




FORUM

# Transnational Flows of Knowledge and the Legalisation of Homosexuality in Interwar Poland

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The article demonstrates how the transnational flows of sexual knowledge created a consensus among medical and legal experts for the decriminalisation of homosexual acts in the Polish Criminal Code of 1932. This happened despite the absence of any significant activism that would demand such a reform in Poland. The German movement's goal to repeal the notorious anti-homosexual paragraph 175 of the German Penal Code was ultimately brought to fruition in Poland but not in Germany. The medical and legal knowledge spread through imperial networks and became useful for the new Polish nation-state in its search for identity and distinctiveness. The novelty of the reform ideas created in German-speaking countries led Polish legal experts to consider their adoption a perfect opportunity for the new nation-state to prove its modernity. Additionally, an authoritarian setting in Poland after 1926 allowed the decision makers to shut out the Church and parliament from the legislative process.

On 30 May 1923, members of the Codification Commission, a body created to construct a new Polish legal system, voted to exclude the crime of 'fornication against nature' (*nierząd przeciwko naturze*) from the future penal code. In practice, it meant that Poland was on its way to becoming the second European country in the twentieth century (after the Soviet Union) to decriminalise homosexual acts. The members of the commission were almost unanimous – six against one voted for the decriminalisation. In the only dissenting opinion, Witold Prądzyński argued that the law should respect 'the opinion prevalent in society', which 'will demand the inclusion of pederasty and sodomy into the Penal Code'. Aleksander Mogilnicki succinctly rejected this view. He emphasised that the commission 'cannot change its fundamental opinions (*zasadnicze poglądy*) for fear of political factors'. He insisted that there was 'no place in the Criminal Code for these kinds of offenders'.<sup>1</sup>

Few authors have discussed the decriminalisation of homosexuality in interwar Poland, and the question how such a reform was possible has yet to be answered.<sup>2</sup> This article analyses the reasons behind the decision, exploring what Mogilnicki meant when he referred to the 'fundamental opinions' of the Codification Commission. I argue that any satisfactory analysis of the motives for decriminalisation should adopt a transnational outlook that pays attention to the circulation of scientific knowledge in Central and Eastern Europe at the beginning of the twentieth century. The article demonstrates that legal and medical debates centred in German-speaking countries had a decisive influence on the

<sup>1</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: sekcja prawa karnego, T.2* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1925), 204.

<sup>2</sup> Historians have not yet tried to answer the question. Some attempts have been made in the field of literary criticism, history of law and in popular history publication; see e.g. Tomasz Kaliściak, *Katastrofy odmieńców* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2011), 122–33; Tomasz Szczygiel, 'Przestępstwa przeciwko moralności w pracach Komisji Kodyfikacyjnej II Rzeczypospolitej', *Z Dziejów Prawa*, 18, 10 (2017), 83–104.

decision to decriminalise homosexual acts in Poland.<sup>3</sup> They coincided with a particular political situation in the country that after 1926 became increasingly authoritarian. The ruling elite that gathered around Józef Piłsudski (1867–1935) pursued a project of Polish nationhood that appealed to ‘a new, modern and more productive citizenship’. This relatively inclusive vision of the nation aimed to create a secular Poland with a progressive political and social agenda.<sup>4</sup> For this political camp, *Sanacja*, modern legal and medical concepts posed an opportunity to manifest Polish uniqueness on the outside and to introduce in an authoritarian way a leftist idea of progress in the internal politics.

In Germany, a social movement that sought to decriminalise homosexual acts failed to achieve its goal, while in Poland, with almost no activism, the reform came to fruition through an imposition. Until the early 1930s it was impossible to form a majority in the *Reichstag* that could abolish infamous criminalising paragraph 175. Afterwards, the paralysis of the Weimar Republic and the rise of national socialism turned the course of the legal reform in the opposite direction.<sup>5</sup>

Knowledge about same sex relations produced in Vienna and Berlin had long circulated beyond nationally defined frameworks and spread through imperial networks. Within the newly formed international order after 1918, the very modernity of these reform ideas led many Polish legal experts to consider their adoption a perfect opportunity for the new state to prove its distinctiveness and national exceptionalism. This is how in Central Europe a sociological turn in criminal law, developments in psychiatry, forensic medicine and sexology came to be aligned with one version of a nationalist quest for unique identity and ‘bordering’.<sup>6</sup> This peculiar alignment created conditions for the decriminalisation of homosexual acts in Poland in the 1920s and early 1930s, despite an almost complete absence of emancipatory activism in Polish society. To demonstrate this process, I analyse the debates of the experts involved in the reform, their writings and intellectual biographies. I argue that the transnational flows of knowledge that enabled the decriminalisation became influential thanks precisely to demands to produce specifically Polish national legislation characterised by its modernity. A leftist version of Polish nationhood that became dominant in 1926 proved willing not only to accommodate a decriminalisation of homosexual acts, but also to impose it as part of its patriotic vision of a modern Poland.

### Imperial Legacies in the Shadow of Piłsudski

Famously, Poland emerged from the First World War as a deeply heterogeneous country, consisting of remnants of three empires. The creation of the new nation-state, a long-awaited realisation of a nationalist dream, was anything but smooth. An undertaking that involved the disaggregation of populations, along with the imposition of new borders and identifications, accompanied the aggregating and identifying of national elements.<sup>7</sup> Often, the national had to be created from scratch. Defining the legal identity of the nation-state was an exercise of practical and symbolic importance. The creation of a specifically *Polish* law was at the heart of the task. In the case of criminal law, multiple solutions were considered. Some well-known Polish lawyers praised the Russian Tagantsev Penal Code of

<sup>3</sup> Anita Kurimay notes that medical discourse in early twentieth century Hungary was also ‘deeply influenced by the German-speaking world’. She describes an attempt to decriminalise homosexual acts in Hungary as early as 1909. Some arguments adduced during that debate were also used later in interwar Poland. Anita Kurimay, *Queer Budapest, 1873–1961* (Chicago: University of Chicago Press, 2020), 29, 85–7.

<sup>4</sup> Eva Plach, *The Clash of Moral Nations: Cultural Politics in Piłsudski’s Poland, 1926–1935* (Athens: Ohio University Press, 2006), 6–7.

<sup>5</sup> Manfred Herzer, *Magnus Hirschfeld und seine Zeit* (Berlin: Walter de Gruyter, 2017), 345; Elena Mancini, *Magnus Hirschfeld and the Quest for Sexual Freedom* (London: Palgrave Macmillan, 2010), 155; Laurie Marhoefer, *Sex and the Weimar Republic: German Homosexual Emancipation and the Rise of the Nazis* (Toronto: University of Toronto Press, 2015), 120–9, 190.

<sup>6</sup> On the process of bordering, see David Newman, ‘Borders and Bordering: Towards an Interdisciplinary Dialogue’, *European Journal of Social Theory*, 9, 2 (2006), 171–86.

<sup>7</sup> On the practices of disaggregating people and property in the process of creating new categories of belonging in Poland after the First World War, see Keely Stauter-Halsted, ‘Violence by Other Means: Denunciation and Belonging in Post-Imperial Poland, 1918–1923’, *Contemporary European History*, 30, 1 (2021), 32–45.

1903 for its relative modernity.<sup>8</sup> However, it was the Austrian Criminal Code of 1852 with which Polish-speaking attorneys were most familiar.<sup>9</sup> Neither of these options, however, could live up to the ambitions of the nation-building project that was unfolding in Warsaw.

A newly created body, the Codification Commission of the Republic of Poland (*Komisja Kodyfikacyjna Rzeczypospolitej Polskiej*), was to design an original Polish legal order.<sup>10</sup> The president of the commission, Franciszek Ksawery Fierich (1860–1928), described the motives behind the establishment of the body: ‘Nobody will impose on us their laws, nobody will dictate us their rules of law; we must create our own legal fundamentals’. The commission’s goal was to ‘create a uniform legislation’ as ‘one of the strongest links bringing together our Motherland into a united whole’. The Codification Commission thus rejected the idea of adopting any of the three imperial jurisprudences.<sup>11</sup> The body was divided into several divisions, each of them working on a different branch of law. Juliusz Makarewicz (1872–1955) led the Criminal Division that prepared the new Penal Code of 1932.

In the meanwhile, a peculiar legal framework was in force on Poland’s territory: three different criminal codes coexisted in the three former imperial partitions. When it came to provisions regulating homosexual acts in western Poland around Poznań, paragraph 175 of the German Code criminalised only sexual relations between men.<sup>12</sup> In the central and eastern parts of the state (including Warsaw), the same Russian Code of 1903 criminalised only anal sex between men (as *pederastja/ мужеложство*).<sup>13</sup> In the southern, former Austrian partition of Galicia, the Habsburg Criminal Code (paragraph 129b) penalised all same-sex relations as fornication (*nierząd/Unzucht*).<sup>14</sup> The coexistence of the three laws meant that when in 1924 a boulevard newspaper scandalised its readers with a story of a lesbian physician from Warsaw, Zofia Sadowska, it could thrill them even more by adding that ‘it would be enough for Ms. Sadowska to travel two railway stations beyond Częstochowa’ (a city close to the former Russian-Austrian border) to risk ‘a few years in prison’.<sup>15</sup>

The Codification Commission remained under the ideological influence of Józef Piłsudski, who appointed all its members.<sup>16</sup> As the most important figure in the emerging Poland, the only ‘Chief of State’ (*Naczelnik Państwa*) in the history of the country, Piłsudski had a decisive role in shaping the state system. In 1919, the republican vision of a Polish nation-state pursued by his pro-independence

<sup>8</sup> This code, although created in Russia, has never entered into force there. Dan Healey, *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent* (Chicago: University of Chicago Press, 2001), 116.

