

Stanisław Salmonowicz

CRIME RATE, LAW BREAKERS AND PENITENTIARY MEASURES IN GDAŃSK IN THE EARLY MODERN PERIOD

Remarks on Dariusz Kaczor's monograph *Przestępczość kryminalna i wymiar sprawiedliwości w Gdańsku w XVI–XVIII w. (Crime and the Administration of Justice in Gdańsk from the 16th to the 18th Century)*, Oficyna Ferberina, Gdańsk 2005, 448 pp.

Important monographs on the history of crime and the penal policy pursued by two of Royal Prussia's large towns in the early modern period were brought out in Poland and Germany at almost the same time¹. An explanation of the penal policy applied during an epoch, of the acts and deeds punished by law as well as a description of the "criminal world" undoubtedly provide important information on the social history of that epoch, on its mentality, axiology, ethics and ideology. Studies on people on the fringes of society who were liable to come into conflict with criminal law open up great possibilities for research into social stratification and the socio-economic conditions in which crimes were committed, especially during the feudal epoch. The development of this kind of research, based not so much on the methods of a historian of criminal law as on those of a researcher into social history, has for the past thirty years been one of the standard projects of Anglo-Saxon and French historiographies, as far as the early modern epoch and the late Middle Ages are concerned. Although excellent individual precursory studies were conducted in this field already before the war — only to mention the important methodological treatise written by two sociologists

¹ Cf. M. Thomsen, *Zwischen Hauptwache und Stockhaus. Kriminalität und Straßjustiz in Thorn im 18. Jahrhundert*, Marburg 2005, and my remarks on this subject in "Kwartalnik Historyczny" vol. 113, 2006, 2, pp. 170–172.

on the history of penitentiary measures², the full text of which was published after the war — this research reached German scholars with some delay but has played an important role in German historiography in the last few years. Diethelm Klippel has recently written: *Die Historische Kriminalitätsforschung ... bildet der Zeit eines der Wachstumsgebiete der Geschichtswissenschaft*³ and added: *Doch geht die historische Kriminalitätsforschung methodisch und inhaltlich weit über die traditionellen Themen der Strafrechtsgeschichte*⁴. I agree with many points raised in this research (especially in the quasi-sociological studies of criminal circles), but as a historian of criminal law who has never ignored its history, I would like to point out that nobody has questioned the necessity of studying not only the provisions of criminal law, penal procedure and the structure of law courts but also penal practice⁵. In civilised law-abiding countries in which criminal law is based on precise codes, studies on penal practice do not change the fact that practice reflects the regulations in force, even though criminal statistics are important for penal policy. The further back we go in history, especially if we go back to the epoch of custom law, the role of penal practice, which sometimes is the only source of information on law, grows in importance. The point is, however, that detailed research could relatively easily be conducted on the scant written sources which have survived from the early or even late Middle Ages. But since the beginning of the early modern era when the states (and cities) expanded penal repression, that is in many countries since the middle of the 15th century, there has been an enormous increase in sources providing information on the activity of the administration of justice. The introduction of investigations based mainly on written procedure made the study of penal practice increas-

² Cf. G. Rusche, O. Kirchheimer, *Peine et structure sociale. Histoire et "Théorie critique" du régime pénal*, Paris 1994, the first German edition was published in 1972. The text was written before 1939. Compare my remarks on this work in "Revue historique de droit français et étranger", vol. 73, 1995, 1, p. 109.

³ D. Klippel, *Staat und Devianz. Zur Einführung*, in: H. Berding, D. Klippel, G. Lottes (Hrsg), *Kriminalität und abweichendes Verhalten. Deutschland im 18. und 19. Jahrhundert*, Göttingen 1999, p. 7.

⁴ *Ibidem*, The book contains bibliographic information on the state of research.

⁵ Cf. S. Salmonowicz, Z. Zdrójkowski, *Bemerkungen zum Program der Forschungen über die Geschichte des Strafrechts in Polen*, "Archivum Iuridicum Cracoviense", vol. 14–15, 1981–1982, pp. 109–123.

ingly difficult technically. There is no doubt that thanks to post-World-War II progress a turning point was reached in research, starting with many regional studies on witchcraft trials; this was due to the fact that mathematical methods and computers opened new possibilities of studying archival materials which were previously too labour-absorbing to attract many experts.

