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## Zweckgedanke, Social Defence and Transnational Criminal Law: Franz von Liszt and the Network of Positivist Criminology (1871-1918)

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### Abstract

This chapter focuses on the international dimension of German positivist criminology, approaching it not as a national ‘Franz von Liszt-school of thought’ but rather as a nationally and internationally intertwined network that manifested in criminological discourses, conferences and associations as in particular the International Union of Penal Law. After reconstructing the network of positivist criminology that formed around von Liszt, the study examines his basic criminological concepts such as *Zweckgedanke im Strafrecht* (utilitarian purposes of criminal law), the typology of criminals, dangerousness, *Zweckstrafe* (utilitarian purpose-oriented punishment) and *Gesellschaftsschutz*/social defence. Their international dimension and significance for transnational criminal law are studied for the topic of international crime (anarchists and women trafficking), the concept of ‘dangerousness’ to the public and the dual-track system of judicial punishment and indefinite security measures that served as *Zweckstrafen*. Finally, the chapter examines penal transportation/deportation, expulsion and extradition as transnational security measures and *Zweckstrafen*. The conclusions discuss if the network of positivist criminology and the concepts elaborated on the international level influenced the reform of criminal law in Germany and resulted in the transnationalisation of social defence and the *Zweckgedanke im Strafrecht*.

### Keywords

Franz von Liszt, positivist criminology, International Union of Penal Law, transnational criminal law, transnational security measures, social defence

**Summary:** 1. Introduction. 2. Roots of positivist criminology in Germany. Von Liszt and the positivist criminological network: protagonists, institutions, media. The basic concepts: *Zweckgedanke*, typology of criminals and *Zweckstrafen*. 5. The transnational dimension: *Zweckgedanke*, social defence and the *Union Internationale de Droit Pénal*. 5.1. The typology of criminals, dangerousness and social defence. 5.2. International crime, *Zweckgedanke* and social defence. 5.3. Transnational *Zweckstrafe*: transportation, measures of security and extradition. 6. Conclusions. Bibliographical References

### 1. Introduction

The history of criminology, criminal jurisprudence and penal positivism in nineteenth century Germany is well researched.<sup>1</sup> Legal history has particularly focused on one of its most

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<sup>1</sup> Wetzell, R.F., *Inventing the criminal. A history of German criminology 1880–1945*, Chapel Hill, 2000; Becker, P., *Verderbnis und Entartung. Eine Geschichte der Kriminologie des 19. Jahrhunderts als Diskurs und Praxis*, Göttingen, 2002; Galassi, S., *Kriminologie im Deutschen Kaiserreich. Geschichte einer gebrochenen Verwissenschaftlichung*, Stuttgart, 2004. For a recent overview see Becker, P., “Researching Crime and

important protagonists, the Vienna born Franz von Liszt (1851-1919), his concepts of the *gesamte Strafrechtswissenschaft* (integrated criminal law sciences) and the *Zweckgedanke im Strafrecht* (utilitarian purposes of criminal law) formed the core concepts of positivist criminology and influenced the development of criminal law in Germany.<sup>2</sup> As a consequence, German penal positivism in the period 1871-1914/18 is still primarily studied as the formation of the ‘*Franz von Liszt-Schule*’, which and doctrinal ‘clash’ of national ‘schools of thought’ that were mostly concerned with national issues of criminal law and legal reform.<sup>3</sup> However, recent research has questioned that a national ‘Franz von Liszt-school’ existed and directed more attention to the network of positivist criminology and the international context.<sup>4</sup> This regards the contribution of Franz von Liszt to international law,<sup>5</sup> his role in the International Union of Penal Law (*Internationale Kriminalistische Vereinigung, IKV*),<sup>6</sup> the entanglement of German criminal law with international criminology and penology<sup>7</sup> and the interdependencies of penal positivism and transnational criminal law. In particular the latter two were closely intertwined: the transnationalisation of criminal law and positivist criminology took place in the same period (from the 1870s to the 1910s), to some extent shared discourses, arenas and actors and dealt with similar topics such as international crime, extradition or penal transportation/deportation.<sup>8</sup>

Based on this, the following chapter focuses on the international dimension of German positivist criminology, approaching it not as a national ‘Franz von Liszt-school of thought’ but rather as a nationally and internationally intertwined network. The international dimension not only regards the criminological discourses, conferences and associations, but also the significance of transnational criminal law for the shaping of positivist criminology.<sup>9</sup> This will be analysed for pivotal topics, namely international crime (particularly women trafficking and

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Criminals in the 19th Century”, *The Handbook of the History and Philosophy of Criminology* (R.A. Triplett, ed.), Hoboken / Oxford, 2018, pp. 32-47; Drenkhahn, K., “Criminology in Germany and the Gesamte Strafrechtswissenschaft”, *Ibid.*, pp. 392-405.

<sup>2</sup> For the current state of research see Koch, A. / Löhnig, M. (eds.), *Die Schule Franz von Liszts. Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts*, Tübingen, 2016; Elbert, C., *Franz von Liszt. teoría y práctica en la política-criminal (1899-1919)*, Barcelona, 2018.

<sup>3</sup> Bohnert, C., *Zu Straftheorie und Staatsverständnis im Schulenstreit der Jahrhundertwende*, Pfaffenweiler 1992; Stäcker, T., *Die Franz von Liszt-Schule und ihre Auswirkungen auf die deutsche Strafrechtsentwicklung*, Baden-Baden, 2012.

<sup>4</sup> Frommel, M., “Was bedeutet uns heute noch Franz von Liszt?”, *Jahrbuch der Juristischen Zeitgeschichte* 14 (2013), pp. 291-311, has stated (p. 291): “es gibt keine „Liszt-Schule“, wohl aber ein prominentes Netzwerk von [...] Persönlichkeiten aus dem Kreis um Franz von Liszt”.

<sup>5</sup> Herrmann, F., *Das Standardwerk. Franz von Liszt und das Völkerrecht*, Baden-Baden, 2001.

<sup>6</sup> Germann, U., “Zweispurige Verbrechensbekämpfung. Kriminalpolitik und Gesetzgebung im transnationalen Diskurs: Franz von Liszt, die schweizerische Strafrechtsreform und die Zweispurigkeit von Strafen und Massregeln”, *Rechtsgeschichte* 14 (2009), pp. 84-121; Wetzell, R.F., “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, *Die Schule Franz von Liszts* (A. Koch, M. Löhnig, eds.), pp. 207-227.

<sup>7</sup> Pifferi, M., *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries*, Oxford, 2016.

<sup>8</sup> Knepper, P., *The Invention of International Crime. A Global Issue in the Making, 1881-1914*, London, 2010; Bruinsma, G., “Criminology and Transnational Crime”, *Histories of Transnational Crime* (G. Bruinsma, ed.), New York, 2015, pp. 1-40; Härter, K. / Hannappel, T. / Tyrlicher, J. C. (eds.), *The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century. Political Crime, Police Cooperation, Security Regimes and Normative Orders*, Frankfurt am Main, 2019.