<sup>9</sup> Józef Koredeczuk, ‘Zaborcze kodyfikacje prawa karnego materialnego w Polsce w okresie przejściowym w latach 1918–1932’, in Jacek Przygodzki, ed., *Okresy przejściowe: ustrój i prawo* (Wrocław: Uniwersytet Wrocławski, 2019), 152.

<sup>10</sup> The commission started its work on 10 Nov. 1919; legal basis: *Dziennik Praw*, no. 44, poz. 315 (1919), 525; more on the commission: Adam Lityński, *Wydział karny Komisji Kodyfikacyjnej II Rzeczypospolitej* (Katowice: Uniwersytet Śląski, 1991).

<sup>11</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: dział ogólny, T.1, Z. 1* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1920), 30.

<sup>12</sup> Juliusz Kałużniacki, *Ustawy bylejk dzielnicy pruskiej, tom 1, Ustawa Karno*, wyd. 1 (Poznań: Rolnicza Drukarnia Nakładowa, 1921), 68. About the German context, see Robert Beachy, *Gay Berlin: Birthplace of a Modern Identity* (New York: Alfred A. Knopf, 2015); Burkhard Jellonnek, *Homosexuelle unter dem Hakenkreuz: die Verfolgung von Homosexuellen im Dritten Reich* (Paderborn: Schöningh, 1990).

<sup>13</sup> The Polish vocabulary related to homosexuality varied and changed in the early decades of the twentieth century. The analysis of existing documents related to the legal persecution of homosexuals in Poland, the files of the vice brigade of Warsaw and the expert debates described in this article allow for a general interpretation of the terms in use: homosexual (*homoseksualny*) – all kinds of same sex (sexual) behaviours; pederasty (*pederastia*) – anal intercourse; fornication (*nierząd*) – all kinds of non-normative sexual behaviours. For more on the Russian context see Healey, *Homosexual Desire*, 164–5, 174. A Polish version of the 1903 Code: *Kodeks Karny z r. 1903* (Warszawa: Wydanie Ministerstwa Sprawiedliwości, 1922).

<sup>14</sup> *Ustawa Karno Austriacka z dnia 27. maja 1852. r.* (Kraków: Księgarnia J. M. Himmelblaua, 1880), 98–9.

<sup>15</sup> ‘Panna doktor Zofia Sadowska jest szkodnikiem społecznym, a ujawnienie tego było czynem obywatelskim’, *Express Poranny*, 3, 46 (15 Feb. 1924), 1. About the case of Sadowska see Wojciech Szot, *Panna Doktor Sadowska* (Warszawa: Wydawnictwo Dowody na Istnienie, 2020).

<sup>16</sup> *Dziennik Praw Państwa Polskiego*, 44 (6 Jun. 1919), poz. 315, 525.

socialists had prevailed, despite ongoing ideological conflicts between Piłsudski's camp and the conservative nationalists on one hand and the communists on the other.<sup>17</sup> As a result, universal suffrage and basic social rights were introduced in the first month of independence. The composition of the commission was yet another example of Piłsudski's camp domination of the state-building process.<sup>18</sup>

The division was dominated by a younger generation of lawyers. In terms of political affiliations, they were rather centre-left oriented, leaning strongly towards Piłsudski's camp, called the Piłsudskiites. Importantly, almost all the men had studied at the universities of the German-speaking area, participated in legal debates there, or published in German.<sup>19</sup>

Only Miklaszewski studied at a Russian university (in St. Petersburg), although he later continued his education in Heidelberg.<sup>20</sup> Juliusz Kałużniacki (1869–1928) was born in Styria, studied law in L'viv, and until 1917 worked as a judge in the Austrian emperor's service.<sup>21</sup> He specialised in the German Penal Code.<sup>22</sup> The Criminal Division's president, Juliusz Makarewicz, originally from Galicia, had studied in Cracow, L'viv, Halle and Berlin. His most important work, *Introduction to the Philosophy of Criminal Law (Einführung in die Philosophie des Strafrechts)*, was written and published in German.<sup>23</sup> Aleksander Mogilnicki (1875–1956), although born in Congress Poland, had received his PhD from the Jagiellonian University in Cracow. In 1894 and 1896, Mogilnicki received awards for his dissertations about the legal theory of Rudolf von Ihering, a German jurist, and for a comparative work on the administrative judiciary systems of 'Western Europe and Russia'.<sup>24</sup> Emil Stanisław Rappaport (1877–1965) studied at the University of Warsaw and completed his apprenticeship in Riga. However, between 1903 and 1909 he had attended courses in Paris, Berlin and London and received a doctorate in Neuchâtel, Switzerland.<sup>25</sup> Waław Makowski (1880–1942), originally from Vilnius but later living in Łódź, studied in Warsaw, Cracow, L'viv and Paris. He had the least experience abroad, but at the same time was the closest to Piłsudski. A few days after the May Coup of 1926, Makowski would become the Minister of Justice.<sup>26</sup> The youngest member of the division and the one

<sup>17</sup> Andrzej Friszke, *Państwo czy rewolucja. Polscy komuniści a odbudowanie państwa polskiego 1892–1920* (Warszawa: Wydawnictwo Krytyki Politycznej, 2020).

<sup>18</sup> The political views of the division's members need further research. Not all of them belonged to Piłsudski's followers. Juliusz Makarewicz was a Christian Democrat but was expelled from his party when in 1931 he refused to vote against the very penal code he had prepared. Among other things, the Christian Democrats (*Chrześcijańska Demokracja*) opposed civil marriage introduced by the code. In the 1930s, Makarewicz joined the *Sanacja*. Makowski was a Piłsudskiite; Rappaport and Miklaszewski at least sympathised with the movement. It seems that none of the division's members was a follower of National Democracy (*Narodowa Demokracja*). 'Rozłam w Chadecji', *Kurjer Nowogródzki*, 1, 44 (7 Nov. 1931), 2.

<sup>19</sup> In the 1860s the Polish language had been introduced at the universities in Galicia, the Austrian partition of the Polish lands. For more see Mitchell G. Ash and Jan Surman, eds., *The Nationalization of Scientific Knowledge in the Habsburg Empire, 1848–1918* (London: Palgrave Macmillan, 2012).

<sup>20</sup> Andreas Wacke, *Historische Verbindungen zwischen polnischem und westeuropäischem Recht und seiner Wissenschaft – Ein Überblick*, in Waław Uruszczak, Paulina Święcicka and Andrzej Kremer, eds., *Leges sapere: studia i prace dedykowane profesorowi Januszowi Sondłowi w pięćdziesiątą rocznicę pracy naukowej* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2008), 662.

<sup>21</sup> 'S.p. Juliusz Kałużniacki', *Dziennik Poznański*, 70, 267 (18 Nov. 1928), 6.

<sup>22</sup> Juliusz Kałużniacki and Ryszard Aureli Leżański, *Kodeks karny obowiązujący na Ziemiach Zachodnich Rzeczypospolitej Polskiej z uwzględnieniem najnowszego ustawodawstwa i orzecznictwa Sądu Najwyższego* (Warszawa: Wydawnictwo Ministerstwa Sprawiedliwości, 1925); Juliusz Kałużniacki, *Ustawy karne Ziem Zachodnich* (Warszawa: Ministerstwo Sprawiedliwości, 1922).

<sup>23</sup> Juliusz Makarewicz, *Einführung in die Philosophie des Strafrechts: auf entwicklungsgeschichtlicher Grundlage* (Stuttgart: F. Enke, 1906).

<sup>24</sup> Kazimierz Opalek and Władysław Wolter, *Nauka filozofii prawa i prawa karnego w Polsce* (Kraków: Polska Akademia Umiejętności, 1948), 26.

<sup>25</sup> Patrycja Grzybek, 'Emil Stanisław Rappaport: His Road from Abolition to Prosecution of Nations', in Frédéric Mégret and Immi Tallgren, eds., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 96–7.

<sup>26</sup> In May 1926, on the request of Piłsudski, Makowski introduced changes into the constitution of Poland; see Stanisław Łoza, ed., *Czy wiesz kto to jest?* (Warszawa: Wydawnictwo Głównej Księgarni Wojskowej, 1938), 456.

that voted against the decriminalisation, Witold Prądzyński (1882–1952), never studied in Polish. After graduating with a law degree from Breslau, he studied in Greifswald, Munich and Berlin and obtained a doctorate in Giessen. Until the First World War, Prądzyński lived and worked in Germany.<sup>27</sup> After 1918, Prądzyński and Mogilnicki participated in the negotiations with Germany over Gdańsk and Upper Silesia, while Kałużniacki served on the Arbitral Tribunal of Upper Silesia.<sup>28</sup>

What should we make of the German experiences of the Criminal Division's members? All of them spoke, read or even published in German. In most cases, it was a legacy of their education in the multinational empires, the heritage of the status quo ante bellum that they were so eager to lay to rest. On the other hand, with the lack of even a basic consensus on the legal Polish vocabulary and the language's peripheral status, German or French fluency was a standard and necessity for a successful career in academia.<sup>29</sup> Those coming from Congress Poland might have encountered administrative obstacles to studying or working in the Russian partition. The universities in Galicia offered education in Polish and a privileged position to Poles among other ethnic groups.<sup>30</sup> Nevertheless, almost none of the lawyers abstained from continuing his education or from gaining additional experience at Western European, primarily German, universities.

### The Criminal, Not the Crime

Legal debates in Germany had a potent influence on the creators of the Polish Penal Code of 1932. Either through direct contact with German academia or otherwise, all Criminal Division members were up to date about developments in criminal law in Germany and Austria. In this regard, Franz von Liszt (1851–1919), the leader of the sociological school in criminal law, exerted the most significant influence on the division's members.<sup>31</sup> Already in the 1880s and 1890s, Liszt demanded legislative reforms based on a new approach to the criminal.<sup>32</sup> The ideas of Liszt contrasted with the school inaugurated by Cesare Lombroso (1835–1909). Liszt postulated that the origin of a crime can only be understood through a study of its social and psychological context. Therefore, it was not the born criminal who committed crimes, as understood by Lombroso, but rather a person with a certain social and psychological background and life story.

