

Criminal Legislation at the Time of Poland's Regaining Independence

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Abstract. *The third partition of Poland, and thus the collapse of the Polish state, spontaneously forced a situation in which the legal orders of the partitioning states came into force almost immediately on Polish lands. In the lands divided between Prussia, Russia and Austria, legal acts of the partitioning states came into force with a strong influence of models derived from French legislation. The Polish lands which came under Austrian rule found themselves in the reality, in which the Austrian legislator conducted codification works on the new penal code, which resulted in the fact that in 1787 the penal code of Joseph II, called Josephine, became binding. As early as 1803, a penal code was introduced in Poland, which was under Austrian rule, under the name of the Book of Laws on Crimes and Serious Police Crimes called Franciscan. In the German annexation there was the Prussian Landrecht, which was characterized by a current far removed from the European science of law. On the territory of the former Duchy of Warsaw a Penal Code for the Kingdom of Poland was introduced. In Russia in 1903, the Tagantsev's Code came into force, which in its systematics divided crimes according to their gravity into crimes and misdemeanours and clearly separated minor offences. The characteristics of criminal legislation until 1918 made it possible to show the enormity of the work of the Codification Commission, the aim of which, after Poland regained independence, was to create a uniform and coherent Polish legal system, not only in terms of social life standards, but also in the area of the catalogue of its areas.*

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Introduction

Year 2018 is the 100th anniversary of Poland's regaining independence. It is certainly a time of contemplation, deliberations and reflection on national history.

By analyzing the fate of the Polish nation, we know that the November date, officially adopted in the era of the Second Polish Republic as the 'Independence Day' only partially closed the process of Poland's regaining independence.

The collapse of the Polish state in 1795 spontaneously forced a situation in which the legal orders of the partitioning states became binding on Polish lands almost immediately. In the lands divided between Prussia, Russia and Austria, legal acts of the partitioning states came into force with a strong influence of models derived from French legislation.

Criminal legislation in Austrian, German and Russian partition

The Polish lands which found themselves under Austrian rule, in fact, found themselves in reality when codification work on the new Penal Code was under way in Austria. In 1787 the Criminal Code of Joseph II called *Josephine* came into

force. The literature on the subject indicates that it was a code with a broad scope of application, opening a new era in terms of the development of criminal law. Interestingly, already at that time the Criminal Code of Emperor Joseph II concerned only substantive criminal law, because the criminal procedure was codified in a separate legal act¹.

Josephine in its assumptions led to the division of crimes, one can nowadays say in terms of gravity². The abovementioned code distinguished between criminal offences — referred to as serious crimes, and political offences — which defined prohibited acts of lower gravity. A landmark moment in the shaping of the described code was an attempt to define the notion of a crime as an act³ and to define the framework of the principle of legalism, which was later called the crown principle of criminal law: *nullum crimen sine lege*.

The mentioned Criminal Code in section 1 indicated: an offence is an act which is considered an offence in this code⁴. Nowadays, we would say that a definition of an offence can be derived from the aforementioned content of section 1 of *Josphine*. Another important issue of the aforementioned code was the establishment of a system of penalties. According to the statutory provision, the court could apply only these types of penalties that were provided for in the code for the given offence, regardless of the social condition of the perpetrator — which at that time was a rather innovative measure⁵. The system of penalties in the code was based on the function of penalty as a factor giving the offender the opportunity to return to the path of principles and social coexistence. Therefore, the Austrian Criminal Code abolished the death penalty and applied prison sentences instead. These sentences were divided according to their duration, i.e.: temporary, long and very long — which could last up to 100 years, as well as according to the severity of the discomfort to the perpetrator — into mild, severe and the most severe. Interestingly, the ailment of these penalties consisted, for example, in chaining the perpetrator of the crime in a dungeon with an iron rim, flogging or fasting on bread and water.⁶