<sup>9</sup> Jescheck, H.-H., “Der Einfluß der IKV und der AIDP auf die internationale Entwicklung der modernen Kriminalpolitik”, *ZStW* 92 (1980), pp. 997-1020; Kesper-Biermann, S., “Die Internationale Kriminalistische Vereinigung. Zum Verhältnis von Wissenschaftsbeziehungen und Politik im Strafrecht 1889-1932”, *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930). Deutschland im Vergleich. Fachtagung am Centre Marc Bloch, Deutsch-Französisches Forschungszentrum für Sozialwissenschaften in Berlin am 17. und 18. Februar 2005* (S. Kesper-Biermann, P. Overath, eds.), Berlin, 2006, pp. 85-107.

anarchism) in relation to the typology of criminals and the concept of ‘dangerousness’; penal transportation/deportation, expulsion and extradition as transnational security measures and *Zweckstrafe*; and the transnational harmonisation of criminal law.

The observation starts with a brief reconstruction of the roots of ‘penal positivism’ and ‘social defence’ in German criminology (2), followed by an outline of the network of positivist criminology (protagonists, institutions, media) that formed around von Liszt and immediately acquired an international dimension (3). The third part examines the basic criminological concepts, in particular the typology of criminals, dangerousness, *Zweckstrafe* and *Gesellschaftsschutz*/social defence (4), which are further analysed with regard to the transnationalisation of positivist criminology and transnational criminal law in the following chapter (5). Finally, the conclusion discusses (6) if these developments resulted in the transnationalisation of the *Zweckgedanke* and social defence and briefly addresses the follow-up question if to which extent positivist criminology and transnational criminal law influenced the reform of criminal law in Germany.

## 2. Roots of positivist criminology in Germany

The *gesamte Strafrechtswissenschaft* and the *Zweckgedanke im Strafrecht*, which von Liszt presented at the beginning of the 1880s, were influenced by contemporary social, political and legal developments but also deeply rooted in traditions of criminal law and criminology in Germany. With the foundation of the German Empire in 1871 a penal code – the *Reichsstrafgesetzbuch* of 1871 – had been enacted that replaced the particular codes of the German states and established the first national code which was based on the pivotal principles of the modern codification of criminal law.<sup>10</sup> However, quite a few jurists and practitioners regarded the *Reichsstrafgesetzbuch* and the German criminal justice system as too liberal and in need of reform, particularly with regard to contemporary social developments such as urbanisation, growth of population, marginal groups and the working class, the formation of the labour movement, political dissent and radical groups, the internationalisation of economy and migration and, above all, the increase of crime and ‘new’ criminal classes/groups.<sup>11</sup>

This was also based on empirical data and the general crime statistics for the Empire that the German government issued from 1882 onwards. Following the example of France, since the 1820s various German states had already published continuous statistics on crime and criminal justice (*Übersicht der Strafrechtspflege*).<sup>12</sup> A few jurists like Abegg, who also published on transnational criminal law, used these empirical data to demand a reform of criminal justice, punishment and criminal law.<sup>13</sup> Hence, the collection and use of crime data

<sup>10</sup> See Kesper-Biermann, S., *Einheit und Recht. Strafgesetzgebung und Kriminalrechtsexperten in Deutschland vom Beginn des 19. Jahrhunderts bis zum Reichsstrafgesetzbuch 1871*, Frankfurt am Main, 2009; Härter, K., “The Influence of the Napoleonic Penal Code on the Development of Criminal Law in Germany: Juridical Discourses, Legal Transfer and Codification”, *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence* (A. Masferrer, ed.), Cham, 2018, pp. 53-75.

<sup>11</sup> For an overview with the focus on criminal law and criminology see: Wetzell, *Inventing the criminal*, pp. 15-38; Becker, *Verderbnis und Entartung.*, pp. 11-34; Galassi, *Kriminologie im Deutschen Kaiserreich*, pp. 81-123.

<sup>12</sup> See, for example, Moses, A., *Kriminalität in Baden im 19. Jahrhundert. Die ‘Übersicht der Strafrechtspflege’ als Quelle der historischen Kriminologie*, Stuttgart, 2006.

<sup>13</sup> Abegg, J.F.H., *Ueber die Bedeutung der s. g. Criminalstatistik für die Wissenschaft, die Anwendung und die Gesetzgebung im Gebiete des Strafrechts. Angeknüpft an e. Betrachtung d. öffentlichen Übersichten d. Strafrechtspflege v. Österreich, Preußen, Bayern u. Baden*, Wien, 1865.

was already an established positivist approach to demand penal reforms or analyse the development of crime and criminal classes. Regarding the latter, various practitioners and experts of the criminal justice system – referred to as *Criminalisten* – had published a large number of surveys and collections that drew from records, files and criminal cases.<sup>14</sup> Treatises, collections, police journals and other print media disseminated information and expert knowledge on dangerous criminal milieus and groups such as robber gangs, vagrants, beggars, gypsies, Jews and the so-called *Gaunertum*, the German concept of the habitual/professional criminals.<sup>15</sup> One of the most popular was *Das deutsche Gaunertum in seiner social-politischen, literarischen und linguistischen Ausbildung* (the socio-political, literally and linguistic formation of the German criminal class), published in four volumes between 1858 and 1862 by Avé-Lallemant (a lawyer and *Criminalist*) to whom von Liszt explicitly referred to in his article on the *Zweckgedanke im Strafrecht*.<sup>16</sup>

Hence, decades before Franz von Liszt and the positivist turn of criminal jurisprudence, in Germany (as well as in other European countries) a criminological discourse on crime, criminals and punishment had already developed that was based on empirical observations. Practitioners, lawyers, police officials, prison officers and various experts – among them *Criminalisten* and *Criminalpsychologen* – discussed pivotal questions of positivist criminology and created narratives of habitual, professional, mobile offenders that would endanger order and society and therefore required a specific criminal policy as well as ‘appropriate’ forms of sanctions.<sup>17</sup> Interdisciplinary areas of this early positivist discourse concerned criminal psychology (*Criminalpsychologie*), the prison reform, transboundary operating criminals and the enhancement of policing regarding transnational cooperation and the techniques of investigation and identification, the so-called *Criminalistik* (criminalistics).<sup>18</sup> Although the protagonists of the German *Strafrechtswissenschaft* (criminal jurisprudence) seemed to be mainly concerned with theoretical, philosophical and dogmatic questions of criminal law, the (not so) new topics of the evolving positivist criminology gradually found their way into juridical debates and also influenced von Liszt with regard to the idea of the *gesamte Strafrechtswissenschaft* as well as concerning the *Marburger Programm*.<sup>19</sup>

### 3. Von Liszt and the positivist criminological network: protagonists, institutions, media

<sup>14</sup> Härter, K., *Strafrechts- und Kriminalitätsgeschichte der Frühen Neuzeit*, Berlin/Boston, 2018, pp. 143-145.

<sup>15</sup> Härter, K., “Gaunertum”, *Handwörterbuch zur deutschen Rechtsgeschichte*, 2<sup>nd</sup> ed., Berlin, 2008, Sp. 1947-1953; Becker, *Verderbnis und Entartung*, pp. 177-254.

<sup>16</sup> Avé-Lallemant, F.C.B., *Das deutsche Gaunertum in seiner social-politischen, literarischen und linguistischen Ausbildung zu seinem heutigen Bestande*, 4 vols., Leipzig, 1858-1862; Liszt, F.v., “Der Zweckgedanke im Strafrecht”, *ZStW* 3 (1883), pp. 1-47, quote p. 21; and likewise: Liszt, F.v., *Lehrbuch des deutschen Strafrechts*, 3<sup>rd</sup> ed., Berlin/Leipzig, 1888, p. 4.

<sup>17</sup> Becker, “Researching Crime and Criminals in the 19th Century”, pp. 35-40.