For Liszt, criminal law's objective should not be retribution but rather prevention – both general and individual – as well as deterrence. In other words, the punishment should never be an end in itself.<sup>33</sup> Proposing a psychological concept of guilt, Liszt demanded an investigation of the offender's behaviour, mental and emotional states.<sup>34</sup> To achieve this end, he considered the expertise of medicine

<sup>27</sup> Andrzej Dzieczkowski and Alina Szklarska-Lohmannowa, 'Witold Prądzyński', *Polski Słownik Biograficzny*, 28 (Warszawa: Wydawnictwo Polskiej Akademii Nauk, 1984–5), 410.

<sup>28</sup> Dzieczkowski and Szklarska-Lohmannowa, *Prądzyński*, 28; Georges Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia', *Transactions of the Grotius Society*, 21 (1935), 30.

<sup>29</sup> Andrzej Zoll credits Juliusz Makarewicz with the creation of the unified Polish vocabulary in criminal law: Andrzej Zoll, 'Juliusz Makarewicz', in Jerzy Stelmach and Waclaw Uruszczak, eds., *Złota Księga Wydziału Prawa i Administracji* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2000), 278.

<sup>30</sup> For more on the nationalisation of universities and knowledge in Austria-Hungary, see Mitchell G. Ash and Jan Surma, *Nationalisation*.

<sup>31</sup> Known also as 'modern' or 'progressive' school: Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law', *The American Journal of Comparative Law*, 53, 3 (2005), 679–707; the influence of Liszt on the criminal laws of multiple European countries has been underlined by several historians; see Kurimay, *Budapest*, 28; Eduardo Correia, 'A Influencia de Franz v. Liszt sobre a Reforma penal Portuguesa', *Boletim da Faculdade de Direito*, 56 (1970), 1–34; Jan-Olof Sundell, 'Karl Schlyter – a Swedish Lawyer and Politician', *Scandinavian Studies in Law*, 40 (2000), 505–14.

<sup>32</sup> Liszt presented his ideas in his 1882 'Marburg Programme', which was crucial for the subject of reforming the criminal code in Germany at the time. Christoph Krehl, 'Reforms of the German Criminal Code – Stock-taking and Perspectives – also from a Constitutional Point of View', *German Law Journal*, 4, 5 (2003), 421; Richard F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880–1945* (Chapel Hill: University of North Carolina Press, 2000), 33.

<sup>33</sup> Franz von Liszt, *Der Zweckgedanke im Strafrecht*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 3, 1 (1883), 33–4.

<sup>34</sup> Albin Eser, 'Justification and Excuse', *The American Journal of Comparative Law*, 24, 4 (1976), 621–37.



and psychiatry indispensable. On the practical side, Liszt believed that the punishment should be decided on an individual basis and the amount of criminal provision should be reduced. In such a legal context, the judge could act more autonomously when deciding sentences.<sup>35</sup> Richard F. Wetzell claims that the goal of incapacitating the offender steered Liszt's attention away from the social causes of crime towards the offender's personality and mental state.<sup>36</sup> In his seminal book *Handbook of German Criminal Law (Lehrbuch des deutschen Strafrechts)*, which had gone through twenty-two editions by 1919, Liszt invoked medical experts and expressed cautious support for the abolition of paragraph 175 of the German Penal Code. He opted for another solution: decriminalisation of 'urning love' (*Urningsliebe*) but a strict penalisation of homosexual prostitution as a way to 'accommodate the requirements of the legal system'.<sup>37</sup>

Richard von Krafft-Ebing (1840–1902), one of the founders of sexology, reciprocated Liszt's esteem for the medical experts' knowledge in his 1894 memorandum *Contrasexuals Before the Criminal Judge (Conträresexuale vor dem Strafrichter)*. He quoted the *Handbook* to build an argument for the decriminalisation of homosexuality in Germany and Austria.<sup>38</sup> Thus was an interdisciplinary agreement established between the experts. As a result, when a group of activists from Berlin founded the Scientific-Humanitarian Committee, a pioneering homophile organisation, they saw Liszt as their obvious ally. Together with Krafft-Ebing, the lawyer was among the first signatories of the committee's 1897 petition to the *Reichstag* and *Bundestag* demanding the repeal of paragraph 175 of the German Criminal Code.<sup>39</sup>

Subsequent editions of the *Handbook* continued to support decriminalisation and Liszt became one of the intellectuals most associated with the initiative. In 1896 Juliusz Makarewicz wrote a review of the seventh edition of Liszt's handbook for a Polish legal journal. He compared this edition to previous versions and analysed the evolution of the author's views. The idea of reducing the number of existing provisions in the criminal law code impressed Makarewicz.<sup>40</sup> Perhaps he had already attended Liszt's course at the universities in Halle or Berlin.<sup>41</sup> In the next decades, Makarewicz would be the most important follower of the sociological school in Poland and the influence of Liszt on the Penal Code of 1932 is considered undeniable.<sup>42</sup>

What is more, out of the seven members of the Criminal Division who discussed the decriminalisation of homosexual acts in 1923, another three, Rappaport, Makowski and Mogilnicki, are also regarded as followers of Liszt's sociological school.<sup>43</sup> This younger generation of Polish lawyers challenged the dominant views of the older professors at Polish universities, most of whom belonged to the classical school of criminal law. The latter focused more on the crime itself and less on the offender.<sup>44</sup> This generational and conceptual antagonism had in fact caused Makarewicz problems at the early

<sup>35</sup> Wetzell, *Inventing*, 34.

<sup>36</sup> *Ibid.*, 36.

<sup>37</sup> Franz von Liszt, *Lehrbuch des Deutschen Strafrechts*, 2nd ed. (Berlin: Guttentag, 1888), 368–9. The idea was repeated in the following edition, even if sometimes with altered wording; see Franz von Liszt, *Lehrbuch des Deutschen Strafrechts*, 10th ed. (Berlin: Guttenberg, 1900), 369–70; Franz von Liszt, *Lehrbuch des Deutschen Strafrechts*, 16th & 17th ed. (Berlin: Guttenberg, 1908), 396–7.

<sup>38</sup> Krafft-Ebing referred to the fourth edition of the *Handbook*; Richard von Krafft-Ebing, *Der Conträresexuale vor dem Strafrichter. De Sodomia ratione sexus punienda. De lege lata et de lege ferenda* (Wien: Franz Deuticke, 1894), 18.

<sup>39</sup> Herzer, *Hirschfeld*, 73–7.

<sup>40</sup> Juliusz Makarewicz, 'Dr. Franz von Liszt. Lehrbuch des deutschen Strafrechts. Siebente durchgearbeitete Auflage. Erster Teil. Berlin 1895', *Przegląd Prawa i Administracji*, 21, 4 (1896), 330.

<sup>41</sup> Danuta Janicka, 'Makarewicz a Liszt. Próba analizy porównawczej', *Czasopismo Prawno-Historyczne*, 57, 1 (2015), 107. Although Leszek Sługocki criticised the claim that Makarewicz may have been a student of Liszt, the influence of the German professor on Makarewicz is indisputable: Leszek Sługocki, 'Juliusz Makarewicz nie był uczniem Franza Rittera von Liszta w Berlinie', *Palestra*, 36, 9–10 (1992), 64–6.

<sup>42</sup> Józef Kordeczuk, *Wpływ nurtu socjologicznego na kształt polskiego prawa karnego procesowego w okresie międzywojennym (Les classiques modernes)* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2007), 58.

<sup>43</sup> Kordeczuk, *Wpływ*, 61–4.

<sup>44</sup> *Ibid.*, 41–2, 45.

stages of his academic career. His post-doctoral habilitation was failed at the Jagiellonian University. One of the senior professors who delivered a critical opinion of the work did not appreciate Makarewicz's sociological approach.<sup>45</sup> Nevertheless, the dissertation was later published in German as *The Essence of Crime (Das Wesen des Verbrechens)*.<sup>46</sup>

In a way, Makarewicz redeemed this early academic defeat twenty-five years later when Piłsudski appointed him to lead the relatively youthful group of lawyers, mostly admirers of Liszt. Perhaps the almost complete absence of elderly legal experts in the Criminal Division was another reason why the sociological school prevailed over more conservative approaches to criminal law.

### The Homosexual, Not Pederasty

Following the sociological school's paradigms, the Criminal Code Division consulted medical experts. In 1920, Makarewicz invited two professors of psychiatry, Jan Piltz (1870–1930) and Rafał Radziwiłłowicz (1860–1929),<sup>47</sup> to discuss the general principles of the Penal Code regarding the concept of 'diminished responsibility' (*niepoczytalność*) and 'moral insanity'. During that meeting, Piltz talked about a series of 'mental disorders which most often led to crimes', among them 'the constitutional psychopathy' characterised by 'the perversions of the sexual drive, especially homosexuality'.<sup>48</sup> To present an example, Piltz described a case of 'passive homosexuality', which he had encountered in medical practice.<sup>49</sup>

The patient, a twenty-year-old man named N.N., asked the doctor for help with depression and apathy. Piltz's first impression was that the patient was in fact 'a young female soul in the man's body', who he diagnosed as 'a case of homosexuality'. As a former assistant in Auguste Forel's (1848–1931) Burghölzli asylum in Zurich, Piltz must have been familiar with the sexual theories of the Swiss psychiatrist. This experience enabled the Polish doctor to immediately recognise the homosexual characteristics in the patient.<sup>50</sup> The man 'blushed too easily', was shy, charming, gentle, well-educated and 'too delicate', but also idle, lazy and slept fourteen hours a day. At age seventeen, he had met a soldier in a public bath. 'With that officer, the sick [subject] had his first sexual intercourse'. Piltz admitted that the patient 'was as beautiful as a doll', so his popularity with men did not seem to surprise the doctor. An important part of the story was a two year long stay of 'the sick [subject]' in Berlin. N.N. informed Piltz about the homosexual scene of the German capital and his discovery of a community of like-minded men and women. When he returned to Cracow, N.N. visited restaurants and public places dressed in female clothes. Here again, Piltz 'had to admit' that the patient's dresses were very tasteful and that 'men courted him – even though he happened to be recognized as a man'. The doctor was convinced that apart from the sexual perversion, the homosexual may manifest other 'forms of constitutional psychopathy': moral insanity, hysteria, tendency to lying and megalomania.