In connection with the incorporation of the territory of the Polish state into Austria, seized as a result of the Third Partition of Poland, it was necessary to introduce a common legal order for the whole area. This was first done by the West Galician penal law act (*Strafgesetzbuch für Westgalizien*), the aim of which was to strengthen penal repressions in new areas against revolutionary movements and which was to temporarily replace the Polish law in force.⁷

In order to unify the legal system, in 1803 a penal code called *the Franciscan* was introduced on Polish lands which were under the Austrian rule and was named the *Book of Laws for Crimes and Serious Police Crimes*. The name of the code came from Francis II. The act was subject to numerous modifications. The final version of the code was reached in 1852 and remained in force in Austria, which is interesting, until 1974! It is worth mentioning that it was in *the Franciscan* (according to the division

¹ Sójka-Zielińska K, Historia prawa. Warsaw, 2015, p. 265.

² *Ibid.*

³ Sójka-Zielińska K, Historia prawa. Warsaw, 2009, p. 277.

⁴ Sójka-Zielińska K, Historia prawa. Warsaw 2015, p. 265.

⁵ *Ibid.*, p. 265.

⁶ *Ibid.*

⁷ Makiela D, Historia prawa w Polsce. Warsaw, 2008, p. 344.

in the French Code), that the offences were divided into crimes, misdemeanours and minor offences⁸. Another important issue in the code was the division into two books. The first concerned crimes, the second heavy police crimes. Each book in its systematics was divided into a general and a special part and contained procedural provisions. The above mentioned Criminal Code provided for criminal liability for committing a prohibited act after the age of ten, and in the catalogue of penalties distinguished: the death penalty, life imprisonment and imprisonment. The death penalty was provided for the crime of murder, violent damage to someone else's property and malicious acts and omissions if, as a result of such acts or omissions, a person lost his or her life, as well as for arson. Imprisonment could last from 6 months to 20 years.⁹ The punishment for a minor offence was detention, fine, forfeiture of goods and objects, flogging or expulsion from the country or place of residence. In the special part, the legislator protected the interests of the state, the emperor and members of the dynasty. Interestingly, the code in the area of the former Austrian partition functioned thanks to its evolutionary and abstract character, which allowed for the adaptation of legal norms to various changes in the field of criminal policy.¹⁰

In the German partition *the Prussian Landrecht* was in force and it was characterized by a current far removed from European science. Katarzyna Sójka-Zielińska wrote in her monograph on the codification of Prussian law: ' (...) it was characterised by casuistry, the lack of strict distinguishing of legal norms from moral guidelines (...)'¹¹. In terms of content, it had typical features ' (...) resulting from a peculiar combination of absolutist concepts of the police state with elements of enlightenment ideology. (...)'¹². Curiously, *the Prussian Landrecht*, on the one hand, adopted the principle of *nullum crimen sine lege* from the European law and, on the other hand, allowed in its dispositions to apply towards recidivists, vagrants and beggars security measures allowing them to be locked in workhouses for an unlimited period of time after serving their sentences.¹³ Another curiosity was maintaining the right to so-called domestic punishment, i.e. the right of the father as the head of the family to apply penalties to his family members. It is worth mentioning here the then existing legal norms concerning crimes against honour, namely: only persons from privileged groups could have legal protection in terms of dignity and honour, while such protection did not apply to peasants, for example.¹⁴ The instructions from *the Landrecht* were in force until 1851. After that date a new penal code based on the principles of the French code of 1810 entered the Prussian legal order. As its foundation it adopted the principle of *nullum crimen, nulla poena sine lege*. In its systematics, it divided the offences into crimes, misdemeanours and minor offences. For the committed crimes the penalty was death, severe imprisonment or imprisonment for more than 5 years. The committed

⁸ Korobowicz A, Witkowski W, *Historia Ustroju i Prawa Polskiego (1772–1918)*. Warsaw, 2012, p. 226.