Kaczor's book belongs to that current of research into social history which focuses on the history of crime as a social phenomenon and on the history of penal repression in a given territory in a given epoch. As I have already pointed out, this kind of research, usually conducted not by law historians *sensu stricto* but by historians interested in the history of society, mentality and economy, is undoubtedly of great cognitive value. As a historian of law I have for a long time drawn attention to this kind of research in many reviews of foreign works and have called this line of research interesting. For there are some controversial issues of interest to both penal law historians and historians of *Kriminalitätsforschung* treated historically (the term was coined years ago by G. Schwehroff) which should not be ignored. As a general remark, which does not necessarily refer to the author of the work reviewed here, let me stress that the advocates of this methodological conception who, especially in Anglo-Saxon historiography, usually have the experiences of a sociologist and not of a historian of law behind them, as a rule pay no attention to proper terminology, which is indispensable if penal repression is to be presented precisely, and frequently disregard such questions as the structure of the administration of justice, penal procedure, the attitudes of judges in those days, their mentality and education, and also the sources used by those judges (sometimes contrary to the law in force)⁶. One could mention many cases the judicial practice of which should, according to historians of criminal law, be explained in order to get a full picture of penal repression in those days, its methods and also the ways in which decisions on the verdict were reached. In turn, historians fascinated with crime as a question of social history

⁶ As regards methodological questions see my reflections (examples mainly from witchcraft trials), *O dążeniu do nadmiernego racjonalizowania procesów historycznych słów kilka (A Few Words on the Ambition to Excessively Rationalise Historical Processes)*, "Historyka" vol. 24, 1994, pp. 91-98; *O niegodziwości procesów o czary (The Wickedness of Witchcraft Trials)*, "Czasopismo Prawno-Historyczne" vol. 46, 1994, pp. 1-2, 115-120.

often accuse historians of law of a certain formalism, of not moving beyond the letter of the law, which is often unclear or is evaded in practice. I have no intention of submitting Kaczor's study to a formalistic criticism or of underestimating his work on source materials which has allowed him to present a picture of judicial practice on Gdańsk. It would of course be ideal if an in-depth source study could be combined with the requirements of a historian of penal law, a result which Marian Mikołajczyk managed to achieve in his presentation of criminal law in the towns of Little Poland during the early modern period⁷. While not giving up the right to raise some questions for discussion and to formulate requirements *pro futuro*, I have no intention of underrating Kaczor's achievements. It is worth pointing out that the Polish title of Kaczor's monograph may give rise to reservations as regards terminology: "criminal offences" is tautology for all offences are criminal⁸.

I have already pointed out that Kaczor's treatise is based on Gdańsk's extremely rich archives from the 16th to the 18th century. Tables and statistical diagrams are, of course, its main element, a result of reflections on respective numbers. The book opens the way to further comparative reflections on the scale of the old Polish-Lithuanian Commonwealth or a European scale, and also to a comparison with German towns which shared many features with Polish towns. Apart from the initial remarks and quite an extensive conclusion, the text of the book is divided into three chapters: I. *Crime as a Social Phenomenon*, II. *The Social Structure of the Criminal World*, III. *The System of Punishments and the Penal Policy of the Municipal Authorities*. The titles themselves show what the author is interested in: it is neither the history of the administration of justice in Gdańsk (including the penal procedure used in courts) nor the history of the criminal law in force in Gdańsk that interest him; the book deals with the social history of crime in that city, that is with the acts or ways of life liable to prosecution; provided that the persons involved

⁷ Cf. M. Mikołajczyk, *Przestępstwo i kara w prawie miast Polski Południowej XVI-XVIII w.* (*Crime and Punishment in the Law of Southern Poland in the 16th-18th Centuries*), Katowice 1998. Let us point out, however, that the treatise does not supply much information on the social history of crime, for detailed figures concern mainly death sentences.