<sup>45</sup> Andrzej Zoll, *Makarewicz*, 277.

<sup>46</sup> Juliusz Makarewicz, *Das Wesen des Verbrechens. Eine criminel-sociologische Abhandlung auf vergleichender und rechtsgeschichtlicher Grundlage* (Wien: Manz, 1896).

<sup>47</sup> Radziwiłłowicz represented the Ministry of Health in the debate. Juliusz Makarewicz, 'Ustawa karna – Część ogólna (Projekt wstępny)', *Przegląd Prawa i Administracji*, 47, 4–6 (1922), 93.

<sup>48</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: wydział karny, sekcja prawa karnego*, T.1, Z.3 (1922), 2–3; Jan Piltz, 'Uwagi o przepisach prawnych dotyczących kwestji niepoczytalności, zmniejszonej poczytalności, okoliczności łagodzących i środków zabaepieczających', *Przegląd Lekarski*, 7 (1921), 67–70.

<sup>49</sup> Unfortunately, the minutes do not contain the case, but Piltz probably described the story of a man which he had presented earlier the same year at a meeting of the Association of the Neurologists and Psychiatrists of Cracow: Jan Piltz, 'Przyczynek do nauki o homologicznej dziedziczności w przypadkach homoseksualizmu', *Przegląd Lekarski oraz Czasopismo Lekarskie*, 15, 3 (1921), 29–31.

<sup>50</sup> Agata Magowska, 'Jan Piltz (1870–1930)', *Journal of Neurology*, 262, 11 (2015), 1099; August-Henri Forel was probably the most popular sexologist author in interwar Poland. The first Polish edition of his 1905 book *La Question sexuelle* was published already in 1906. By 1939 *Zagadnienie seksualne* had been published at least fifteen times; the first Polish edition: August Forel, *Zagadnienia seksualne roztrząsane ze stanowiska nauk przyrodniczych, psychologii, higieny i socjologii* (Lwów: Księgarnia Polska B. Połoniecki, 1906).

Piltz blamed genetics for the ‘sickness’ of N.N., which could be grounds for claiming diminished responsibility.<sup>51</sup>

Through the story of N.N., Piltz demonstrated to the lawyers that homosexuality was primarily not a chosen behaviour but a type of person. This Foucauldian moment that proclaimed a homosexual ‘species’ corresponded with the legal paradigms of Liszt and Makarewicz. The offender mattered, not the offence. And the offender in this case was congenitally ‘sick’. He was no longer to blame for his queerness and this was his defence – at least from legal persecution. Concluding his presentation, Piltz underscored that the existing law did not correspond to contemporary psychiatric knowledge and he called for a legislative change. Hence, the medical expert recognised the transformation that had recently taken place in medical views of same-sex sexual acts – the emergence of Foucault’s ‘homosexual’ out of sodomitic acts – and demanded a corresponding adjustment of the law.<sup>52</sup> He postulated the placement of psychopathic offenders in separate institutions with suitable and individually tailored ‘repressions’.<sup>53</sup> As a result, the division decided to assign ‘constitutional psychopaths’ to mental asylums as a preventive measure, not a punishment. Yet, homosexuals as a category of psychopaths were not explicitly discussed. As a general principle of the Penal Code, the division resolved that offenders suffering from ‘mental disorders’, who ‘could not recognize the meaning of their deeds or guide their actions’, were not to be subjected to punishment.<sup>54</sup> Perhaps, the lawyers did not discuss homosexuality at length because they had earlier achieved consensus on the matter.<sup>55</sup>

### Aggregation of Polish Psychiatric Knowledge

In 1920, a year before Piltz’s presentation to the Criminal Division, the first meeting of the Congress of Polish Psychiatrists took place in Warsaw. During a discussion about the legal status of homosexuality, Włodzimierz Sieradzki (1870–1941), one of the delegates, expressed his conviction that the new Polish Penal Code would not criminalise ‘sexual perversions’.<sup>56</sup> Apparently, he already knew the opinion of the Criminal Division. Sieradzki was a professor of forensic medicine at the University of L’viv, where Makarewicz taught criminal law.<sup>57</sup> Could Sieradzki have known Makarewicz’s views on the issue or even have influenced them as a medical expert? When, in 1922, Makarewicz presented a draft of the Criminal Code’s general section in a legal journal, he mentioned three sources of expert medical knowledge: Jan Piltz, the Congress of Polish Psychiatrists and Włodzimierz Sieradzki.<sup>58</sup>

After completing studies in Cracow, Vienna and Berlin, Sieradzki had been an assistant of Leon Wachholz (1867–1942), the founder of modern Polish forensic medicine. Wachholz, in turn, had been a student of Eduard von Hofmann (1837–97) and Richard von Krafft-Ebing in Vienna between 1892 and 1893, both pioneers of forensic science.<sup>59</sup> Wachholz’s scientific debut was the article ‘About Case Studies of Sexual Deviations’ (*Zur Kasuistik der sexuellen Verirrung*), published in German in 1892.<sup>60</sup> Subsequently, Krafft-Ebing included in the ninth edition of his seminal *Psychopathia sexualis* the cases of ‘contrary sexual feeling’ described by Wachholz.<sup>61</sup> Copying the terminology of

<sup>51</sup> Jan Piltz, ‘Przyczynek’, 31.

<sup>52</sup> Michel Foucault, *The History of Sexuality. Volume 1: An Introduction* (New York: Vintage Books, 1990), 43.

<sup>53</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: sekcja prawa karnego, T.2* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1925), 138.

<sup>54</sup> Ultimately as paragraph 17 of the penal code: *Dziennik Ustaw*, 60 (15 Jul. 1932), poz. 571, 1154.

<sup>55</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: wydział karny, sekcja prawa karnego, T.1, Z.3* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1922), 2.

<sup>56</sup> *Pamiętnik Pierwszego Zjazdu Psychiatrów Polskich* (Warszawa: Wydawnictwo Ministerstwa Zdrowia Publicznego, 1921), 79.

<sup>57</sup> *Uniwersytet Jana Kazimierza we Lwowie. Skład Uniwersytetu w roku szkolnym 1920–1921* (Lwów: Uniwersytet Jana Kazimierza, 1921), 9,12.

<sup>58</sup> Juljusz Makarewicz, ‘Ustawa’, 93.

<sup>59</sup> Jan Widacki, ‘Leon Wachholz, zapomniany polski kryminolog’, *Archiwum Kryminologii*, 60 (2018), 523–34.

<sup>60</sup> Leo Wachholz, ‘Zur Kasuistik der sexuellen Verirrung’, *Friedrichs Blätter für gerichtliche Medizin und Sanitätspolizei*, Band 4 (Nürnberg: Korn, 1892).

<sup>61</sup> As cases 100 and 175: Richard von Krafft-Ebing, *Psychopathia sexualis, mit besonderer Berücksichtigung der conträren Sexualempfindung. Eine klinischforensische Studie* (Stuttgart: F. Enke, 1894), 224–5, 242, 367.



Krafft-Ebing, Wachholz used the word homosexual (initially as *homo-sexualny*) for the first time in Polish.<sup>62</sup> In all his publications on the subject Wachholz followed in the footsteps of Krafft-Ebing and appealed for the decriminalisation of homosexual acts.<sup>63</sup> Krafft-Ebing's views in turn had been significantly influenced by the most important early homophile activists, Karl Heinrich Ulrichs and Magnus Hirschfeld.<sup>64</sup> When Wachholz returned to Galicia, he propagated the expert knowledge he had gained in Vienna. He also trained the first generation of Polish forensic medicine experts, among them Sieradzki.<sup>65</sup> As the most prominent scholar in the field and the author of Polish academic textbooks, Wachholz had a profound influence, if not directly,<sup>66</sup> on the emerging consensus about the need for decriminalisation. In this way, at the beginning of the twentieth century in Galicia, the forensic medicine and psychiatric knowledge produced in Vienna encountered a receptive response from the followers of Liszt, such as Makarewicz.

In 1920, the Congress of Polish Psychiatrists also agreed on the necessity of decriminalisation. A paper presented by Antoni Mikulski (1872–1925), the head of the psychiatric hospital in Kochanówka (Łódź), was the focal point of a discussion on the topic.<sup>67</sup> Mogilnicki, a member of the Criminal Code Division, joined the audience to listen to this paper. Mikulski argued that only deeds that harmed society or individuals deserved a penalty, and 'sexual perversions' did not constitute such a danger. He also criticised all three imperial criminal codes existing in Poland at the time as conflicting and as influenced by 'outdated religious views'. Most of all, he claimed, the legal provisions were harmful: they prevented homosexuals from searching for medical help, made divorce difficult and created criminal opportunities for blackmailers.<sup>68</sup>

None of the delegates expressed objections to the views of Mikulski. Sieradzki was convinced that decriminalisation was only a matter of time and Mogilnicki assured the congress that such was the intention of the Criminal Division. A lawyer from Warsaw even demanded the creation of an association on the model of Magnus Hirschfeld's Scientific-Humanitarian Committee. Finally, Jan Nelken (1878–1940), a psychoanalyst from Warsaw, expressed his belief that there was 'not the slightest reason to punish people with sexual perversions'. What is more, he advised the utmost caution in the medical approach to homosexuals since there was no grounds for considering them 'mentally abnormal'.<sup>69</sup> As a former student of Carl Jung in Zurich and an eager follower of Freudian interpretation of homosexuality as an 'arrested development', a remnant of a primitive bisexual constitution of all humans, Nelken opposed Mikulski's opinion that homosexuals were mentally ill and in need of a therapeutical approach.<sup>70</sup>

<sup>62</sup> Leon Wachholz, *Wykłady medycyny sądowej* (Kraków: Towarzystwo Biblioteki Medyków, 1896), 64.