<sup>18</sup> Ludi, R., *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750–1850*, Tübingen 1999; Vec, M., *Die Spur des Täters. Methoden der Identifikation in der Kriminalistik (1879-1933)*, Baden-Baden, 2002; Greve, Y., *Verbrechen und Krankheit. Die Entdeckung der ‘Criminalpsychologie’ im 19. Jahrhundert*, Köln, 2004; Becker, P., *Dem Täter auf der Spur. Eine Geschichte der Kriminalistik*, Darmstadt, 2005.

<sup>19</sup> Schmidt-Recla, A. / Steinberg, H., “Eine publizistische Debatte als Geburtsstunde des ‘Marburger Programms’”, *ZStW* 119 (2007), pp. 195-213.

With the *gesamte Strafrechtswissenschaft*, von Liszt provided a conceptual framework to integrate different positivist disciplines and approaches which should serve to approach the new functions of criminal policy (*kriminalpolitische Aufgaben*) and to establish a national as well as transnational network of positivist criminology. Although he rejected the terms ‘criminology’ and ‘penology’ as too limited and wanted to keep the primacy of jurisprudence, the *gesamte Strafrechtswissenschaft* should also include criminalistics, criminal anthropology (*Kriminal-Biologie*) and the sociology of crime (*Kriminal-Soziologie*) corresponding to the French *sciences pénales* and the Italian *scienze penali*.<sup>20</sup>

The publication medium and *kriminalistisches Centralorgan* (criminological central organ) of the new movement was the journal *Zeitschrift für die gesamte Strafrechtswissenschaft* (*ZStW*), founded in 1880/81 and edited by von Liszt and Adolf Dochow.<sup>21</sup> From 1883 onwards the latter was replaced by Karl von Lilienthal, a representative of the new sociological direction of criminal law. Since March 1881, the still existing journal appeared four times a year and published an amazing number of articles, reviews and reports dealing with a broad variety of criminological topics ranging from dogmatic penal law and jurisprudence, penal legislation and judicial decisions, criminal anthropology, psychology and policing to transnational crime and criminal law. The topics demonstrated the interdisciplinary, international and empirical aspirations of the *gesamte Strafrechtswissenschaft* and also covered other countries, particularly in the periodic review *Auslandsrundschau*. Accordingly, the authors originated from many countries, although the German speaking formed the large majority and the language of the journal was German.

The *Zeitschrift für die gesamte Strafrechtswissenschaft* provided a platform for von Liszt, his students and colleagues as well as the members of the rapidly growing positivist network to publish on numerous topics of criminal law and positivist criminology. In the third number of the journal, von Liszt himself outlined his own approach in the programmatic article *Zweckgedanke im Strafrecht*, the printed version of his inaugural lecture held in Marburg in 1882, later denoted as the *Marburger Programm*.<sup>22</sup> In 1881 he had already published a monograph on German penal law, from the second edition onwards (1884) retitled as *Lehrbuch des Deutschen Strafrechts* (textbook of German criminal law) that gradually absorbed issues and results of positivist criminology in the following editions (twenty until 1914).

From the start, von Liszt aimed to include the new approaches of the *gesamte Strafrechtswissenschaft* into his teaching at the universities of Marburg (1882), Halle (1889) and Berlin (1898) and finally established the so-called *Kriminalistisches Seminar* in 1888. The seminar attracted a growing number of law students and participants (attorneys, judges, judicial practitioners), among them some from abroad, since the library also contained a large collection of foreign criminal law. Many participants of the seminar published on topics of the *gesamte Strafrechtswissenschaft* and positivist criminology respectively; 23 students were

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<sup>20</sup> Liszt, F.v., “Kriminalpolitische Aufgaben”, *ZStW* 9 (1889), pp. 452-498, 737-782, 10 (1890), pp. 51-82, 12 (1892), pp. 161-199, quote p. 9 (1889), p. 455-458. See Baratta, A., “Strafrechtsdogmatik und Kriminologie. Zur Vergangenheit und Zukunft des Modells einer gesamten Strafrechtswissenschaft”, *ZStW* 92 (1980), pp. 107-142; Vervaele, J., “La naissance de l’Etat-Providencia et le modèle des sciences pénales intégrées (gesamte Strafrechtswissenschaft)”, *Déviance et Société* 13 (1989), pp. 141-154.

<sup>21</sup> “To our readers”, *ZStW* 1 (1881), pp. 1-3.

<sup>22</sup> Liszt, “Der Zweckgedanke im Strafrecht”; Liszt, F.v., *Das deutsche Reichsstrafrecht auf Grund des Reichsstrafgesetzbuchs und der übrigen strafrechtlichen Reichsgesetze, unter Berücksichtigung der Rechtsprechung des Reichsgerichts systematisch dargestellt*, Berlin, 1881, 20<sup>th</sup> ed.: *Lehrbuch des deutschen Strafrechts*, 20. völlig durchgearb. Aufl., Berlin, 1914.

later appointed as professors, among them influential figures like Hans von Hentig, Robert von Hippel or Gustav Radbruch, and in 1910 von Liszt counted 34 further participants from abroad who held professorships.<sup>23</sup> The immediate doctoral and post-doc students (*Doktoranden, Habilitanden*) of von Liszt represented only a minority, and thus, the *Kriminalistisches Seminar* rather formed an institutional set-up for the growing network.

Almost in parallel to the establishment of the seminar, in 1888/89 von Liszt founded the *Union Internationale de Droit Pénal/Internationale Kriminalistische Vereinigung (IKV)*, together with Adolphe Prins (Brussels) and Gerard Anton van Hamel (Amsterdam). The three professors of criminal law not only shared scientific opinions, but had already met at the third International Prison Congress held in 1885 in Rome in connection with the first International Congress of Criminal Anthropology, organised by Lombroso, Ferri and Garofalo.<sup>24</sup> Although von Liszt, van Hamel and Prins participated in many of the subsequent Congresses of Criminal Anthropology, they nevertheless decided to establish a separate association that was more strongly committed to criminal law and criminal policy and organised particular international congresses. Hence, the *IKV* served to extend and develop their positivist concepts of *gesamte Strafrechtswissenschaft*, criminal policy and social defence (the latter developed by Prins) to an international level and establish a respective ‘criminological positivist network’ with von Liszt, van Hamel and Prins acting as executive board (*Gesamtvorstand*).<sup>25</sup> The *IKV* allowed to interdisciplinarily and internationally integrate jurists, criminologists, experts, practitioners and state officials from different disciplinary backgrounds and countries, and as a result the number of the members grew to 1148 in 1913, originating from 27 countries with Russia (between 300 and 500) and Germany (between 300 and 360) being the largest national groups. Between 1889 and 1914, the *IKV* organised 12 international conferences that dealt with nearly 50 different topics (‘questions’).<sup>26</sup> Furthermore, it published the annual bilingual *Bulletin de l'Union Internationale de Droit Pénal/Mitteilungen der internationalen kriminalistischen Vereinigung* (1889-1914) as well as two volumes on *La législation pénale comparée*.<sup>27</sup> After the outbreak of World War I, the *IKV* lost its international character, and in 1917 and 1919 the three founders died.