⁹ *Ibid.*, p. 227

¹⁰ Sójka-Zielińska K, *Historia prawa*. Warsaw, 2015, p. 267.

¹¹ Sójka-Zielińska K, *Historia prawa*. Warsaw, 2009, p. 277.

¹² *Ibid.*, p. 280.

¹³ Sójka-Zielińska K, *Historia prawa*. Warsaw, 2015, p. 267.

¹⁴ *Ibid.*, p. 268.

misdemeanours were punishable by imprisonment in a fortress for up to 5 years, a penalty of imprisonment of more than 6 weeks or a fine of more than 50 thalers, while for the exhaustion of the statutory features of the minor offences was provided for imprisonment of up to 6 weeks or a fine of up to 50 thalers.¹⁵ The code also provided for circumstances excluding criminal liability, such as: insanity, juvenile delinquency, statute of limitations. Apart from penalties, the Prussian Code also provided for penal measures such as: loss or limitation of parental rights, police supervision, public pronouncement of a sentence, confiscation of property.

This code became the foundation for the penal code of the North German Union, which in 1871 was transformed into the penal code of the German Reich and applied to the entire territory of the Second German Reich. The new code in its instructions lowered the penalty of imprisonment to 15 years and introduced the possibility of early release from serving the sentence. The condition for the perpetrator to use the following statutory benefit was to apply for early release not earlier than after serving $\frac{3}{4}$ of the sentence with good behaviour. There were also limited cases in which it was possible to sentence to the death — only in relation to the murder or attempted murder committed by the perpetrator, but towards the ruling person. The criminal liability of persons under twelve years of age was excluded. On the other hand, the juvenile delinquency limit was raised to 17 years of age.¹⁶ A characteristic feature of the described legal system was the fact that the legislator transferred the burden of criminal liability for the, so called, deeds of a political nature to special acts. Thanks to this procedure some regulations were excluded from the penal code, for example: 'against the universally dangerous aspirations of social democracy' or the 'dynamite' act, which in its instructions introduced the death penalty for terrorist attacks with the use of dynamite.¹⁷ It is worth noting, that the penal code of the German Reich was in force on the territory of the former Prussian partition until 1903.

The first half of the 19th century brought about significant political changes in the Polish lands under annexation. As a result of the provisions of the Treaty of Tilsit on July 7th and 9th 1807, the Duchy of Warsaw was established. Significantly, on 22nd July 1807, the Duchy was given a constitution. The adopted legal and systemic structure of the Duchy led to the division of law into public, covering the functioning of state institutions and private law covering legal regulations concerning natural and legal persons¹⁸. In the area of criminal law, although the acting and appointed by Napoleon Ruling Commission maintained the existing provisions of the Polish law, *the Prussian Landrecht* of 1794 was introduced in a subsidiary way. Interestingly, in case of doubts, it was recommended to apply law which was more lenient for the perpetrator¹⁹.

The legislation of the Duchy of Warsaw specifically regulated crimes against the fiscal interests of the state. Cases related to fraud and smuggling were investigated by customs and administrative authorities.²⁰ It is worth noting here that in the

¹⁵ Korobowicz A, *op. cit.*, p. 180.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 181

¹⁸ Makiela D, *Historia prawa w Polsce*. Warsaw, 2008, p. 352.

¹⁹ *Ibid.*, p. 353.