<sup>63</sup> Leon Wachholz, 'Krytyczne uwagi w sprawie uranicznego poczucia płciowego', *Krytyka Lekarska*, 4, 7–8 (1900), 189–96, 213–19; Leon Wachholz, *Krytyczne uwagi w sprawie uranicznego poczucia płciowego*, (post 1899).

<sup>64</sup> Harry Oosterhuis, 'Sexual Modernity in the Works of Richard von Krafft-Ebing and Albert Morr', *Medical History*, 56, 2 (2012), 133–55; Robert Beachy, 'The German Invention of Homosexuality', *The Journal of Modern History*, 82, 4 (2010), 816.

<sup>65</sup> Another student of Wachholz, Wiktor Grzywo-Dąbrowski (1885–1968), who became the head of the forensic medicine institute at the University of Warsaw, was one of few Polish authors writing about homosexuality. See Wiktor Grzywo-Dąbrowski, *Przestępstwa w związku z zaspakajaniem popędu płciowego* (Poznań: Rolnicza Druk. i Księgarnia Nakładowa, 1936); Wiktor Grzywo-Dąbrowski, 'Podstawy anatomiczne homoseksualizmu i jego leczenie operacyjne', *Lekarz Wojskowy*, 2, 30 (1921), 953–9.

<sup>66</sup> The works of Wachholz were not well known among lawyers at the time. Jan Widacki, 'Leon Wachholz, zapomniany polski kryminolog', *Archiwum Kryminologii*, 40 (2018), 523–34; Stefan Raszeja, 'Zarys historii medycyny sądowej w Polsce i jej powiązań z medycyną sądową w krajach niemieckojęzycznych', *Archiwum Medycyny Sądowej i Kryminologii*, 54, 4 (2004), 184–94.

<sup>67</sup> Maria Grzywo-Dąbrowska, 'Ś. p. Prof. dr. Antoni Mikulski', *Nowiny Psychjatryczne*, 2 (1925), 105–6; Stanisław Trzebiński, *Wydział Lekarski Uniwersytetu Stefana Batorego w latach 1919–1929* (Wilno: Druk Józefa Zawadzkiego, 1931), 96–7.

<sup>68</sup> *Pamiętnik*, 78–9.

<sup>69</sup> *Ibid.*, 80.

<sup>70</sup> In 1914 Sigmund Freud mentioned Nelken as 'a student of Jung'. In the 1920s, Nelken was one of the most important experts on homosexuality. He served as forensic expert in the aforementioned case of Zofia Sadowska and published a

The dissonance between Nelken and Mikulski was inevitable since both psychiatrists followed different schools. After graduating from the University of Kiev, Mikulski had worked for a year at a psychiatric clinic in Munich.<sup>71</sup> Mikulski's views on homosexuality were consistent with those held by Emil Kraepelin (1856–1926), the head of the clinic and 'the dean of German psychiatry'.<sup>72</sup> Kraepelin included homosexuality in his path-breaking classification of mental disorders, although he opposed the idea of its criminalisation.<sup>73</sup> This interpretation of homosexuality was at odds with psychoanalysis. When the focus of the discussion in Poland was the new Penal Code, however, the differences between Mikulski and Nelken were less important. Polish lawyers and medical experts agreed to not include the criminalising provisions in the new law. Their consensus spanned the followers of different schools and traditions – it included students of Wachholz, Forel, Kraepelin and Jung.

### Legal Discussion on Queer Sex

When the nine lawyers<sup>74</sup> gathered in Warsaw on 30 May 1923 to discuss 'unnatural fornication', the debate seems to have been a formality. With no public debate in the press, the experts had already stated their consensus on the matter. Their discussion started with a paper presented by Stefan Glaser (1895–1984), a graduate in law at the University of Vienna and recent supervisee of Juliusz Makarewicz in L'viv.<sup>75</sup> Glaser interpreted homosexuality as only one of many forms of 'unnatural fornication' (every kind of non-procreative sex: masturbation, necrophilia, zoophilia, heterosexual sex other than penis in vagina), a 'morally repulsive' behaviour of medically unknown cause. Despite calling it a result of an 'inborn or inherited defectiveness', Glaser admitted that it could also occur in other situations, which Kałużniacki described as cases where 'the lack of culture' was present. Makarewicz proclaimed the necessity of abandoning religious justifications for the criminalisation of homosexuality. Instead, he derived its culpability from the fact that it 'drew the sexual drive away from its aim of maintaining the species'. Glaser stressed that it led to depopulation, endangered the health of the nation and its 'marital order'.

The inclusion of homosexuality in the 'unnatural fornication' category of equally reprehensible deeds posed a logical challenge: to satisfy the requirement of consistency, either all its forms should be punished or none. Should the new Polish code criminalise also masturbation and non-procreative encounters between husband and wife? In the face of such questions the arguments for a complete decriminalisation prevailed. For the Criminal Division's members, legal persecution not only created an opportunity for blackmail but it also led to scandalous trials demoralising the public. Glaser invoked 'the practical reasons related to legal policy': the difficulty to gather evidence in such

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booklet about his homosexual patient. Sigmund Freud, *Zur Geschichte der psychoanalytischen Bewegung* (Leipzig: Internationaler Psychoanalytischer Verlag, 1924), 35; Magnus Ljunggren, 'The Early Psychoanalytical Breakthrough in Poland', in Dorota Tubielewicz Mattsson and Janina Gesche, eds., *Przekraczanie granic. Ewie Teodorowicz-Hellman z okazji 60. rocznicy urodzin. Gränsöverskridanden: till Ewa Teodorowicz-Hellman på hennes 60-årsdag* (Stockholm: Stockholms universitet, 2006), 161–6; 'Wywiad naszego korespondenta ze znakomitym psychiatrą, dr. Janem Nelkenem', *Dziennik Białostocki*, 2, 52 (22 Feb. 1924), 1; Jan Nelken, *Kokainizm i homoseksualizm* (Warszawa: Wydawnictwo 'Rocznika Psychjatrzyckiego', 1931). On Jung's views on homosexuality see Robert H. Hopcke, 'Jung and Homosexuality: A Clearer Vision', *Journal of Analytical Psychology*, 33, 1 (1988), 65–80; Robert H. Hopcke, *Jung, Jungians, and Homosexuality* (Eugene: Resource Publications, 1989).

<sup>71</sup> Eufemjusz Herman, 'Ś. p. Prof. Dr. med. Antoni Feliks Mikulski', *Warszawskie Czasopismo Lekarskie*, 5 (1925), 199.

<sup>72</sup> Wetzell, *Inventing*, 43.

<sup>73</sup> Emil Kraepelin, *Compendium der Psychiatrie zum Gebrauche für Studierende und Aerzte* (Leipzig: A. Abel, 1883); Florian Mildnerberger, 'Kraepelin and the "Urnings": Male Homosexuality in Psychiatric Discourse', *History of Psychiatry*, 18, 3 (2007), 323.

<sup>74</sup> Apart from the seven members of the Criminal Code Division, an external expert presenting a paper, Stefan Glaser, and a repentant of the Ministry of Justice, both had no voting rights. About the organisation of the Codification Commission, see Leonard Górnicki, 'Komisja Kodyfikacyjna II RP: pozycja ustrojowa, struktura organizacyjna, podejmowanie decyzji,' *Acta Universitatis Wratislaviensis. Prawo. Studia Historycznoprawne*, 328 (2019), 109–51.

<sup>75</sup> Karolina Wierczyńska and Grzegorz Wierczyński, 'Stefan Glaser', in Mégret and Tallgren, *Dawn*, 308–9.

investigations and problems in the interpretation of criminalising provisions. Also, there was a eugenic argument that the persecution of homosexuals might compel them to hide in heterosexual relationships and procreate, which could cause the spread of the 'disorder' instead of stopping it. What is more, the fear of punishment could make it difficult for homosexuals to seek medical treatment, which would be debilitating for society and contrary to the goals of the criminal law. Interestingly, Miklaszewski, who specialised in Russian law, adduced the new Soviet Penal Code, which did not criminalise sodomy. He noticed that the decriminalisation had not caused 'negative consequences' in Russia.<sup>76</sup>

The insertions of homosexuality into the spectrum of what we might call generally queer (non-normative) sexual behaviours, so-called 'unnatural fornications', allowed the commission to liberate the homosexual from criminal persecution in Poland. The principles of consistency and coherence clashed with the reality of scandalous investigations into intimate matters. Stripped of religious motives and provided with psychiatric insights, the lawyers conceded the inefficiency of any attempts to regulate sexual perversions. Interestingly, many of their arguments had been previously used by the movement demanding the repeal of paragraph 175 in Germany. But it was the knowledge of Polish sexual experts that allowed the Criminal Division to drop the penalisation of homosexual acts and relocate the *pederast* (at the time it was the most common term in Polish for a man having sex with other men) from the prison to the mental hospital. It removed him from the domain of law and placed him in the domain of psychiatry.<sup>77</sup> In a way, this relocation liberated him from the state's surveillance and the criminal spotlight in which he had remained. Poland proclaimed its disinterest in the homosexual.