⁸ Lawyers discern a broad category of forbidden deeds which also includes civil lawlessness. In old literature acts of that kind were sometimes called "civil crime", but this is not a correct term.

were dealt with by the Gdańsk administration of justice and this fact found a reflection in sources. A background would be useful to help readers understand the Gdańsk system of the administration of justice (including the system of prosecuting wrongdoers). Let us add that there has always been, and still is, an undefined number of offences which are outside the knowledge or activity of penal repression organs, the so-called dark numbers in all crime statistics, in other words, the efficiency of penal repression cannot always be evaluated on the basis of sources produced by penal repression organs⁹.

Wishing to present a comparative picture, the author has made use of the rich literature dealing with this subject, referring to it in footnotes and the bibliography. He has made use mainly of German literature, to a smaller extent also of other European and Polish works. These comparisons are very useful for further research, the predominance of German works is understandable, but the author has perhaps pushed Polish works on the history of penal law too far down. Some Polish studies would have been useful¹⁰, perhaps even more so than the English studies dealing with an administration of justice which from the 16th century¹¹ differed from the administration of justice in East-Central Europe where the law and penal procedure reforms introduced by *Constitutio Criminalis Carolina* in 1532 overlapped the old German city laws (Magdeburg, Chełmno and Lübeck laws)¹².

Let me make a few remarks on the individual chapters of the book. The author starts Chapter I, and also Chapter III, *in medias res*, that is, without any initial remarks he examines various

⁹ As regards the effectiveness of penal policy in towns, let us point out that Martina Thomse n has established that the policy of social discipline was not successful in Toruń. According to her this was due to the weakness of the prosecution organs. The author does not say what this problem looked like in Gdańsk.

¹⁰ Cf. Z. D r ó j k o w s k i, "Praktyka kryminalna" Jakuba Czechowicza. Jej źródła i system na tle rozwoju współczesnego prawa karnego Zachodniej Europy (Jakub Czechowicz's "Criminal Practice". Its Sources and System Compared with the Development of Criminal Law in Western Europe), Toruń 1950. See my specifications in the article *Die neueren (1959-1978) polnischen Forschungen zur Geschichte des Strafrechts*, "Acta Poloniae Historica" vol. XLII, 1980, pp. 209ff. Further examples in footnotes.

¹¹ As we know, the system of English courts and the inquisitional system introduced in Poland at the end of the 16th century under the influence of *Constitutio Criminalis Carolina* were two completely different legal systems.

¹² Compare my remarks entitled *Wizerunek kodeksu: Constitutio Criminalis Carolina (Picture of a Code: Constitutio Criminalis Carolina)*, "Rocznik Nauk Prawnych", vol. XIII, 2003, N° 1, pp. 53-66.

groups of offences, starting with offences against property (the most numerous group, of course) up to offences against executive authority and public confidence. Such method may be all right for an expert on the history of Gdańsk, but I missed introductory remarks (they would also be useful for Chapter III)¹³ which would briefly present not only the legal landscape of Gdańsk (judicial and police organs, the criminal law and penal procedure applied by the courts) but also the evolution of crime against the background of demographic growth, an important question which the author does not discuss. Kaczor mentions this question casually in a few places but after all, quantitative problems are directly connected with demography, not only with economy. What is also disputable is that some general problems of criminal law which determined how a deed was qualified and what sanction was chosen (the question of guilt, circumstances excluding illegality, excluding guilt etc.) are discussed marginally by the author when he quotes concrete cases from acts, but we do not get a clear general picture of the criteria used by law courts. This question returns, sometimes in a more specific way, in Chapter III; on the whole this part of the book makes complicated reading. As to more detailed questions, let me express but one doubt: was it advisable to separate offences against marriage (including adultery) from offences against morals if in the second part adultery had to be discussed again? The German terms *Eherbruch* and *Unzucht* distinguished two kinds of adultery, but it seems that it would have been more useful to analyse these two forms together. This is again a “dark number” problem. The author has not examined closely a wife’s infidelity if the marriage lasted (the man’s infidelity was as a rule not prosecuted); on the whole it can be assumed that in moral cases concerning families the law did not intervene in the lives of privileged groups of the urban population¹⁴. As regards witchcraft trials, the courts of such great

¹³ The content of both chapters is similar; the result is that information contained in Chapter I is frequently repeated in Chapter III.