Notably von Liszt used the international arena of the *IKV* to evade a self-contained national ‘school’ and to establish a criminological positivist discourse in which other German criminologists and criminal lawyers could participate more unrestricted.<sup>28</sup> Within the *IKV*, eleven national groups were established that met more frequently and prepared specific

<sup>23</sup> Liszt, F.v., “Das kriminalistische Seminar”, *Geschichte der Königlichen Friedrich-Wilhelms-Universität zu Berlin* (M. Lenz, ed.), vol. 3, Berlin, 1910, pp. 28-33. Cf. Stäcker, *Die Franz von Liszt-Schule*, pp. 72-77; Koch, A., “‘v. Liszt-Schule’ – Personen, Institutionen, Gegner”, *Die Schule Franz von Liszts* (A. Koch, M. Löhnig, eds.), pp. 27-56; Mayenburg, D.v., *Kriminologie und Strafrecht zwischen Kaiserreich und Nationalsozialismus. Hans von Hentig (1887-1974)*, Baden-Baden, 2005, pp. 168 ss.

<sup>24</sup> Kaluszynski, M., “The International Congresses of Criminal Anthropology: Shaping the French and International Criminological Movement, 1886-1914”, *Criminals and their Scientists. On a Comparative History of Criminology* (P. Becker, R.F. Wetzell, eds.), Cambridge, 2006, pp. 301-316.

<sup>25</sup> Liszt, F.v., “Eine internationale kriminalistische Vereinigung”, *ZStW* 9 (1889), pp. 363-372; Prins, A., *La défense sociale et les transformations du droit pénal*, Bruxelles, 1910.

<sup>26</sup> On the history of the *IKV* see Kitzinger, F., *Die internationale kriminalistische Vereinigung. Betrachtungen über ihr Wesen und ihre bisherige Wirksamkeit*, München, 1905; Radzinowicz, L., *The Roots of the International Association of Criminal Law and their Significance. A Tribute and a Re-assessment on the Centenary of the IKV*, Freiburg (Breisgau), 1991; Bellmann, E., *Die Internationale Kriminalistische Vereinigung (1889-1933)*, Frankfurt am Main, 1994; Jescheck, “Der Einfluß der *IKV*”; Kesper-Biermann, “Die Internationale Kriminalistische Vereinigung”.

<sup>27</sup> *Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung / La législation pénale comparée* (F.v. Liszt, ed.), 2 vols, Berlin/Paris, 1894/99.

<sup>28</sup> Cf. Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, pp. 209-211.

national topics and proposals, as, for instance, the legal opinion of the German group concerning the draft of criminal procedural code.<sup>29</sup> In this regard, the *IKV* provided an intermediary organisational structure between international criminology and the German jurisprudence or rather the *gesamte Strafrechtswissenschaft*. Influential German jurists and criminologists from many disciplines were members of the *IKV* and involved in the network of positivist criminology, as, for example:

- Albert Friedrich Berner (1818-1907), one of the last ‘Hegelianer’ who published an influential *Lehrbuch* and a history of penal law as well as one of the first monographs on the transnational ambit of criminal law and had held the prestigious professorship in criminal law at the law faculty in Berlin (von Liszt was his successor);<sup>30</sup>
- Carl Ludwig von Bar (1836-1913), professor of criminal law in Göttingen who published on the history and theory of penal law and international law, was appointed in 1875 as the first German member of the *Institute of International Law* (founded in 1873) and developed his ‘classical’ theoretical approach into the direction of positivist criminology;<sup>31</sup>
- Hans Gross (1847-1915), a jurist, criminologist and practitioner of criminal investigation from Austria who is considered as a founder of *Kriminalistik* and published the criminological journal *Archiv für Kriminal-Anthropologie und Kriminalistik* (1898-1916);<sup>32</sup>
- Robert Heindl (1883-1958), a criminologist and practitioner who developed the concept of the professional criminal (*Berufsverbrecher*), published books on the methods of criminal investigation and penal colonies and was the successor of Gross as the editor of the *Archiv für Kriminologie* from 1917 onwards;<sup>33</sup>
- Gustav Aschaffenburg (1866-1944), a psychiatrist who published on crime and its repression from the angle of *Kriminalpsychologie*, edited in collaboration with von Liszt the journal *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* (1905-1935) and organised the seventh Congress of Criminal Anthropology in Cologne (1911);<sup>34</sup>
- Hans Kurella (1858-1916), a psychiatrist and criminal anthropologist who published *Cesare Lombroso und die Naturgeschichte des Verbrechers* and other books on criminal anthropology/psychology and translated and published pivotal works of Lombroso, Ferri and Garofalo and other authors of the ‘Italian positivist school’ in the series *Bibliothek für Socialwissenschaft* (1895-1898).<sup>35</sup>

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<sup>29</sup> *Stellungnahme der Internationalen Kriminalistischen Vereinigung, Landesgruppe Deutsches Reich, zum Entwurf einer Strafprozeßordnung und der Novelle zum Gerichtsverfassungsgesetz. Stenographischer Bericht über die Verhandlungen zu Berlin am 4. und 5. Januar 1909*, Berlin, 1909.

<sup>30</sup> Berner, A.F., *Wirkungskreis des Strafgesetzes nach Zeit, Raum und Personen. Besonders von der Bestrafung der im Auslande begangenen Verbrechen, vom Asylrecht und von der Auslieferung der Verbrecher, von der Rückwirkung der Strafgesetze und vom Rechtsirrthum*, Berlin, 1853.

<sup>31</sup> Bar, C.L.v., *International law: private and criminal*, Boston and Edinburgh 1883; Bar, C.L.v., *A history of continental criminal law*, Boston, 1916.

<sup>32</sup> Gross, H., *Handbuch für Untersuchungsrichter als System der Kriminalistik*, Graz, 1893, Engl.: *Criminal Investigation. A practical handbook for magistrates, police officers, and lawyers [...]*, Madras, 1906.

<sup>33</sup> Heindl, R., *Meine Reise nach den Strafkolonien*, Berlin, 1913; Heindl, R., *Der Berufsverbrecher. Ein Beitrag zur Strafrechtsreform*, Berlin, 1926.

<sup>34</sup> Aschaffenburg, G., *Das Verbrechen und seine Bekämpfung. Einleitung in die Kriminalpsychologie für Mediziner, Juristen und Soziologen, ein Beitrag zur Reform der Strafgesetzgebung*, Heidelberg, 1903, Engl.: *Crime and its Repression*, Boston, 1913.

<sup>35</sup> Kurella, H., *Cesare Lombroso und die Naturgeschichte des Verbrechers*, Hamburg, 1892.



All in all, the *Union Internationale de Droit Pénal* comprised members from many legal ‘schools’ and disciplines, among them about 30 German professors of criminal law as well as criminologists and jurists who were interested in international and transnational criminal law and published pivotal works in a foreign language. Although not all of them actively participated in the conferences of the *IKV*, most of them were involved in international activities of criminal law and positivist criminology, in particular the International Prison/Penitentiary Congresses and the Congresses of Criminal Anthropology. Regarding the latter, van Hamel, Prins and von Liszt actively participated in the meetings in Paris (1889), Brussels (1892) and Geneva (1896) as rapporteur or Honorary President.<sup>36</sup> Vice versa, important protagonists of the criminal anthropology movement were members of the *IKV*, communicated with von Liszt and participated in conferences, as, for instance, Lombroso, Ferri and Garofalo.<sup>37</sup> In the fourth meeting of the *IKV* in Paris (1893), the latter gave a report on the influence of criminal sociology and criminal anthropology on the basic concepts of criminal law. Dealing with the same topic, von Liszt noted that neither the *IKV* nor positivist criminology could provide a *Schulformel* (scholarly formula) and ready-made solutions; instead it would be necessary to discuss different opinions, reach compromises and mutual agreements and in doing so establish basic principles and concepts of integrated criminal law sciences.<sup>38</sup> In this regard, von Liszt used the international level to further develop concepts of positivist criminology, to integrate different opportunities and seek compromises. Hence, the *Zweckgedanke* as expressed in the *Marburger Programm* of 1882 represented only the first steps towards a *gesamte Strafrechtswissenschaft* that should serve for the purposes of criminal policy and the reform of criminal law.