### Polonisation of Law through Modernisation

Apart from the general principles that guided the decision about the decriminalisation, and which were based on the sociological school of law and the corresponding expert knowledge in psychiatry and forensic medicine, another principle inherent in the entire idea of the code enabled this break with the legacies of the past. A clear nationalist undertone of the endeavour reflected one of its main goals – the creation of Poland. During the inaugural meeting of the Codification Commission in 1919 one of its members had proclaimed that 'the main difficulty in the codification work was not the legislative unification of the Polish lands but rather the expression of the nation's genius through the new law. This law – according to this member – should be able to co-operate with the Polish nation in its civilizational mission both within and outside the state'.<sup>78</sup> The goal of the Codification Commission was, therefore, both to create and defend Poland's national distinctiveness.

The task was also bidirectional – the law was supposed to express the *Polish soul*, but at the same time to define what was *Polish*. One of the division's members marked out a special, quasi-metaphysical role for Polish lawyers. Makowski wrote that 'Poland and justice are terms of such importance that every work related to any of them must be based on the other and connect the social psyche of the nation with its own reflection, the organization of justice'.<sup>79</sup> Only a few years earlier, in 1916, Makowski had drawn an analogy between soldiers and lawyers: invoking the metaphor of the nation as a human body, he compared soldiers to the limbs and lawyers to its mind.<sup>80</sup> He believed that Poland would come into existence through law, since legislation was a material representation of the nation's soul. He claimed that 'Poland did not die' during the time of partitions because

<sup>76</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: sekcja prawa karnego, T.2* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1925), 198–205.

<sup>77</sup> A *pederasta* was by definition a man. As I mentioned earlier, apart from the lands of former Galicia, sex between women had not been criminalised in Poland. When discussing the matter in 1923, the lawyers still thought mostly about male homosexuality.

<sup>78</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: dział ogólny, T.1, Z. 1* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1920), 25.

<sup>79</sup> Wacław Makowski, *Rozważania prawnicze* (Warszawa: F. Hoesick, 1928), 118.

<sup>80</sup> Makowski, *Rozważania*, 315.

Polish souls ‘were filled with her’. Therefore, in the time of national freedom, if Poles ‘have a strong enough desire of Poland, she will become real [and] will find its . . . legal form’.<sup>81</sup> For Makowski, lawyers had a transcendental role in the act of Poland’s creation. They should search for its true spirit (Polishness) and express it through legal codes. In short, the Polish lawyer was to breathe life into the political body of the state.

At the same time, the Criminal Division wanted to create an original Polish law that would be evidence of Polish distinctiveness and modernity. The entanglement of the Polish and the modern in the German, however, posed a challenge. Makarewicz suggested one way of managing the problem: ‘there is no need to cite only German literature. Legal thought is equally highly developed in Italy, France, Anglo-Saxon countries, and even Russia. Why should we be slavishly stuck in a taxonomy of one nation, why should we be vassals of German thought?’<sup>82</sup> The ambivalent attitude toward ‘German thought’ as simultaneously an example to follow and a continuation of the power of a threatening oppressive overlord echoes the contradictory role of Germans in Polish culture of the nineteenth century that Julian Dybiec called at once ‘oppressors and teachers’.<sup>83</sup>

In the post-1918 nation-state, personal biographies and knowledge acquired under imperial circumstances were placed in a matrix of contradictory guidelines. Poland had to be special, originally ‘Polish’, but at the same time its distinctiveness was built on the notions of modernity produced somewhere else, mostly in Germany and Austria. However, the chasm between ‘German’ modern ideas and the German Criminal Code offered an opportunity for the Criminal Division to create a *Polish* legal order in this gap, and thus define modernity as Polish and Polishness as modernity.

In line with Makarewicz’s principle of looking beyond Germany, the Criminal Division often referred to different countries’ penal codes as it searched for the most fitting solutions to different challenges. In the case of homosexuality, Latin countries’ legal systems presented an alternative. The codes based on the Napoleonic Code, which generally did not criminalise ‘unnatural fornication’, offered a link between newly created Poland and its Napoleonic predecessor, the Duchy of Warsaw. Additionally, the decriminalisation of homosexuality was an example of a clear break with the heritage of partition and an example of *Polish* difference from the three empires. Yet another way to pursue national distinctiveness was the consultation with *Polish* expert institutions like the Congress of Polish Psychiatrists. The German genealogy of *Polish* modern knowledge did not seem to bother the authors of this effort. The irony that the Criminal Division’s attempt to express Polish ‘national genius’ could in fact have articulated *German* knowledge seems to have been lost on the lawyers.

The quest for Polishness as a quest for modernity became a personal aim of Makarewicz. Before presenting the final project of the new code, he travelled to the United States to observe ‘American ideas of astounding daring, of far-reaching radicalism in cutting the Gordian Knot of problems’.<sup>84</sup> The journey reflected the ambition to create an original and modern law that would represent Poland among other national legal systems. It should fill Polish lawyers with pride and make the new code a leader among international penal codes. Geert Somsen, who called this attitude ‘Olympic internationalism’, asserted that ‘national achievements, after all, can only be measured by *international* standards’.<sup>85</sup> Hence, the Criminal Division consulted legal provisions and even drafts of new penal codes from all over the world: a Japanese code and a Swiss project were often quoted.

<sup>81</sup> Ibid., 320.

<sup>82</sup> Juliusz Makarewicz, *Prawo karne. Wykład porównawczy* (Lwów: Książnica Polska, 1924), 4.

<sup>83</sup> Julian Dybiec, ‘Prześladowca i nauczyciel. Niemcy w nauce i kulturze polskiej 1795–1918’, in Bogusław Dopart, Jacek Popiel and Marian Stala, eds., *Literatura, kulturoznawstwo, uniwersytet. Księga ofiarowana Franciszkowi Zięje w 65. rocznicę urodzin* (Kraków: Universitas, 2005), 455–68.

<sup>84</sup> Juliusz Makarewicz, *U.S.A. Kartki z podróży po Stanach Zjednoczonych* (Lwów: Ateneum, 1929), 5.

<sup>85</sup> Geert J. Somsen, ‘A History of Universalism: Conceptions of the Internationality of Science from the Enlightenment to the Cold War’, *Minerva*, 46 (2008), 364. On Polish examples of the oscillation between scientific transnationalism and internationalism: Katherina Kreuder-Sonnen, ‘From Transnationalism to Olympic Internationalism: Polish Medical Experts and International Scientific Exchange, 1885–1939’, *Contemporary European History*, 25, 2 (2016), 207–31.

The decriminalisation of homosexuality, or the decision to exclude ‘unnatural fornication’ from the Penal Code of 1932, represented to some extent a coincidental alignment of two separate emancipatory goals: that of Piłsudski’s brand of Polish nationalism on one side, and the campaign against legal persecution of homosexuals on the other. The fact that the latter hardly existed in Poland could have, paradoxically, facilitated the alignment. The decision about the decriminalisation was taken within a relatively small group of legal and medical experts, an elite circle. Unintentionally, these men provided the cause of homosexual emancipation with the respectability of heterosexuality, science and bourgeois ideas of progress.

### The Homosexual Departs from the Crime Scene

The decriminalisation of consensual homosexual acts by no means meant the complete equality of heterosexuality and homosexuality in the Polish Penal Code. The Criminal Division made clear its view that same-sex relations were sick through another provision. The lawyers decided unanimously that ‘a man, who offers himself for money to another man in order to commit an act similar to copulation’, shall be punished.<sup>86</sup> The reasoning behind this decision was based on the premise about the allegedly morbid nature of homosexuality: if it was a symptom of a pathological sexual perversion, then a person trying to use it for a financial gain should be punished. However, it does not seem that the division wanted to *protect* the homosexual as an individual with diminished capacities whose debilitating mental condition could be exploited. Makarewicz expressed the conviction that ‘pederasts’ found their partners ‘almost exclusively thanks to money’ and male prostitutes acted merely for pecuniary gain.<sup>87</sup> Hence, the goal of the provision was rather to contain the supposed social demoralisation that the homosexual radiated. The criminalisation of homosexual sex work was a means to quarantine the homosexual.

At the same time, the division decided not to regulate heterosexual prostitution in the Criminal Code. Although brothels were outlawed in interwar Poland, female sex workers could offer their services as long as they remained under the control of medical experts.<sup>88</sup> The state saw the female prostitute as a venereological threat to the nation but not as a criminal.<sup>89</sup> Some scholars in Poland believe that this approach, adopted already in 1919, resulted from the influence of ‘Western’ humanitarian thought and was less repressive than the previous, imperial systems.<sup>90</sup>

The criminalisation of homosexual sex workers marked the separation of the homosexual (along with the female prostitute) from the criminal in Poland. If the nineteenth century *urning* had been a liminal figure from the criminal world, the early twentieth century homosexual was a psychopath of a rather benign nature. Scott Spector has argued that German experts, more than a half century earlier, in a different context but with the same goal in mind, had ‘conceded inborn homosexual identity [to] remove it from the domain of criminality if only to reposition it in the domain of insanity’.<sup>91</sup> However, when the homosexual departed from the crime scene, the homosexual prostitute remained there as a malevolent figure living beyond the limits of morality and driven by greed.

The legal provision separated the criminal homosexual prostitute (usually from a working-class background) from the generally upper-class paying client, who was merely sick but not malignant.

<sup>86</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: sekcja prawa karnego, T.2* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1925), 209–10.

<sup>87</sup> *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: sekcja prawa karnego, T.2* (Warszawa: Wydaw. Urzędowe Komisji Kodyfikacyjnej, 1925), 209.

<sup>88</sup> Sylwia Kuźma-Markowska, ‘Wiele twarzy “nierządu.” Prostyucja w międzywojennym Wilnie’, in Mateusz Rodak, ed., *Margines społeczny Drugiej Rzeczypospolitej* (Warszawa: Instytut Historii PAN, 2013), 291.