¹⁴ Compare D. Janicka, *Prawo karne w trzech rewizjach prawa chełmińskiego z XVI w. (Criminal Law in Three Amendments of Chełmno Law)*, Toruń 1992, pp. 102–105. The Toruń amendment treated bigamy as a qualified form of adultery. It is worth recalling that in 1712 a prominent Gdańsk lawyer, Samuel F. Wilenberg (1663–1748), published a text *Die finibus polygamiae licitae* in which he asserted that polygamy was permissible in the light of natural law. We do not know whether the treatise was widely known in Gdańsk but it may have contributed to a more lenient attitude towards bigamy.

cities as Gdańsk were, as could be expected, very cautious, at least from the end of the 17th century; the situation in Toruń in the 18th century was similar¹⁵; some German territories, especially Catholic ones, were very zealous in this respect, but at the turn of the 17th century the situation in the Polish–Lithuanian Commonwealth was completely different from what was practised in Gdańsk¹⁶. Speaking about offences against executive authority the author mentions tumults in towns but he does not discuss this problem in detail, not even the great anti–Catholic tumult of 1678. Urban tumults of various kinds (social, religious and others) were always sternly prosecuted not only in states with an absolute system, but religious tumults were a politically complicated case in towns whose inhabitants professed different religions; even interventions by state authorities did not help much.

Chapter II on the social structure of the criminal world is one of the most interesting chapters in the book; it is equipped with many tables and diagrams. What is disputable in this chapter? First, a question, which has not been fully discussed; did runaway peasants constitute a large proportion of the offenders in towns? The author frequently raises the question of newcomers in towns, that complex group of unemployed people (pp. 192ff), but for some strange reason he prefers to refer to European examples (such as B. Geremek's studies concerning only France or the Middle Ages), and ignores many Polish studies of this question¹⁷. Some questions are not explained in Chapter III either. I have in mind such questions as the social background of the accused, the proportion of free unemployed people who

¹⁵ Cf. M. Thomson, *op. cit.*, pp. 264–267. As regards witchcraft trials, I would on the whole refer readers to works discussing conditions in Poland; cf. two general studies: J. Tazbir, *Procesy o czary (Witchcraft Trials)*, "Odrodzenie i Reformacja w Polsce", vol. XXIII, 1978, pp. 151–178; S. Salmonowicz, *Procesy o czary. Próba rozwiązań modelowych (Witchcraft Trials. Tentative Model Solutions)*, in: *Prawo wczoraj i dziś. Studia dedykowane Profesor Katarzynie Sójce-Zielińskiej*, Warszawa 2000, pp. 303–322, and also a short summing up of the situation in 18th century Poland: S. Salmonowicz, *L'apogée et la fin des proces de sorcellerie en Pologne: XVII^e–XVIII^e siècles*, in: *Auctoritas. Melanges offerts au professeur Olivier Guillot. Etudes réunies par G. Constable et M. Rouche*, Paris 2006, pp. 721–725.

¹⁶ Small towns and villages in Great Poland and Little Poland experienced the climax of witchcraft trials in the period from the end of the 17th century to circa 1730.