#### 4. The basic concepts: *Zweckgedanke*, typology of criminals and *Zweckstrafen*

Although the positivist approach to criminal law was not entirely new, around Franz von Liszt initiated an exemplary positivist turn of criminal jurisprudence that manifested in his inaugural lecture at the University of Marburg in 1882 on the *Zweckgedanke im Strafrecht* (printed a year later in *Zeitschrift für die gesamte Strafrechtswissenschaft*).<sup>39</sup> The so-called *Marburger Programm* reflected earlier developments as well as contemporary trends of criminal law and criminology and is regarded as a founding text of the German ‘positivist school’ – or rather the evolving network of positivist criminology.<sup>40</sup> Von Liszt, however, refined elements of the *Zweckgedanke* such as the typology and dangerousness of criminals, the factors and manifestations of crime, punishments and security measures in further

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<sup>36</sup> Cf. *Actes du deuxième Congrès International d'Anthropologie criminelle*, Paris, 1889; *Actes du troisième Congrès International d'Anthropologie criminelle*, Bruxelles, 1893; *Congrès International d'Anthropologie Criminelle. Compte Rendu des Travaux de la Quatrième Session, Tenue A Genève du 24 au 29 Août 1896*, Genève, 1897.

<sup>37</sup> Ranieri, S., “Franz von Liszt und die positive Strafrechtsschule in Italien”, *ZStW* 81 (1969), pp. 701-722; Kempe, G.Th., “Franz von Liszt und die Kriminologie”, *Ibid.*, pp. 804-824.

<sup>38</sup> *Bulletin de l'Union Internationale de Droit Pénal / Mitteilungen der internationalen kriminalistischen Vereinigung = MIKV* 4 (1894), pp. 125-143 (v. Liszt) and 143-154 (Garofalo).

<sup>39</sup> Liszt, “Der Zweckgedanke im Strafrecht”.

<sup>40</sup> Schoech, H., “Das Marburger Programm aus der Sicht der modernen Kriminologie”, *ZStW* 94 (1982), pp. 864-887; Frisch, W., “Das Marburger Programm und die Maßregeln der Besserung und Sicherung”, *ZStW* 94 (1982), pp. 565-598; Kreher, C.O., *Herkunft und Entwicklung des Zweckgedankens bei Franz von Liszt. Eine rechtshistorische Analyse des Marburger Programms*, Zürich, 2015, who is disregarding the development of German criminology as well as the international context.

publications as well as in the international context of the *Union Internationale de Droit Pénal*.<sup>41</sup>

As previous authors who dealt with the reform of criminal law, von Liszt stated the failure of the contemporary criminal justice system referring (rather vaguely) to empirical data like crime statistics and the recidivism rate. According to Liszt, the reason for this was the pre-eminence of the *Vergeltungsstrafe*: punishment that would only retaliate the crime, based on criminal law and purposes of punishment, which the classical philosophical jurisprudence had differentiated in dogmatic detail. Instead of a theoretical foundation, the purposes of punishment should be determined based on a historical-empirical model as developed by the Italian anthropological school with regard to the offender and the violation or endangering of legally protected rights (*Rechtsgüter*). *Strafe ist Rechtsgüterschutz*: the purposes of punishment as *Schutzstrafe* should be the protection of legal goods (individual, social and national/international), which included the defence of society (*Gesellschaftsschutz*) from crime and criminals. This resulted in three basic purposes of punishment:

- rehabilitation/reform/correction (*Besserung*);
- prevention/deterrence (*Abschreckung*);
- neutralisation/elimination (*Unschädlichmachung*).<sup>42</sup>

This required the development of a classification and typology of offenders regarding their *Gesinnung* (criminal attitude/mind) and ‘dangerousness’ on historical-evolutionary and empirical grounds, using criminal statistics, anthropological and sociological research. Although not rejecting individual and anthropological/biological factors, Liszt preferred an evolutionary sociological approach and characterised crime as a *sozial-ethische Erscheinung* (social-ethical phenomenon). Such social factors could be age, race, class, income, job, status, education, mobility and other habits that would influence the *Gesinnung* and the ‘dangerousness’ of criminals, but could also change historically. According to von Liszt, around 1800 robber gangs, vagrants and gypsies had been the most dangerous types of offenders, whereas the modern period (since 1880) would face new types of criminals, resulting from economic and social changes which he characterised as the proletarianisation and globalisation of crime. The *Gesinnung* and ‘dangerousness’ also manifested in the criminal act (type, commission, frequency) and the related violation of *Rechtsgüter*. Based on this, von Liszt developed a typology of criminals in relation to the potential effects of punishment on the individual delinquent:

- *Gelegenheitsverbrecher*: occasional offenders, who needed to be deterred, prevented or rehabilitated;
- *Besserungsfähige/besserungsbedürftige Verbrecher*: corrigible criminals with the possibility/need of rehabilitation and correction;
- *Gewohnheitsverbrecher*: incorrigible, habitual, professional criminals who should be neutralised or eliminated.<sup>43</sup>

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<sup>41</sup> Liszt, “Kriminalpolitische Aufgaben”; Liszt, F.v., “Das gewerbsmässige Verbrechen”, *ZStW* 13 (1901), pp. 121-141; Liszt, F.v., “Die gesellschaftlichen Faktoren der Kriminalität”, *ZStW* 23 (1903), pp. 203-216; Liszt, F.v., *Das Verbrechen als sozial-pathologische Erscheinung. Vortrag, gehalten in der Gehe-Stiftung zu Dresden am 10.12.1898*, Dresden, 1899.

<sup>42</sup> Liszt, “Der Zweckgedanke im Strafrecht”, pp. 33-36.

<sup>43</sup> Liszt, “Der Zweckgedanke im Strafrecht”, pp. 36-39.

As a consequence, criminal justice should punish the different types and the respective individual delinquents with appropriate *Zweckstrafen* that worked more effectively to deter, prevent, correct/rehabilitate or neutralise and eliminate criminals and to protect society: the social function of *Zweckstrafen*. However, regarding the actual penalties and measures, the *Marburger Programm* was rather vague. Von Liszt proposed the limitation of discretionary power of judges, the reduction of short term imprisonment and indeterminate penal slavery with forced labour (*Strafknechtschaft mit Arbeitszwang*) for incorrigible offenders, but he neither elaborated a dual-track system of punishment and security measures nor did he refer to the concept of the indeterminate sentence.<sup>44</sup> Instead he stressed that criminal justice and punishment alone were not sufficient to suppress crime and protect society (or the *Rechtsgüter*) and should be complemented by preventive and security measures in the field of policing, social policy and social control, that all together formed a criminal policy – *Kriminalpolitik* – which served to defend society against the various types of criminals.<sup>45</sup>