<sup>89</sup> Anna Dobrowolska, *Zawodowe dziewczyny. Prostyucja i praca seksualna w PRL* (Warszawa: Wydawnictwo Krytyki Politycznej, 2020), 27–30.

<sup>90</sup> Marzena Lipska-Toumi, *Prawo polskie wobec zjawiska prostytucji w latach 1918–1939* (Lublin: Wydawnictwo KUL, 2014), 214.

<sup>91</sup> Scott Spector, *Violent Sensations: Sex, Crime, and Utopia in Vienna and Berlin, 1860–1914* (Chicago: University of Chicago Press, 2017), 110.



To be sure, the members of the Criminal Division believed that the homosexual prostitute *was not* in fact a homosexual. The two, even if united in a homosexual act, shared nothing in common anymore. All of this reminds us that the Polish Code of 1932 decriminalised homosexual acts but did not normalise them.

The decision to criminalise homosexual prostitution accommodated the moral judgement against same-sex sexual acts in the law without persecuting the homosexual. At the same time, it made the male prostitute the morally and legally guilty party. In practice, the new code rendered every lower-class man involved in same-sex acts a potential criminal and a target of policing efforts of the state. It also revealed that the members of the division understood homosexual behaviours as something that could be tempting and *possible* for some (lower-class) men under certain conditions, such as poverty. For them, heterosexual normativity was a domain of upper-class men that guaranteed their social privilege and confirmed their respectability and culturedness. By contract, homosexual acts belonged to the environment of the mental clinic or to the world of poverty.

The solution found by the Criminal Division was hardly an innovative one.<sup>92</sup> The replacement of paragraph 175 with a provision punishing homosexual prostitution had already been proposed by Franz von Liszt in the *Handbook*. Krafft-Ebing and Emil Kraepelin, among others, demanded similar legal regulation of the issue.<sup>93</sup> Their Polish students followed the teachers: Wachholz, Mikulski, Sieradzki – all argued for the same regulation.<sup>94</sup>

The decisions taken during the Criminal Division's debate in 1923 remained unchanged until 1932, when work on the Penal Code was finalised. The only significant alteration took place when the lawyers decided to include women in the regulation, rendering homosexual prostitution punishable in the case of both sexes. The change may well have been an echo of the 1924 case of Zofia Sadowska. It manifested a shift in developing anxieties about women's sexuality. The female doctor from Warsaw openly proclaimed her homosexuality before the court and assertively claimed that it should not matter for the libel lawsuit, which she had filed against a boulevard newspaper.<sup>95</sup>

Although the 1932 Penal Code ignored homosexuals, it targeted poorer men and women who offered sex to other people of the same sex. The arguments about the difficulty in gaining evidence of particular sexual activity or the scandalous character of such an endeavour, which had been brought during the debate on the decriminalisation of 'unnatural fornication', were not adduced during the debate on homosexual prostitution. Clearly, the regulation had more to do with one social class controlling the actions of another.

### Undemocratic Modernisation

During the division's vote on decriminalisation, Witold Prądzyński expressed the only dissenting opinion. Yet, he did not disagree on the merits of the decision. Instead, he voiced a conviction that it might outrage some 'political factors'. At that moment, it seemed that the Polish parliament, the *Sejm*, would have a say on the draft law. A debate could easily have led to a rejection of the reform,

<sup>92</sup> The German Criminal Code reform projects between 1902 and 1930 contained the same regulation – explicitly criminalising homosexual male prostitution, whereas the 1871 German Criminal Code did not regulate the issue; see Martin Lücke, 'Hierarchien der Unzucht: Regime männlicher und weiblicher Prostitution in Kaiserreich und Weimarer Republik', *L'homme: Zeitschrift für feministische Geschichtswissenschaft*, 21, 1 (2010), 55.

<sup>93</sup> Richard von Krafft-Ebing, *Psychopathia Sexualis* (Burbank: Bloat Publishing, 1999 [1903]), 421, 479; for more on the subject see Kerwin Kaye, 'Male Prostitution in the Twentieth Century', *Journal of Homosexuality*, 46, 1–2 (2004), 1–77; John Scott, 'A Prostitute's Progress: Male Prostitution in Scientific Discourse', *Social Semiotics*, 13, 2 (2003), 179–99; Andreas De Block and Pieter R. Adriaens, 'Pathologizing Sexual Deviance: A History', *The Journal of Sex Research*, 50, 3–4 (2013), 276–98.

<sup>94</sup> Wachholz, *Krytyczne*; Antonioni Mikulski, *Homoseksualizm ze stanowiska medycyny i prawa* (Warszawa: Odczyty kliniczne wydawane przez Redakcję Gazety Lekarskiej, 1920), 22, 263–4.

<sup>95</sup> Główna Biblioteka Lekarska, Akta Izby Lekarskiej Warszawsko-Białostockiej, nr kat. 2/1/1122, 2/1/2513, 2/1/4945, akta w sprawie przeciwko Dr. Zofii Sadowskiej przeciwko wyrokowi Sądu Izby Lekarskiej Warsz.-Białostockiej, rok 1926, nr 13–26/17.

as happened in Germany's *Reichstag*. The sections on the decriminalisation could even jeopardise the parliamentary fortunes of the whole Criminal Code. Only two days before Prądzyński's remark a new centre-right government had been formed in Warsaw. Apart from proclaiming the dominance of ethnic Poles in the state, it had also promised to increase the privileges enjoyed by the Catholic Church.<sup>96</sup> The political atmosphere was not advantageous for liberal legal reforms.

When Mogilnicki criticised Prądzyński's objection and invoked the 'fundamental opinions', he not only meant the general rule related to the diminished responsibility of the mentally ill and the expert knowledge. As the member of the commission who was closest to Piłsudski and the one who had promised the Congress of Polish Psychiatrists that the new code would not criminalise homosexual acts, Mogilnicki was an emissary of a certain vision of Poland's modernity rooted in the Piłsudski camp's project of inclusive nationalism and progressivism.<sup>97</sup>

Eventually, contrary to the fears of Prądzyński, the *Sejm* did not object to the decriminalisation of homosexuality. It did not have a say in the matter at all. After the 1926 May Coup staged by Piłsudski, Poland took an authoritarian path that ended its short experiment with democracy. The 'Code of Makarewicz' entered into force in September 1932 pursuant to the decision of the president of the Republic.<sup>98</sup> Catholic bishops protested 'with pain' against the new law as 'being at variance with Christian ethics'. They demanded greater privileges for Catholicism and focused on the liberalisation of access to abortion the code introduced.<sup>99</sup> The bishops did not mention same-sex acts, but they warned that the new law posed 'a great danger to good mores and demographic policy', since it cleared the way for 'impunity in sexual life'.<sup>100</sup> One Catholic newspaper reported that the Polish Penal Code upset even the pope himself.<sup>101</sup> Nevertheless, the Church desired to maintain a relationship with Piłsudski's regime and it seems that the new code was not worth a mass for Polish bishops.<sup>102</sup>

Few popular press articles reported on the decriminalisation of homosexual acts.<sup>103</sup> Since 1926 the press had been increasingly subjected to censorship, which influenced the discussion on the legal reform prepared by the government. The only significant voice in the press was a lengthy article in *Morning Express* (*Express Poranny*), a newspaper associated with the ruling *Sanacja*, in July 1931, about a year before the introduction of the code.<sup>104</sup> The author argued that the homosexual was 'neither a licentious reprobate nor a heavily sick psychopath'; for this reason he 'did not pose a danger to the blissful life of heterosexuals'. The article expressed the conviction that 'in Poland the legal approach to homosexual love' would soon be 'fundamentally and positively changed'.<sup>105</sup>

All in all, homosexuality remained primarily a subject of medical and legal literature. The press reported about same-sex love mostly on the occasions of sensational trials like Sadowska's libel trial or in the case of police raids on cruising points.<sup>106</sup> The few public voices that demanded

<sup>96</sup> Paul Brykczynski, *Primed for Violence: Murder, Antisemitism, and Democratic Politics in Interwar Poland* (Madison: University of Wisconsin Press, 2016), 131–41.

<sup>97</sup> Plach, *Clash*.

<sup>98</sup> *Dz. U. z 1932 r.*, nr 60, poz. 571; Dariusz Makiła, *Historia prawa w Polsce* (Warszawa: Wydawnictwo Naukowe PWN, 2008), 478, 487; Adam Lityński, *Wydział karny Komisji Kodyfikacyjnej II Rzeczypospolitej: dzieje prac nad częścią ogólną kodeksu karnego* (Katowice: Uniwersytet Śląski, 1991).

<sup>99</sup> K.A.P., *Polska Katolicka Agencja Prasowa*, 5, 240 (21 Oct. 1931), 3.

<sup>100</sup> *Ibid.*, 241 (22 Oct. 1931), 3.

<sup>101</sup> *Przegląd Katolicki*, 38, 34 (4 Sep. 1932), 540.

<sup>102</sup> Plach, *Clash*, 35.

<sup>103</sup> *Kurjer Czerwony*, 11, 191 (22 Aug. 1932), 5.

<sup>104</sup> Wiesław Władysław, *Krew na pierwszej stronie. Sensacyjne dzienniki Drugiej Rzeczypospolitej* (Warszawa: Czytelnik, 1982), 248.

<sup>105</sup> J. Pruszyński, 'Mniejszości seksualne', *Głos Poranny. Dodatek Społeczno-Literacki* (*Express Poranny*), 10, 195 (19 Jul. 1931), 1–2.