²⁰ *Ibid.*

Duchy of Warsaw civil French law was adopted by introducing into the legal order the Napoleonic Code. It is worth mentioning here that the introduction of French regulations in the lands of the Duchy of Warsaw led to many organizational difficulties in the field of, for example, translation, implementation and reorganization of the judiciary. Despite the collapse of the Duchy of Warsaw and the entire Napoleonic system in Europe, the Napoleonic Code survived and regulated legal relations until the 20th century.²¹

The establishment of the Kingdom of Poland and its constitution in 1815 resulted in the Kingdom of Poland having its own constitutional order between 1815 and 1831. In 1817, work on the codification of criminal law began. Work on the Code was started by the Code Commission, which was called the Legislative Commission and was chaired by Ksawery Potocki²². In 1818, in the area of the former Duchy of Warsaw, *the Penal Code for the Kingdom of Poland* was introduced and it was modelled on the French Code. It was possible to distinguish books which divided crimes according to the model of the French code: crimes, misdemeanours and police offences²³. The described code contained 588 articles in its instructions. According to Article 4 of the Penal Code, the crimes were punishable by main penalties, misdemeanours punishable by corrective penalties and minor offences by police penalties.²⁴ Katarzyna Sójka-Zielińska indicates in her monograph on the History of the Law that: 'From the point of view of legislative technique, the Penal Code did not show greater achievements yet, e.g. the general part was not singled out here, while the language of the Code was a positive testimony to the development of Polish legal terminology and the sense of national identity of the creators of this legal monument'²⁵ Example: Article 459 of the Code was worded as follows: 'Anyone who, in an unnamed or a signed letter, threatens to commit against a person, property or other rights, a crime deserving the death penalty or a fortified prison according to the law, and also demands depositing a certain amount of money in a designated place or fulfilling other conditions, deserved to be locked in the house of correction from one to three years'²⁶.

Interestingly, *the Penal Code* adopted a contemporary construction of guilt pointing to the intentionality and unintentionality of committing a prohibited act. Intentionality in the *Penal Code* was understood as bad intent, distinguishing between bad direct intent, and bad indirect intent. The circumstances cancelling bad intention (intentionality) included: insanity of the perpetrator, temporary mental illness, temporary disruption of mental functions and, interestingly, alcohol intoxication (without the intention to commit a crime), physical coercion and a mistake of law²⁷. The catalogue of punishments in the described code was divided

²¹ *Ibid.*, p. 357.

²² Sójka-Zielińska K, *Historia prawa*. Warsaw, 2015, p. 271.

²³ Śliwowski J, *Kodeks karzący Królestwa Polskiego 1818 r. Historia jego powstania i próba krytycznej analizy*. Warsaw, 1958, p. 280.

²⁴ Sójka-Zielińska K, *Historia prawa*. Warsaw 2015, p. 271.

²⁵ *Ibid.*

²⁶ In its original wording according to the *Dziennik Praw Królestwa Polskiego* of 1918, Vol. 5, *Prawo*, No. 20, the described code became the Code for the Kingdom of Poland, *quoted after*: Cieślak W, *Wymuszenie rozbójnicze*. Krakow, 2000, p. 32.

²⁷ Korobowicz A, Witkowski W, *op. cit.*, p.138.

into: the main punishments which included the death penalty, life imprisonment in fortified prison, temporary fortified imprisonment from 10 to 20 years and heavy imprisonment from 3 to 10 years. Corrective penalties included: house of correction from 8 days to 3 years, public arrest from 8 days to 3 years, financial penalties and corporal punishment. Police penalties included: fines, police detention, house arrest and corporal punishment. The death penalty was carried out by beheading or hanging. Significantly, the prison sentence was characterised by shaving one's head, fettering, sleeping on bare boards or hay and very modest food every few days in the form of bread and water.²⁸