¹⁷ Cf. especially S. Grodziski, *Ludzie luźni (Unemployed People)*, Kraków 1961; M. Franćić, *Ludzie luźni w osiemnastowiecznym Krakowie (Unemployed People in 18th Century Cracow)*, Warszawa–Kraków 1967.

arrived in Gdańsk from territories farther away from that city than Pomerania; this question is connected with another one which is not quite clear and may be difficult to solve by sources at our disposal, namely, can one speak about the ethnic origin, mother tongue and religion of those people? This question is not raised in any table or diagram. It would be interesting to know to what extent the migrants, or people from the nearest surroundings of Gdańsk (domestic servants) were Catholics, to what extent they were Kashubs or Poles. As I have already mentioned, the author has not examined the penal procedure of that time. As a rule the courts in Gdańsk used, of course, the German language. What was the situation of the accused who did not know German? Are there any data on this question in accessible sources? Table 15 on p. 218 entitled *The Socio-Occupational Structure of Offenders in Gdańsk in 1680-1783* is very interesting. It shows that nearly a third of the law-breakers were from the social margin, a fact which is by no means surprising. The author has distinguished the group of "vagrants, beggars" which accounted for 36.9 per cent of the total number of law-breakers. Would it be possible to establish to what extent these were runaway peasants and to what extent they were strangers who had come from other territories? We shall not learn the details about the mechanisms of the Gdańsk administration of justice for the author does not discuss such an essential question as the problem of evidence (the use of torture, investigation proceedings) I understand that it was not possible to discuss all these questions in a doctoral thesis, for this is what Kaczor's monograph originally was. It should however have been realised that the restrictions imposed on a doctoral thesis may influence general conclusions about the character, also the social character, of the repressive policy pursued by the municipal authorities which, let us remember, represented the narrow elite of the city (patricians and the *Gelehrte*), an exclusively Protestant elite which, on the whole, identified itself with German culture and the German language. These facts cannot be ignored when one examines the picture of crime supplied by the court acts and political system of the city of Gdańsk.

Chapter III discusses the system of punishments and the penal policy of the municipal authorities. On the basis mainly of court verdicts, the author draws attention to the fact that there

was a difference between the letter of the law and the penal policy, especially as regards punishments, for some punishments ceased to be applied and the death sentence was pronounced less and less frequently (from the first decades of the 18th century). However, Chapter III does not contain any general remarks but deals with more detailed questions, starting with the most important problem, that is, the kind of death sentences used in Gdańsk and the evolution in their use. It is well known that the death sentence was widely used in Europe in various forms, being practically the only punishment for crimes regarded as grave in those days. It is therefore important to point out that in the 18th century its use was restricted, accounting for 15 per cent of all penal sanctions. Beheading and hanging were the forms the most frequently used¹⁸. The restriction of the death sentence and many other evolutionary measures may have been due to an early spread of humanitarian trends in Gdańsk. The question, though raised by the author, may deserve a separate study. What is worth examining is the role played in this field by professors of *gymnasium academicum*, by the studies conducted by patricians and the *Privatgelehrte* at leading German universities (Halle, Leipzig, and slightly later Göttingen) and also by enlightened periodicals published in Gdańsk. I have in mind the early influence of the ideas of Thomasius and Montesquieu¹⁹. Another question requiring examination is the level of education of the Gdańsk judges in those days, the extent to which they themselves determined the sentence without considering the formal provisions of the law. We know how primitive the courts in small and medium-sized towns of Great Poland and Little Poland were in those days (the first half of the 18th century) and how this influenced the witchcraft trials. Gdańsk, like a few other large cities in the Polish-Lithuanian Commonwealth, was undoubtedly a positive exception in this respect. Banishment, combined with a humiliating punishment (corporal punishment, pillory), was for a long time a widely applied punishment in towns. The banishment of migrants was a cheap though not necessarily an effective way of "getting rid of the trouble". A powerful city

¹⁸ On the whole, women were not hanged in Gdańsk. The author should perhaps have added that this was an old custom; the hanging of women was regarded as an indecent spectacle.

¹⁹ Cf. my general remarks in *Cesare Beccaria und die Strafrechtsreform in Polen im 18. Jahrhundert*, "Comparative Law Review", vol. VI, 1996, pp. 91-103.

which effectively controlled the inflow of newcomers could afford to apply such punishments²⁰.