Although von Liszt did not follow Lombroso's concept of the born criminal and preferred a more sociological approach that comes closer to Enrico Ferris *Sociologia criminale* (1881/82),<sup>46</sup> it seems questionable if this topology was entirely based on empirical facts. Von Liszt never engaged in related empirical criminological or sociological research, but rather used established juridical categories and partially adopted previous (vagrants, beggars, prostitutes) as well as contemporary (mobile, organised *Gaunertum*) narratives of dangerous, habitual and professional offenders. The narratives of *Gewohnheitsverbrecher* and *Berufsverbrecher* demonstrated the general criminological problem of how to establish valid empirical criteria to classify criminals: Was the main criteria recidivism that evinced a habitual offender? Or the dangerousness to society of *gemeingefährliche Verbrecher*? Or the habit of criminals that made a living/profession out of crime and organised themselves in groups and networks? And what would be effective responses: judicial punishment and/or security measures?<sup>47</sup>

The typology of criminals and the criteria to determine them as well as the exact relation to judicial punishment, preventive security measures and *Kriminalpolitik* remained a key topic of the international criminological discourse and the *IKV* in particular. Regarding German jurisprudence, the *Marburger Programm* and the subsequent publications of von Liszt met with mixed responses. As already outlined, some of the new ideas were already shared or welcomed by quite a few German jurists, criminologists and practitioners. Von Liszt immediately found supporters, which legal history commonly apostrophises as the 'von Liszt-school' that unanimously defended his concepts against the opposition of the so-called 'classical school'.<sup>48</sup> It is true that several protagonists of the dogmatic-oriented criminal jurisprudence like Karl Binding harshly criticised the concept of the *Zweckgedanke* and the *gesamte Strafrechtswissenschaft*, the interdisciplinary, sociological and socio-political approach, the rejection of retaliative punishment in favour of the *Zweckstrafe* and the

<sup>44</sup> Liszt, "Der Zweckgedanke im Strafrecht", pp. 39-42.

<sup>45</sup> Later elaborated in detail in: Liszt, "Kriminalpolitische Aufgaben"; cf. Naucke, W., "Die Kriminalpolitik des Marburger Programms 1882", *ZStW* 94 (1982), pp. 525-564.

<sup>46</sup> The first German translation was published by Hans Kurella in the *Bibliothek für Socialwissenschaft*, entitled: Ferri, E., *Das Verbrechen als sociale Erscheinung, Grundzüge der Kriminalsociologie*, Leipzig, 1896.

<sup>47</sup> Kaspar, J., "Die 'Unschädlichmachung der Unverbesserlichen'. Die v. Liszt-Schule und der Umgang mit gefährlichen Gewohnheitsverbrechern", *Die Schule Franz von Liszts* (A. Koch, M. Löhnig, eds.), pp. 119-133. For a critical analysis of the criminological discourse on the various types see: Wetzell, *Inventing the criminal*, pp. 25-38 and passim; Galassi, *Kriminologie im Deutschen Kaiserreich*, pp. 351-360.

<sup>48</sup> See Bohnert, *Zu Strafrechtstheorie und Staatsverständnis im Schulenstreit*; Stäcker, *Die Franz von Liszt-Schule*; Kreher, *Herkunft und Entwicklung des Zweckgedankens*.

theoretical-dogmatic shortcomings. Although this triggered controversial debates, neither the movement that von Liszt initiated nor the ‘classical opponents’ formed complete integrated ‘schools’ with uniform programs that resulted in a national ‘clash of schools’ (*nationaler Schulenstreit*).<sup>49</sup>

### 5. The transnational dimension: *Zweckgedanke*, social defence and the *Union Internationale de Droit Pénal*

As already outlined, von Liszt and his supporters established a national as well as international network that discussed different approaches, ideas and questions and was closely intertwined with the burgeoning international and interdisciplinary discourse of positivist criminology.<sup>50</sup> Especially the *Union Internationale de Droit Pénal* provided a forum of debate and exchange of knowledge through conferences, meetings, expert reports, statements, debates, conclusions, recommendations and print media to develop pivotal elements of the *Zweckgedanke*: social defence that included the protection and securitisation of *Rechtsgüter* and *Gesellschaftsschutz*; the indeterminate sentence, preventive detention, security measures and punishments that could serve as *Zweckstrafen*; the further development of the typology of criminals and the concept of dangerousness; and the reform of penal law through transnational comparison and harmonisation.

In the year (1882 in which he presented the *Marburger Programm*, von Liszt published a legal opinion for the German *Juristentag* about common principles of international criminal law and how to aspire them.<sup>51</sup> In this treatise he dealt with extradition and mutual assistance as well as with *internationale Rechtsgüter*, common international legal rights that should be protected against international crime. Hence, from the very beginning von Liszt intersected ‘transnational criminal law’ with his criminological approach.<sup>52</sup> The respective criminological discourse that took place in the *IKV*<sup>53</sup> did not only revolve around the basic concepts of positivist criminology, but also involved several transnational issues. In 1911, Joost van Hamel (the son of the *IKV* founder) published an article about the *IKV* in which he stressed that “in late years we find an interesting movement to obtain efficient international relations for mutual assistance of police authorities, extradition, and other measures, necessitated by the growth of international crime; defraudations; prostitution;

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<sup>49</sup> Koch, “‘v. Liszt-Schule’ – Personen, Institutionen, Gegner”, pp. 48-55, stating: “Freilich darf die unhistorische Rede von der ‚Liszt-Schule‘ nicht dazu verleiten, von einer einheitlichen Bewegung mit einem festen ‚Programm‘ auszugehen” (p. 47); and regarding the ‘classicals’: “der Begriff ‚Schule‘ führt hier vollends in die Irre” (p. 49).

<sup>50</sup> Kesper-Biermann, “Die Internationale Kriminalistische Vereinigung”; Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”.

<sup>51</sup> Liszt, F.v., “Sind gleiche Grundsätze des internationalen Strafrechts für die europäischen Staaten anzustreben und eventuell welche? Gutachten, i. A. d. ständigen Deputation d. dt. Juristentages erstattet”, *ZStW* 2 (1882), pp. 50-81.

<sup>52</sup> Cf. Herrmann, *Das Standardwerk*, pp. 224 s. On ‘transnational criminal law’ in historical perspective see: Härter, K., “The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century: Political Crime, Police Cooperation, Security Regimes and Normative Orders – an Introduction, *The Transnationalisation of Criminal Law* (K. Härter, T. Hannappel, J.C. Tyrichter, eds.), pp. 1-19.

<sup>53</sup> On the topics, the *IKV* discussed, cf. in general: Kitzinger, *Die internationale kriminalistische Vereinigung*, pp. 18-131; Radzinowicz, *The Roots of the International Association of Criminal Law*, pp. 10-21; Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 32-114; Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, pp. 212-225.

‘white slave trade,’ etc.’<sup>54</sup> Hence, regarding the transnational dimension the discussions of the *IKV* and the criminological concept of the *Zweckgedanke* were related to:

- the typology of criminals and the problem to legally define and classify the habitual/professional offenders (*internationale Gewohnheitsverbrecher/Berufsverbrecher*) and the relevance of the transnational dimension regarding international and cross-border crime, notably white slave trafficking and anarchism;
- transboundary punishments and security measures such as transportation, deportation, penal colonies, expulsion and extradition that served as transnational *Zweckstrafen*;
- the transnational functions of punishment: the protection/securitisation of common, international protected rights and social defence;
- and the implementation of the concepts of positive criminology in transnational criminal law through the reform of national law (regarding, for instance extradition laws) or the transboundary harmonisation of legal principles.