In 1847, the *Penal Code for the Kingdom of Poland* was replaced by a legal act called *the Code of Main and Corrective Penalties*. It was not applauded by the public, but was rather perceived as 'a new defeat for the country' because it was a good means of repression for the tsarist authorities²⁹. The systematics of this code was based on the division of penalties. In article 19 of *the Criminal Law of the Kingdom of Poland* of 1847 we read in the first section: 'The main penalties are as follows: I Deprivation of all rights and death penalty. II Deprivation of rights and exile for heavy labour, combined in cases marked by law, for persons not excluded from corporal punishment, with stigmatisation and the penalty of caning by means of rods from eighty to two hundred times. III Deprivation of all rights and settlement in Siberia, combined in cases marked by law, for persons not excluded from corporal punishment, with stigmatisation and penalty of caning by means of rods from forty to eighty times. IV Deprivation of all rights and deportation to settle beyond the Caucasus'³⁰. For example, in this code you can find the prototype of extortion by force, placed along with crimes against freedom in Article 1037, which was placed in the ninth chapter entitled: On the dangers, where also prohibited acts, such as punishable threat and forcing people to act illegally, have been included. This article reads as follows: 'A person who threatens to deprive the other person of their own life, their family members or close relatives, or to set fire to the house or to any property belonging to them or to members of their family or close relatives, if it is not proved that he or she did intend to commit this crime and that he or she prepared to do so, shall be punished in accordance with the following rules:

for a threat in a signed letter or in another signed or unsigned letter — imprisonment in a tower from 3 to 6 months;

— for a threat by word, directly or indirectly or through the intermediary — detention from 3 weeks to 3 months'³¹.

The Code of Main and Corrective Penalties was in force until 1876, when the Russian Penal Code of 1866 was introduced the following year in the Kingdom. ' (...) It was a very extensive casuist code, which adhered to the theory of deterrence and allowed the use of analogies (...)'³².

²⁸ *Ibid.*

²⁹ Sójka-Zielińska K, *Historia prawa*. Warsaw, 2015, p. 286.

³⁰ Grochowski L, Misiuk A, *Historia państwa i prawa Polski. Wybór źródeł X-XX wiek*. Olsztyn, 2003, p. 146.

³¹ *Kodex Kar głównych i poprawczych*. Warsaw, 1847, p. 753.

³² Korobowicz A, Witkowski W, *op. cit.*, p.141.

This procedure caused the unification of criminal law, as a result of which the Kingdom of Poland and Russia since then had a common — Russian penal code.

In the second half of the 19th century, work on a new code in Russia began and it entered into force in 1903. It was called *the Tagantsev's Code*, from the name of its main creator.

It was a codification which differed from the previous legal status. First of all, it was a much shorter work, one could say a concise one. There was a previously unknown concept of separating the general part. The crimes were divided according to their gravity into crimes and misdemeanours, and minor offences that were punishable by detention and a fine were clearly separated³³. The described code contained in its content a definition of an offence as an act prohibited by the criminal law in force at the time of its perpetration. The code upheld the principle of *nullum crimen nulla poena sine lege*, did not allow for analogy and did not allow for the retroactivity of the act³⁴. *The Tagantsev's Criminal Code* introduced sanctions in the case of a crime committed by the perpetrator, and these were: the death penalty, penal servitude, i.e. hard labour and exile.³⁵ The misdemeanours were punished with imprisonment for up to 6 years or a fortress. In the special part of the code, crimes against religion, crimes against property and other property rights took a special place.

Interestingly, the code introduced innovative institutions at that time, such as suspension of sentences, waiving sentences and conditional release.³⁶ It should be mentioned here that the Russian Penal Code of 1903 was in force on central and eastern lands of the Second Polish Republic reborn after World War I until 1932.³⁷

Summary

Polish legislation, as mentioned earlier, was doomed until 1918 to the legal regulations of countries that had our lands in their possession and control. One hundred and twenty-three years of annexation led to the fact that the Polish legal order lost its spirit and identity, having no chance for development with evolving progress. Over the years, the divided Polish lands became saturated with the legal systems of the partitioning states, which was significantly visible after Poland regained independence

In 1919, already after Poland regained independence, the established Codification Commission was to create a legal system whose aim was to regulate not only the norms of social life, but also the whole catalogue of social life areas. Despite intensive work, in the interwar period it was not possible to unify the entire legal system. It is worth mentioning here that in 1928 the Polish Code of Penal Procedure was published, in 1932 the Polish Criminal Code and the Civil Procedure Code, and in 1933 the Code of Commitments.