The author has devoted much attention to various forms of deprivation of liberty, a punishment which though of marginal importance for a long time, acquired significance in Gdańsk thanks to the establishment of a reformatory in 1629²¹. The nearest reformatory had since 1613 existed in Lübeck. Toruń did not organise such an institution until 1723–1724²². It is worth remembering that social historians link the development of this punishment with utilitarian trends which sprang thanks to the growth of capitalist elements in the economy²³. In point five of this chapter the author describes how punishments became more lenient or were made more severe, that is he examines the penitentiary policy of the municipal authorities (pp. 352 ff.). The point is, however, that these questions, which kept changing in history, belong to the general section of criminal law, but the author does not say whether a more lenient punishment (in accordance with the recommendations of *Constitutio Criminalis Carolina*) was due to lack of evidence. Nor do we know how often the perpetrator was pronounced guilty because he had admitted his guilt under torture during the investigation. During the

²⁰ It was in the Polish–Lithuanian Commonwealth that *ius terrestre* continued to envisage various forms of banishment or infamy for noblemen. This policy of sending criminals to other countries or territories was strongly criticized by Enlightenment philosophy.

²¹ The author is a specialist also in this field and has published an extensive article on this subject: D. Kaczor, *Dom Poprawy /Zuchthaus/, w Gdańsku w XVII–XVIII w. (The Reformatory in Gdańsk in the 17th and 18th Centuries)*, "Rocznik Gdański" vol. 56, 1996, N^o 1, pp. 43–63) The subject had been earlier discussed by M. Bogucka, *Les origines de la pensée pénitentiaire moderne en Pologne du XVII^e siècle*, "Acta Poloniae Historica" 56, 1988, pp. 19–28.

²² Cf. D. Janicka, *Więzienia w Toruniu w XVIII–XX w. (Prisons in Toruń from the 18th to the 20th Century)*, "Rocznik Toruński" vol. 30, 2003, pp. 85–114.

²³ D. Kaczor, p. 384: "...the penal system of Gdańsk can be regarded as modernized from the 1720s; of basic importance in it was deprivation of liberty combined with compulsory work for the local community". This utilitarian aspect, emphasized by the author, has led to disputes in literature: was it humanitarian ideas which had the decisive influence or only the interests of capitalist economy? As far as this question is concerned, M. Foucault's famous treatise *Surveiller et punir. Naissance de la prison*, Paris 1975, does not depart from the trends expressed in the great work by Georg Rusche and Otto Kirchheimer referred to in footnote 2. In my opinion extreme attitudes should not be turned into absolutes: utilitarianism found supporters in circles which were far from the humanitarianism of philosophers.

Enlightenment period reformers of the administration of justice sharply criticised the judges' freedom in pronouncing sentences.

The book closes with remarks (pp. 385–409) which sum up the results of the author's research. Kaczor returns once again to statistical specifications which show a certain evolution in crime and in the city's penal policy. The most significant is the fact that the prosecution of offences against religion and morals was alleviated. Compared with the final decades of the 16th century, there was a drop in the number of offences. The reasons for this drop are not clear. The author links drops and increases in crime (p. 396) with Gdańsk's economic situation; he does not consider the demographic situation but examines whether the economic situation was favourable or unfavourable. This may be natural with regard to offences against property but there is seldom a clear correlation between the evolution of crime and the economic situation; a slump does not necessarily lead to an increase in crime. We now know that in societies which have quickly become rich and have great, frequently artificially stimulated, consumer appetites, a boom often leads to an increase in crime and this usually happens in great metropolises.

The aims which the author set himself have been fulfilled and what we have received is a valuable contribution to Gdańsk's social history. My remarks and proposals by no means detract from the value of the book. It is of course natural that a historian of law regrets that the author, after studying court acts for many years, sometimes leaves out important historical-legal issues, an examination of which would enrich his work and would not cause him too much trouble. I think that in their methodology the group of researchers to which the author belongs exaggerate the social background to the disadvantage of the legal background of the subject, which naturally interests mainly historians of law. I hope that Dariusz Kaczor will use his knowledge of the law applied in Gdańsk in further works. During the last thirty years we have been able to enrich our knowledge of Gdańsk in the old Polish epoch, but the city's rich library and archival collections are ready to receive many more researchers.

(Translated by Janina Dorosz)