### 5.1. The typology of criminals, dangerousness and social defence

Already the first statute of the *IKV* had put the typology of criminals and their differentiation on the international agenda: “La distinction entre les délinquants d’accident et les délinquants d’habitude est essentielle en pratique comme en théorie; elle doit être la base des dispositions de la loi pénale.”<sup>55</sup> The most controversial questions that the *IKV* debated in several meetings<sup>56</sup> concerned the criteria to define the specific type of incorrigible, habitual/professional/dangerous criminals (*Gewohnheitsverbrecher, Berufsverbrecher, gemeingefährliche Verbrecher*), the criteria of dangerousness<sup>57</sup> and the related measures of social defence: the indeterminate sentence or security measures.<sup>58</sup> These debates revealed the fundamentally different approaches of the Lombrosian ‘school’ that prioritised biological/psychological criteria and the sociological school that stressed incorrigibility, recidivism and *Gesinnung*.<sup>59</sup> In 1890, the second meeting in Bern started to discuss the typology question and the classification of habitual/professional offenders, dealing with the question “Wie ist der Begriff des unverbesserlichen Gewohnheitsverbrechers im Gesetze zu bestimmen und welche Maßregeln sind gegen diese Verbrechergruppe zu empfehlen?” The *IKV* agreed that recidivism constituted a pivotal criterion to classify habitual offenders and unanimously approved the report of van Hamel in the 1891 meeting who – for the purpose of

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<sup>54</sup> Hamel, J.A.v., “The International Union of Criminal Law”, *Journal of the American Institute of Criminal Law and Criminology* 2 (1911), pp. 22-27, quote p. 26.

<sup>55</sup> *Statuts de l’Union Internationale de Droit Pénal*, printed in: Liszt, “Eine internationale kriminalistische Vereinigung”, p. 364.

<sup>56</sup> See Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, pp. 216-219; Kitzinger, *Die internationale kriminalistische Vereinigung*, pp. 70-84; Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 55-60, 87-105.

<sup>57</sup> For a general overview see Houchon, G., “Évolution du concept de dangerosité en criminologie européenne (« Vingt ans après ... »)”, *Criminologie* 17 (1984), pp. 79-91.

<sup>58</sup> For a general overview see Pifferi, *Reinventing Punishment*, pp. 86-142.

<sup>59</sup> For a more general outline see, Knepper, P., “Laughing at Lombroso: Positivism and Criminal Anthropology in Historical Perspective”, *The Handbook of the History and Philosophy of Criminology* (R.A. Triplett, ed.), Hoboken/Oxford, 2018, pp. 51-66; Dunnage, J., “The Work of Cesare Lombroso and its Reception: Further Contexts and Perspectives”, *Crime, Histoire & Sociétés / Crime, History & Societies* 22 (2018), Online: <http://journals.openedition.org/chs/2258> (accessed 10.05.2019).

social defence – proposed subsequent security measures and the indeterminate sentence.<sup>60</sup> The debate was continued in 1902 in St. Petersburg, where von Liszt elaborated the social factors of crime and stressed his concept of *Gesinnung* (criminal attitude/mind). In several concomitant presentations and articles, von Liszt had further developed *Gesinnung* and crime as a *sozial-ethische Erscheinung* (social-ethical phenomenon), emphasising criteria such as incorrigibility, making a living out of crime, the mode of criminal operation (organised, mobile, international), being member of a ('professional') criminal group with a certain grade of organisation, the methods of committing crimes, the damaged caused and the related condition of dangerousness to the public (*Gemeingefährlichkeit*).<sup>61</sup> In 1905 the tenth congress of the *IKV* in Hamburg discussed the criteria of dangerousness and the type of offenders that would constitute a danger to the public (*gemeingefährliche Verbrecher*). Von Liszt rejected to equate incorrigible, habitual criminals (*Gewohnheitsverbrecher*) with *gemeingefährliche Verbrecher* and recidivism with dangerousness, stating that the latter was also related to his concept of the *Gesinnung*: to him and many members of the *IKV*, dangerousness was a condition or state – *état dangereux du délinquant* – and not the mere outcome of recidivism. This was directly linked to the question of how to protect society against such *gemeingefährliche Verbrecher* – among them 'professional', 'mobile' and 'international' offenders – and which security measures would serve best for the purpose of social defence and the *Zweckstrafe* of *Unschädlichmachung* (elimination). However, the meeting could not agree on a resolution and some members of the *IKV* opposed von Liszt's concept for different reasons: the anthropological determination of such criminals on the one, and the threat to individual liberty and the rule of law on the other hand.<sup>62</sup>

The congress of Brussels (1910) again debated 'dangerousness' and related measures of social defence and established some sort of compromise. In the first report on the notion of dangerousness and appropriate security measures, Emile Garçon from Paris suggested to rather restrict the criteria of dangerousness to crimes and recidivism.<sup>63</sup> In contrast, von Liszt stressed again that the state of dangerousness (*état dangereux*) was directly linked to the type, habits, milieu, personality and mental state of perpetrators that could result in a fundamental threat to the legal order (or the *Rechtsgüter*). Although recidivism and incorrigibility of convicted delinquents would constitute an important factor, dangerousness and social defence should also include 'non-delinquents': "L'état dangereux peut exister, même quand l'individu n'a pas commis d'acte délictueux (the dangerous state may exist even when the individual has not yet committed any wrongful act)". This could include young delinquents, drunkards and idle or mobile delinquents (such as beggars and vagrants) that should be treated with reintegrating and disciplining penalties and measures of adaption (houses of corrections, prison works houses, forced labour etc.) as described by Prins in his recent book on *défense sociale* to which von Liszt explicitly referred.<sup>64</sup> However, regarding criminals that constituted a danger to the public because of incorrigibility, recidivism, professional crime, habits, criminal milieu and mental insanity, von Liszt suggested preventive security measures that should eliminate them from social life as long as their *état dangereux* exists, since society could expect that such individuals would commit future crimes from which the threat of

<sup>60</sup> *MIKV* 2 (1890), p. 116 and passim.

<sup>61</sup> *MIKV* 10 (1902), p. 44; printed version (1893) Liszt, "Die gesellschaftlichen Faktoren der Kriminalität"; furthermore: Liszt, *Das Verbrechen als sozial-pathologische Erscheinung*; Liszt, "Das gewerbsmässige Verbrechen". See also Kaspar, "Die 'Unschädlichmachung der Unverbesserlichen'"; Radzinowicz, *The Roots of the International Association of Criminal Law*, p. 30.

<sup>62</sup> See *MIKV* 13 (1905), passim; Wetzell, "Franz v. Liszt und die internationale Strafrechtsreformbewegung", pp. 215-218.

<sup>63</sup> *MIKV* 17 (1910), pp. 189 ss.

<sup>64</sup> Prins, *La défense sociale et les transformations du droit pénal*.

criminal punishment would not deter them: “The sane delinquent who appears to be dangerous because of reiterated and grave relapses into crime must be secluded so long as the dangerous state lasts. Secondarily should be considered whether he will be sent to a penitentiary or a special establishment. On the other hand, any attempt to fix a definite period of confinement should be absolutely rejected.”<sup>65</sup> Although Emile Garçon had rejected such a direct correlation of *Gemeingefährlichkeit* and indeterminate sentence/measures, after further interventions by Nabokoff, Aschaffenburg, van Hamel, Prins and others, the conference finally adopted the resolution: “The law should establish special measures of social security against delinquents who are dangerous because of either their legal relapses, their habits of life such as the law may define as dangerous, or their antecedents, hereditary or personal, manifested by a crime or offense that the law shall determine.”<sup>66</sup> Hence, not only recidivism and anthropological criteria, but also the state of *Gemeingefährlichkeit* of potential criminals with certain habits legitimised measures of social defence.