<sup>106</sup> For example 'Dr. Zofja Sadowska udowadnia swą niewinność', *Dziennik Białostocki*, 2, 42 (12 Feb. 1924), 1; 'Panna dr. Zofja Sadowska w obronie swej niewinności', *Express Poranny*, 3, 43 (12 Feb. 1924), 1–2; 'Bał sztucznych biustów przy ul. Kruczej', *Express Poranny*, 3, 17 (17 Jan 1924), 3.

decriminalisation, like those of Tadeusz Boy-Żeleński and Irena Krzywicka, remained isolated.<sup>107</sup> Homosexuals in the 1920s in Poland did not have any official organisations that would represent their interests. However, some of them subscribed to Germanophile magazines and even used them to inform each other about meeting spots in Warsaw.<sup>108</sup> The meagre degree of Polish participation in the World League for Sexual Reform still awaits an historian's attention.<sup>109</sup> The right to abortion and divorce remained the focal points of press debates on sexuality in that period. The category of homosexual, as understood by Foucault, had not yet gained a foothold among the public in Poland. It seems that not even the legal experts fully wrapped their minds around the difference between the homosexual 'species' (as a mental disorder) and same-sex sexual acts (as committed by a male prostitute). In the 1920s and early 1930s in Poland, homosexuality remained a subject of expert knowledge, a riddle for intellectuals and a challenge for criminalistics. It had not yet been politicised and even men who had sex with other men might have felt the topic did not concern their lives.

The Polish Criminal Code of 1932 was modern and innovative, but not completely exceptional. It followed contemporary trends in the fields of legal theory and medicine. The independence of Poland in 1918 and the quest to define its identity as modern and distinctive had powerfully influenced the formation of its law. The decision to decriminalise homosexuality was mostly a consequence of debates, activism and scientific developments in German-speaking countries. The arguments brought during the debate of the Criminal Division and its final decision closely followed medical ideas conceived in Austria-Hungary and Germany. When in 1933 a new Danish Penal Code entered into force, it too included regulations that decriminalised consensual homosexual sex and criminalised prostitution. Similarly, the Danish legislators invoked psychiatric experts, who explicitly followed the views of a German expert, Magnus Hirschfeld.<sup>110</sup> This sexologist and activist also influenced an analogous reform in Estonia in 1935.<sup>111</sup>

The Criminal Division's decision from 1923 to decriminalise homosexual acts in Poland was the final one in the matter. However, it took almost a decade for the new law to enter into force. As I mentioned before, other parts of the Criminal Code were more divisive and contested. Janicka claims that the work on the final version of the code took so long due to the difficult task of uniting three different legal systems from the time of partitions.<sup>112</sup> Lityński blames vaguely 'historical circumstances', as well as the size and composition of the body.<sup>113</sup> However, the work on criminal codes in other countries in that period took even longer. The preparation of the 1942 Swiss Penal Code started in 1888.<sup>114</sup> Work on the Danish Criminal Code of 1933 began in 1905.<sup>115</sup> In Poland, the omission of the parliament in the legislative procedure significantly simplified and precipitated this process.

<sup>107</sup> Tadeusz Boy-Żeleński, 'Nasz nowy kodeks karny', *Wiadomości Literackie*, 38 (1931), 1; Tadeusz Boy-Żeleński, 'Literatura "mniejszości seksualnych"', *Wiadomości Literackie*, 51/52 (1930), 2; Irena Krzywicka, 'Wstęp', in Radclyffe Hall, *Źródło samotności* (Warszawa: Towarzystwo Wydawnicze Rój, 1933), v–xi.

<sup>108</sup> Advertisement in *Die Freundschaft*, 4, 22 (1922), 6; anonymous financial contributions for *Jahrbuch für sexuelle Zwischenstufen*, see *Jahrbuch für sexuelle Zwischenstufen*, 13 (1913), 255, 507.

<sup>109</sup> Magdalena Gawin and Ivan Crozier, 'Światowa Liga Reformy Seksualnej w latach międzywojennych w Anglii i w Polsce', in Anna Żarnowska and Andrzej Szwarz, eds., *Kobieta i rewolucja obyczajowa* (Warszawa: Wydawnictwo DiG, 2006), 311–34.

<sup>110</sup> Wilhelm von Rosen, 'Denmark 1866–1976: From Sodomy to Modernity', in Jens Rydström and Kati Mustola, eds., *Criminally Queer: Homosexuality and Criminal Law in Scandinavia, 1842–1999* (Amsterdam: Aksant, 2007), 68–72.

<sup>111</sup> Andreas Kalkun, 'Homoseksuaalsuse sõnastamise katsed. Eulenburgi skandaal ja Magnus Hirschfeld XX sajandi alguse Eesti ajakirjanduses', *Keel ja Kirjandus*, 63, 1–2 (2020), 112–32.

<sup>112</sup> Danuta Janicka, 'Materialles Strafrecht', in Martin Löhnig and Anna Moszyńska, eds., *Laboratorium für internationale gesetzgeberische Arbeit. Die Geburt der polnischen Rechtsordnung der Zwischenkriegszeit im europäischen Kontext* (Wien: Böhlau Verlag, 2021), 279.

<sup>113</sup> Adam Lityński, *Wydział karny Komisji Kodyfikacyjnej II Rzeczypospolitej: dzieje prac nad częścią ogólną kodeksu karnego* (Katowice: Uniwersytet Śląski, 1991), 147.

<sup>114</sup> Thierry Delessert, 'L'homosexualité dans le Code pénal suisse de 1942: Droit octroyé et préventions de désordres sociaux', *Vingtième Siècle. Revue d'histoire*, 131 (2016), 125.

<sup>115</sup> Rosen, *Denmark*, 68–72.

## Conclusion

The decriminalisation of homosexual acts in Poland resulted from several coinciding developments. The transnational flows of knowledge produced in the previous imperial framework provided a scientific impulse and a definition of modernity. The newly established independence of Poland created a demand for a code that would embody the nation's distinctiveness. The influence of Piłsudski on the Criminal Code's creation determined its left-leaning, relatively liberal character. Additionally, the 1926 May Coup made it easier for the Piłsudskiites to shut out the nationalist right and the Catholic Church from the legislative process. The liberal character of the 1932 law's provisions undermines a simplistic assumption that the authoritarian governments of *Sanacja* inevitably steered to the right from the very outset of the regime. It also demonstrates that historical periodisation is never exact or consistent.

The decision makers remained under the influence of the sociological school that incorporated modern disciplines of psychiatry, sexology and forensic medicine into the process of law production. However, they also pursued a neoromantic, exceptionalist vision of the nation's rebirth that they shared with most of Poland's centre-left establishment. Eva Plach noticed that the idea of *Sanacja* as a blurry but pompous concept of moral national renewal had been invented long before the May Coup, even if it became the watchword of Piłsudski's camp after 1926. In fact, it had been used for the first time in 1923, the very year when the decriminalisation of homosexual acts had been decided.<sup>116</sup> The Criminal Code was only one of many attempts to realise a neoromantic vision of a better and modern Poland. The decriminalisation of homosexuality was one element of this patriotic (or nationalist) pursuit. Paradoxically, the furtherance of Poland's 'modernity' and national distinctiveness relied on looking backwards – towards the imperial frameworks persistent in academia, international scientific networks and in people's biographies. This seeming contradiction makes it difficult to resort to neat benchmarks in modern history and demonstrates another continuity between epochs ruptured by 1918 in the traditional narratives about East-Central Europe.

As Foucault famously demonstrated, the homosexual as a separate category of man had been conceptualised during the decades before the decision about the decriminalisation of homosexuality in Poland took place.<sup>117</sup> This new medical knowledge was implemented by Polish lawyers through a relocation of the homosexual from the criminal law to the psychiatric hospital. In this sense, the decision was evidence of modernity and humanitarian, expert character of Poland's laws rather than a manifestation of sexual permissivism, as conservatives wanted to see it. Thus, the realisation of the code in law manifested the persistence of the ideological chasm still separating the right from the Piłsudskiites at the beginning of the early 1930s – although the differences had already started to dissipate.

It is important to note that the genealogy of the decision to decriminalise homosexual acts in Poland cannot be traced back only to the lawyers and medical experts. The fact that it was deeply rooted in German homophile activism of Magnus Hirschfeld's Scientific-Humanitarian Committee demonstrates that homosexual men had successfully pursued their legal emancipation in interwar Europe, even if they did not manage to achieve their principal goal – the repeal of German paragraph 175.

In Poland, the members of the Criminal Division were aware that the decision would be contested by the public, especially by the right. But such was the elitist, increasingly authoritarian programme of Piłsudski's camp, deeply rooted in the ethos of Polish intelligentsia. It was well expressed in 1926 by Walery Sławek, arguably the second most important person in the state at the time, when he opined that in Poland it had always been, and would always be, an elite who brings real change to the nation.<sup>118</sup> This missionary, paternalistic attitude permeated the work of the Codification Commission and paralleled the civilisational discourse deployed by the Polish elite in other sectors and regions of the state.<sup>119</sup>

<sup>116</sup> Plach, *Clash*, 29–30.

<sup>117</sup> Foucault, *History of Sexuality*.

<sup>118</sup> After: Plach, *Clash*, 84.

<sup>119</sup> Kathryn Ciancia, *On Civilization's Edge: A Polish Borderland in the Interwar World* (Oxford: Oxford University Press, 2020).

The question should be asked whether or how this undemocratic character of the reform influenced the later movement for LGBTQ rights in Poland, or rather the lack thereof. The provisions of the Makarewicz Code remained in force until the 1960s and homosexuality has never been criminalised again. For decades, there was no legal cause around which queer people in Poland could unite. Formally, they were free to love the way they wanted long before similar rights were bestowed on queer subjects in the United Kingdom or in both German states. Although the interwar Criminal Division took the decision during a short democratic window in Poland's history, the law entered into force already in an authoritarian setting that only became more repressive. The public debate that was lacking at the time would be impossible for decades to come. The decriminalisation of homosexual acts took place in Poland before legal persecution could galvanise its queer community to resistance. This means that unlike in many Western countries, such as the United States, Poland's LGBT movement in the twentieth century did not develop against the state's laws but was defined to a greater extent by other factors.

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