³³ Sójka-Zielińska K, *Historia prawa*. Warsaw, 2009, p. 287.

³⁴ Korobowicz A, Witkowski W, p. 141.

³⁵ Sójka-Zielińska K, *Historia Prawa*. Warsaw, 2015, p. 274.

³⁶ Korobowicz A, Witkowski W, p. 141.

³⁷ *Ibid.*, p. 142.

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Streszczenie. Trzeci rozbiór Polski i tym samym upadek państwa polskiego wymusił samoistnie sytuację, w której na ziemiach polskich niemal od razu zaczęły obowiązywać porządki prawne państw zaborczych. W podzielonych pomiędzy Prusami, Rosją i Austrią ziemiach weszły w życie akty prawne państw zaborczych z silnym wpływem wzorców pochodzących z ustawodawstwa francuskiego. Ziemie polskie, które znalazły się pod panowaniem austriackim znalazły się w rzeczywistości, w której austriacki ustawodawca prowadził prace kodyfikacyjne nad nowym kodeksem karnym, co spowodowało, że w roku 1787 r. zaczął obowiązywać kodeks karny Józefa II zwany *Josephiną*. Natomiast już w roku 1803 wprowadzono na ziemie polskie, będące pod zaborem austriackim, kodeks karny pod nazwą *Księga ustaw na zbrodnie i ciężkie policyjne przestępstwa* zwany *Franciscana*. W zaborze niemieckim obowiązywał *Landrecht Pruski*, który charakteryzował się nurtem daleko odbiegającym od europejskiej nauki prawa. Na obszarze byłego Księstwa Warszawskiego wprowadzono w życie *Kodeks karzący dla Królestwa Polskiego*. W Rosji w 1903 r. wszedł w życie *kodeks Tagancewa*, który w swojej systematyce dokonał podziału przestępstw ze względu na ciężar gatunkowy na zbrodnie i występki oraz w sposób wyraźny oddzielił wykroczenia. Charakterystyka ustawodawstwa prawnokarnego do roku 1918 pozwoliła na ukazanie ogromu pracy, jaki miała Komisja Kodyfikacyjna, której celem po odzyskaniu przez Polskę niepodległości było stworzenie jednolitego i spójnego polskiego systemu prawnego, nie tylko w aspekcie norm życia społecznego, ale także w obszarze katalogu jego dziedzin.

Резюме. Третий раздел Польши и одновременно падение польского государства привели к ситуации, в которой на польской территории почти сразу обязывали законные стандарты социальной жизни государств, участвующих в разделе. На территории разделенной между Пруссией, Россией и Австрией вступили в силу юридические акты этих государств с сильным влиянием стандартов французского законодательства. Польская территория под австрийским правлением оказалась в ситуации, в которой австрийский законодатель работал над кодификацией нового

уголовного кодекса. Это привело к тому, что в 1787 году вступил в силу уголовный кодекс Иосифа II (т.н. Жозефина). Кроме того, уже в 1803 году на польской территории, находившейся под австрийской юрисдикцией был введен уголовный кодекс «Закон о преступлениях и тяжких полицейских преступлениях», т.н. «Францискана». На территории немецкой аннексии, обязывающим законом являлся «Ландрехт Пруссия», который характеризовался подходом, далеким от европейской науки права. В бывшем Варшавском княжестве был введен Уголовный кодекс для Королевства Польского, а в России в 1903 году вступил в силу Кодекс Таганцева, который разделил преступления и проступки с учетом тяжести состава преступления, а также четко выделял правонарушения. Характеристика уголовного законодательства до 1918 года позволяет определить масштаб работы Комиссии по кодификации, цель которой после восстановления независимости Польши заключалась в создании единой и согласованной польской юридической системы, не только с точки зрения социальных стандартов жизни, но и в рамках каталога ее областей.

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