *Prace Komisji Historii Nauki Polskiej Akademii Umiejętności*, ii (2000), 107–26.

extent, the replication of some foreign solutions in the field of isolation punishment. For example, there are visible parallels with the Swiss Penal code of 1937. The rationale justifies directly the reasoning of the Commission. Some patterns were rejected, and others were adopted. Ultimately, the draft code, which became law in 1932 “modelled on the Norwegian and Dutch code, introduced one type of prison”.⁴⁷

The unification of Polish prison system was accomplished by a number of normative acts, including: the Decree of the Chief of State of 8 February 1919, the regulations of the Minister of Justice of 25 September 1922 and 17 April 1925. The Commission for the organization of penitentiaries prepared the draft acts of law. However, the Commission did not create anything new, in particular the ‘Polish prison model’ was not established. The Commission simply chose the best solution for this time – a progressive system. In the Regulation of the Minister of Justice of 20 June 1931 regarding the prison regulations,⁴⁸ finally adopted a diversified interaction model based on the classification of convicts.

As in the past, they sought inspiration in the American solutions. The penitentiary commission was fascinated with the model of relatively unspecified judgments created by Zabulon Brokway in Elmir.⁴⁹ The new American system was considered the ultimate achievement of penitentiary thought.⁵⁰ In Poland, however, there was no determination to introduce this new model.

On the other hand, post-penal preventive measures were introduced (Article 84 of the Penal Code of 1932), referring to the legal line that was established at that time in the world. In the introduction to the penal code of 1932, it was pointed out that: “The modern penalty of deprivation of liberty, performed in terms of the offender’s improvement, turned out to be a very weak means of fighting crime.

⁴⁷ Cf. ‘Uzasadnienie części ogólnej’, in *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja Prawa Karnego*, v, 3 (Warszawa, 1930), 55.

⁴⁸ *Journal of Laws of the Republic of Poland* (Dziennik Ustaw Rzeczypospolitej Polskiej, hereinafter: Dz.U.), 71 (1931), item 577.

⁴⁹ Cf. more Wojciech Zalewski, *Przestępca ‘niepoprawny’ – jako problem polityki kryminalnej* (Gdańsk, 2010), and the literature discussed there.

⁵⁰ See Zygmunt Bugajski, ‘Wyroki nieokreślone i rola administracji więziennej przy ich stosowaniu’, in Zygmunt Bugajski and Edward Neymark (eds.), *Aktualne zagadnienia i projekty reformy więziennictwa* (Warszawa, 1925), 203.

Directors of prisons in rare cases indulge in the hope of correcting the offender to the extent of speaking about securing society by means of punishment before his return to crime. ... If we make a balance of penal measures which modern society operates, then we will come to the conclusion that these are not at all means of securing society against crime. ... The so-called preventive measures owe their origin to these considerations ...".⁵¹ It is clear what the creators of the Polish Criminal Code were guided by and how critically they diagnosed the state of penal and criminal policies.

Indeed, at the turn of the twentieth century, a number of regulations were adopted in Europe and in the world, against criminals 'by birth', incorrigible, considered immanently dangerous. An example of Italian *delinquente nato*, German *Gewonheitverbrecher*, English *habitual criminal*, French *criminel habituel*. To this day, the Italian *delinquente nato* seems to be the most widely used, in a coherent *doppio binario* model.⁵² Details of the historical evolution of preventive measures have been discussed elsewhere,⁵³ however, several previous arrangements should be presented.

The Courts in Europe and America have rarely used excessive in their opinion regulations against incorrigible offenders. This was the case in Europe, e.g. in Norway in the Bernhard Getz Code of 1902, or in the USA, for example, the famous *Baume's Law* of 1924, which ended with the power of *desuetude*.

In Poland, the regulations were in use for too short a time to allow for clear conclusions. Polish courts applied provisions on post-penal preventive measures, in particular Article 84 of the Penal Code from 1932 to 1939. However, due to the fact that the executive regulation of the penal code was not issued until 1934, it was only at that date that the fight against the incorrigible according to the new methods in Poland began.⁵⁴ According to the original text of the Regulation

⁵¹ *Projekt Kodeksu Karnego w redakcji przyjętej w drugim czytaniu przez Sekcję Prawa karnego Komisji Kodyfikacyjnej R.P. Uzasadnienie Części Ogólnej* (Warszawa, 1930), 83.

⁵² Marco Pelissero, 'The doppio binario in Italian criminal law', <https://studylib.net/doc/10742443/the-doppio-binario-in-italian-criminal-law--marco-pelissero> [Accessed: 15 Jan. 2019].

⁵³ Cf. Zalewski, *Przestępca 'niepoprawny'*, and the literature discussed there.

⁵⁴ For more, Jan Nelken, 'Polska myśl kryminologiczna od schyłku XIX w. do 1939 r.', *Archiwum Kryminologii*, xiii (1986), 250 ff.

on the organization of prisons for incorrigible offenders, such as the institution at Koronowo. By virtue of the Regulation of the Minister of Justice of 6 February 1936 (Journal of Laws 1936.10.100), it was decided to establish a correctional facility for the incorrigible offenders at Lubliniec, instead of the liquidated prison at Koronowo. Then, penal institutions at Trzemeszno, Bojanów and Leśna Podkowa were established.⁵⁵

In less than two years after the establishment of the first institution, the results of Witold Świda's research were published, summarizing the first period of using a preventive measure in the form of a facility for the incorrigible offenders in Poland.⁵⁶ As research has shown, Polish judges, in comparison with, for example, Norwegian or British, used detention very often. Until October 24, 1935, the punishment of allocating an incorrigible offender in a facility was legally adjudicated to 392 offenders. Young internees prevailed. In the group of prisoners, as much as 77 per cent did not turn 35 years old. The punitive basis for the decision were usually the short sentences of imprisonment. Sentenced to 6 months to 1 year – 36 per cent, more than a year to 2 years – 31 per cent, above the 2 to 5 years – 29 per cent, convicted over 5 years accounted for only 3 per cent of all respondents.⁵⁷ The number of prisoners placed in the facility for the incorrigible offenders was gradually increasing: in 1937 – 256 people were isolated in them, and in 1938 – 420. Facility for the incorrigible offenders in the interwar period had many followers.⁵⁸ Moreover, for example Świda, and later also Władysław J. Medyński stressed the need for a wider application of art. 84 of the p.c.⁵⁹

⁵⁵ See 'Rozporządzenie Ministra Sprawiedliwości z dnia 16 marca 1937 r. o utworzeniu zakładów dla niepoprawnych przestępców w Bojanowie i Trzemesznie', Dz.U., 27 (1937), item 196; 'Rozporządzenie Ministra Sprawiedliwości z dnia 1 sierpnia 1938 r. o utworzeniu zakładu dla niepoprawnych przestępców w Leśnej Podlaskiej', Dz.U., 66 (1938), item 492.

⁵⁶ Cf. Witold Świda, 'Zakład dla niepoprawnych w praktyce sądów polskich', *Głos Sądownictwa*, 7–8 (1936).

⁵⁷ *Ibidem*, 537–50.

⁵⁸ Cf. similarly Stefan Lelental, 'Postępowanie z recydywistami w systemie penitencjarnym II Rzeczypospolitej', in Andrzej Marek (ed.), *Księga Jubileuszowa więziennictwa polskiego 1918–1988* (Warszawa, 1990), 94.

⁵⁹ Witold Świda, 'Zakład dla niepoprawnych, w praktyce sądów polskich', *Głos Sądownictwa*, 7–8 (1936), 549; Władysław J. Medyński, 'Stosowanie art. 84 k.k. Uwagi de lege ferenda', *Głos Sądownictwa*, 12 (1938), 937.

Extensive research on the incorrigible offenders at the Lubliniec facility was conducted by Stanisław Batawia.⁶⁰ Batawia examined 150 internees from the total number of 163 who were staying at the institution at that time, which meant that the vast majority (90.9 per cent) of the inmates were examined. Batawia's research essentially confirmed the results of slightly earlier findings by Świda. Internment was subjected mainly to the young perpetrators. 62.6 per cent of the total internees did not reach the age of 30, and 38.6 per cent were under 25 years of age. On the other hand, the group consisted of multiple recidivists. As many as 30 per cent of prisoners were punished more than 10 times. Together with them, as many as 72 per cent of prisoners were punished more than 5 times, while only 28 per cent of prisoners were punished less than 5 times. All examined criminals were placed in the establishment for crimes against property, out of which 135 (90 per cent) were there for theft.⁶¹

The conclusions that Batawia derived from the collected data were critical of the penal policy pursued. Author considered by far the misapplication of juvenile short-term custodial sentences. He pointed to the need to economically operate with detention. In Polish conditions, criminological diagnosis was superficial and based on fragile material. Batawia perceived a complete lack of bio-criminal data and comprehensive environmental interviews. Under these conditions, the diagnosis of incorrectness had to be based only on data about previous criminal records and the material of the current case.⁶²

In interwar Poland, mostly multiple recidivists were sentenced to stay in the facility for the incorrigible offenders. This testifies to the restraint of the judges in applying detention to previously unpunished professional or habitual criminals. Crimes against property, as a definite basis of the sentence imposed before the verdict of detention, in turn prove that the offense was the main or minor source of livelihood of the internees. The prison sentence was reserved for perpetrators of serious crimes. There were no criminological research and reliable prognostic findings that would clearly indicate the need for or lack of detention. Application of the law by the courts seemed intuitive.

⁶⁰ See Stanisław Batawia, 'Niepoprawni przestępcy w świetle 150 wyroków z art. 84 k.k.', *Archiwum Kryminologiczne*, ii, 3–4 (1937), 440 ff.

⁶¹ *Ibidem*, 442, 458 ff.

⁶² *Ibidem*, 470–1.

VI
DOUBLE-TRACK SYSTEM IN POST-WAR POLAND.
FROM REPEAL (1952) TO RESTORATION (1997, 2013)

After the change of the form of government, the preventive measures system ceased to function in the pre-war shape. The application of art. 84 p.c. of 1932 was suspended in practice, although initially detention was formally reserved. The breakthrough proved to be the case law of the Supreme Court. Through the judicature of 8 April 1952, the Supreme Court confirmed the desuetude of the institution in question and removed the de facto establishments for the incorrigible offenders.⁶³ The Supreme Court in its justification used three arguments. First, the preventive measures were ‘fundamentally contradictory’ with the foundations of socialist criminal law, breaking the prohibition of double punishment for the same crime. Secondly, the thesis about the need for preventive measures was used to justify fascist terror and the functioning of concentration camps. Thirdly, the preventive measures could not be applied in Polish People’s Republic, because in the conditions of a people’s state there could be no question of incorrigible criminals, because in the people’s state everyone can be corrected.

In the Penal Code of 1969, there were no further preventive measures of a post-penal, eliminational or repressive nature. Also in the Penal Code of 1997, it was initially limited to medical and administrative preventive measures.⁶⁴ The breakthrough came first with the Act of 22 November 2013 on the treatment of people with mental disorders posing a threat to life, health or sexual freedom of other people,⁶⁵ and then the amendment to the Penal Code of 2015,⁶⁶ by means of which elimination – repressive detention has been restored in Poland.

Over the years, no wider reflection on preventive measures has been made in Europe. The end of the twentieth century and the beginning of this century is a time of severe repression against criminals, which is

⁶³ Wyrok SN z dnia 8 kwietnia 1952 r. sygn. akt IV K 19/51, OSN(K) 1952 r., nr 5, s. 67, LEX nr 164340.

⁶⁴ Cf. more broadly, Adam Kwieciński, *Lecznicze środki zabezpieczające w polskim prawie karnym i praktyka ich wykonywania* (Warszawa, 2009), 42 ff.

⁶⁵ Dz.U., 24 (2014), and its subsequent amendments.

⁶⁶ ‘Ustawa z dnia 20 lutego 2015 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw’, Dz.U., 396 (2015)

motivated populistically, not scientifically. Also in Poland, subsequent criminal law reforms aimed at threatening criminals, especially sexual ones, were undertaken in the rhythm of media reports about shocking, though individual, cases.⁶⁷

At the beginning of the twenty-first century, only eight European countries retained their post-penal measures in connection with a crime committed: Germany, Austria, Switzerland, Italy, Denmark, Slovakia, San Marino and Liechtenstein.⁶⁸

In Germany, the case that gave the impulse for the law extending repressive measures was the case of *M. vs Germany* from 2009 before the European Court of Human Rights. Until now, it seemed clear that following the conviction of another classic post-penal, non-meditative preventive measure in relation to the perpetrators who had already been convicted would violate the fundamental principles of criminal law, constitutional law and human rights law, the prohibition of retroactivity and double punishment. That is why it was decided to go a different way. As a result, the Act of 22 December 2010 on the Treatment and Accommodation of Mentally Impaired Violent Offenders – Therapy Accommodation Act, which entered into force on 1 January 2011, was adopted (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter – Therapieunterbringungsgesetz*). The preventive measures applied after serving the penalty, provided for criminals already punished, were given in Germany the shape of therapeutic means. In matters of their application, civil courts shall make decisions using a civil procedure. Premises of adjudication have been arranged in a way that breaks the link between their use and the act for which the perpetrator was in prison.⁶⁹ Over time, the order to maintain a clear distinction between preventive measures (punishments) and therapeutic detention (*Abstandsgebot*) was raised to the statutory level. Each German federal state was to introduce its laws ‘distinguishing’ therapeutic detections from post-penal punishments and detentions.⁷⁰

⁶⁷ Cf. Wojciech Zalewski, ‘Therapeutic and Legislative Approaches to Sex Offenders in Poland’, *Monatsschrift für Kriminologie und Strafrechtsreform*, xcvi, 1 (2014), Gunda Wößner (ed.), *Developing Sexual Offender Laws and Treatment in Europe*, 48 ff.

⁶⁸ *M. vs Germany* (Application no. 19359/04) 17 Dec. 2009, thesis 70.

⁶⁹ Cf. Kirstin Drenkhahn, ‘Secure preventive detention in Germany: Incapacitation or treatment intervention’, *Behavioral Sciences & the Law*, xxxi (2013), 320 ff.

⁷⁰ For example, in Lower Saxony, such a law was adopted on December 12, 2012 under the title *Gesetz zur Neuregelung des Vollzuges der Unterbringung in*

The first high-profile issue in which the compliance of the *Therapieunterbringungsgesetz* with the ECHR was considered was the case of *Bergmann vs Germany* from 2016,⁷¹ which was widely received, as it was considered compatible with the ECHR.⁷² The Strasbourg Court found that German law passed the test of ‘sufficient difference’.

The Polish Constitutional Tribunal issued the judgment on 23 November 2016 with reference to the aforementioned Act of 2013, recognizing it in principle in accordance with the Constitution of the Republic of Poland.⁷³ Despite the extensive arguments, the narrative axis was simple. The PCT used arguments in the spirit of the above-mentioned *Abstandsgebotes*. According to the PCT, the law passed a test of ‘sufficient difference’. Therapeutic detention is not a punishment, it is sufficiently different from the penalties, the placement procedure is not a criminal procedure, etc. At the same time, the Tribunal stated that – “for the same reasons – criminal-law features are not subject to preventive supervision, envisaged by statute. Both measures are preventive and therapeutic in nature, not ‘repressive’ or ‘punitive’.

The amendment to the Penal Code of 2015 introduced a number of changes, the most serious of which concerns the introduction of post-penal, elimination – repressive measures. Article 93d. §5 p.c. states that if the perpetrator was sentenced to imprisonment without conditional suspension of his performance, the penalty of 25 years imprisonment or life imprisonment, the ordered protective measure shall be applied after serving the sentence or conditional release, unless the Act provides otherwise. If you add that the time spent in the appropriate facility is not determined in advance, it turns out that the current regulation is much like its pre-war model (see § 2 Article 84 of the Penal Code of 1932). History has come full circle.

der Sicherungsverwahrung in Niedersachsen, which came into force on June 1 of the following year.

⁷¹ Application no. 23279/14.

⁷² Cf., for example, in Russia: Даниил Д. Харламов, ‘Проблемы применения превентивного заключения в уголовном праве Германии’, *Вестник Университета имени О.Е. Кутафина (МГЮА)*, 7 (2017), 173 ff.

⁷³ ОТК-А 2016/98, Dz.U.2016/2205, LEX no. 2172426.

VII CONCLUSION

Jeremiah Bentham concludes his work on Panopticon with a reference to the story of Columbus's egg.⁷⁴ He suggested that he had found a simple solution for only seemingly, in his opinion, complex problem. He wrote "Gordian knot not cut but resolved – all thanks to a simple architectural idea".⁷⁵ He meant a group of complex phenomena, including moral improvement. History, however, proves that just like Columbus's egg, Bentham's Panopticon being a simple answer to a complex problem is just an illusion. As research shows,⁷⁶ the preventive measures used in the twentieth century did not prove effective. They have not contributed to the effective fight against crime. However, the measures adopted in the law aroused the resistance of the judges, who saw in them a tool of excessive criminal repression and the manifestation of secondary punishment for the same crime. In Poland, preventive measures are directed against minor offenders, committing acts against property. Criminological diagnoses were not made. It is true, however, that history has come full circle. After a hundred years, the idea of the 'incurable' and 'dangerous' perpetrator returns. Criminal law ceases to be a breakwater protecting against the will of the state, against Leviathan. Criminal law and its guarantees are handled by introducing repressive regulations outside it or on its periphery. As Liszt wrote: "So paradox, es klingt: das Strafgesetzbuch ist die magna Charta des Verbrechers".⁷⁷ Liszt's words about the paradox are surprisingly actual, only that the Penal Code no longer fulfils a guarantee function in terms of therapeutic detention, which was formally excluded from the criminal law area, has recently 'shed' its borders, and all in the name of increasing the safety of citizens. The need to protect the freedom of individuals against the discretion of state power, however, remained. By holding to the Bentham comparisons about the history of the Columbus egg,

⁷⁴ The point is to define a simple solution to a seemingly difficult problem, it originated from a story attributed to Krzysztof Columbus, who allegedly solved the riddle of how to set the egg vertically.

⁷⁵ Bentham, *Panopticon*, 73.

⁷⁶ See, for example, Zalewski, *Przestępca "niepoprawny"*, and the literature discussed there.

⁷⁷ Franz von Liszt, 'Die deterministischen Gegner der Zweckstrafe', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 13 (1893), 325–70, 357.

it can be finished with a question mark just like He did. Is it true that in order to put an egg vertically, it should be broken? The solution is only seemingly accurate, because in essence it is a workaround. After all, total surveillance and supervision do not guarantee security or freedom in the long term.

trans. Magda Cieszyńska-Klimek

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