However, the function and relation of security measures and indeterminate judicial punishments were still further discussed at the congress in Copenhagen (1913), also referring to the statements that von Liszt, von Bar and others had published regarding the implementation of indeterminate punishment and preventive or subsequent indefinite security measures (*Sicherungsverwahrung*) in the revision of the German penal code.<sup>67</sup> Whereas indeterminate punishment was still based on a judicial sentence which merely had not determined the duration of imprisonment, security measures could be indefinite with regard to the imposing institution (judiciary, administration, police), the type (confinement, workhouse, deportation, expulsion, social measures) and the duration. After controversial discussions, the majority of the *IKV* approved the statement of Carl Torp: „Le congrès entend par là que le juge doit prononcer contre le récidiviste dangereux une mesure de sureté ou une peine dont il fixe le minimum mais dont le maximum reste indéterminé“.<sup>68</sup> Finally, the meeting adopted as compromise formula several possibilities of application: judicial punishment combined with a subsequent indefinite security measure or indeterminate preventive detention without criminal punishment. This was a dual-track system that combined judicial punishment, indeterminate preventive and indefinite subsequent security measures which could be inflicted (by a court or possibly other institutions) against dangerous criminals.

As a result, the *IKV* adopted the concept of dangerousness to the public and type of the *gemeingefährliche Verbrecher* to enhance the typology of habitual/professional criminals and link it to indeterminate preventive measures of social defence.<sup>69</sup> In so far the *IKV* approved concepts and narratives which other crucial figures of the German positivist criminology and

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<sup>65</sup> Report of v. Liszt, *MIKV* 17 (1910), pp. 423-449, quote p. 447 and from the English translation of his final propositions by: Smithers, W.W., “1910 Meeting of the International Union of Penal Law”, *Journal of Criminal Law and Criminology* 2 (1911), pp. 381-385, quote p. 384. Cf. Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, p. 218 s.

<sup>66</sup> *MIKV* 17 (1910), p. 495; English translation: Smithers, “1910 Meeting of the International Union of Penal Law”, p. 384.

<sup>67</sup> Aschrott, P.F. / Liszt, F.v., *Die Reform des Reichsstrafgesetzbuchs. Kritische Besprechung des Vorentwurfs zu einem Strafgesetzbuch für das Deutsche Reich unter vergleichender Berücksichtigung des österreichischen und schweizerischen Vorentwurfs, unter Mitwirkung von L. v. Bar*, 2 vols., Berlin, 1910.

<sup>68</sup> *MIKV* 20 (1913), pp. 539-540; cf. Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, p. 225 s.

<sup>69</sup> Cf. Ruske, A., *Ohne Schuld und Sühne. Versuch einer Synthese der Lehren der ‘défense sociale’ und der kriminalpolitischen Vorschläge der modernen deutschen Hirnforschung*, Berlin, 2011, pp. 47-58.

von Liszt's network such as Auerbach, Gross and Heindl propagated to some extent.<sup>70</sup> Furthermore, the *IKV* approved indefinite security measures that could be inflicted as a subsequent measure after determined judicial punishment or as a preventive measure for *Gemeingefährliche* who had not committed an actual crime. This did not only expand the concept of the indeterminate sentence, but also concurred with the *Zweckstrafe: Unschädlichmachung inkorrigibler, gemeingefährlicher Verbrecher* through preventive indefinite security measures (*Sicherungsverwahrung*).<sup>71</sup>

However, neither von Liszt nor the *IKV* managed to collect valid empirical data or transnationally comparable crime statistics that would have allowed to substantiate the discussed criteria and define the most serious/dangerous type of criminals. Rather, they referred to established narratives and labels such as the proletarian milieu that would create anti-social criminal behaviour or beggars and vagrants that would constitute a breeding ground of habitual professional mobile criminals. The *IKV* had already discussed the latter topic in 1894, and in 1913 René Garraud further developed the classification of *gemeingefährliche* professional criminals with regard to vagrants, beggars and other mobile and transboundary operating professional/habitual groups.<sup>72</sup>

## 5.2. International crime, *Zweckgedanke* and social defence

The concepts of dangerousness and social defence involved a transnational dimension with regard to international crime as well as transboundary measures such as penal transportation and extradition. According to von Liszt, dangerousness was also based on habits such as international connections (*internationale Verbindungen*), cross-border mobility and professional organised crime, and therefore, vagrants, *professionelles Gaunertum*, white slave traders and anarchists constituted a transnational danger threatening the *Rechtsgüter* of all civilised nations. Although von Liszt did not specifically elaborate international crime, he and several members of the criminological network and the *IKV* nevertheless dealt with crimes that obtained a transboundary and international dimension, in particular women trafficking and anarchism.

The debate on anarchism as the most dangerous manifestation of transboundary political violence was clearly inspired by Lombroso's work *Gli anarchici* (1894), that members of the *IKV* immediately translated and published in Germany, France and other countries.<sup>73</sup> In 1896, van Hamel gave a presentation at the fourth congress of Criminal Anthropology (Geneva) in which he discussed anarchism as an international crime and a threat to international legally protected rights that all civilised nations had in common. Therefore, he concluded, violent anarchism was a matter of transnational social defence.<sup>74</sup> The *Bulletin de l'Union Internationale de Droit Pénal* printed the report and the statements of

<sup>70</sup> Cf. Aschaffenburg, G., *Die Sicherung der Gesellschaft gegen gemeingefährliche Geisteskranke. Ergebnisse einer im Auftrage der Holtzendorff-Stiftung gemachten Studienreise*, Berlin, 1912; Heindl, *Der Berufsverbrecher*. See also Becker, P., "Zwischen Tradition und Neubeginn: Hans Goss und die Kriminologie und Kriminalistik der Jahrhundertwende", *Die Gesetze des Vaters. 4. Internationaler Otto Gross Kongress* (A. Götz von Olenhusen, G. Heuer, eds.), Marburg, 2005, pp. 290-309; Wetzell, *Inventing the criminal*, pp. 66-68.

<sup>71</sup> Cf. Pifferi, *Reinventing Punishment*, pp. 132-134.

<sup>72</sup> Cf. Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 72 s.

<sup>73</sup> Lombroso, C., *Die Anarchisten. Eine kriminal-psychologische und soziologische Studie*, ed. by H. Kurella, Hamburg, 1895.

<sup>74</sup> Hamel, G.A.v., "L'anarchisme et le combat contre l'anarchisme au point de vue de l'anthropologie criminelle", *Congrès International d'Anthropologie Criminelle. Compte Rendu des Travaux de la Quatrième Session, Tenue A Genève du 24 au 29 Août 1896*, Genève, 1897, pp. 111-119.



Ferri and Lombroso, but the *IKV* did not put the topic on the agenda, since it seemed to be too vague and too controversial.<sup>75</sup> In the end, Lombroso and the ‘anthropological school’ failed to integrate anarchists and international crime in the theory of atavism.<sup>76</sup> Although he discussed anarchists as protagonists of international crime and rejected biological criteria, von Liszt too could not develop specific criteria to systematically allocate anarchists in his typology. He concluded that anarchist perpetrators did not commit specific political, but rather ordinary crimes and should be classified accordingly. Hence, anarchists should be treated like other internationally operating *gemeingefährliche* criminals that violated international legally protected rights (*internationale Rechtsgüter*) and threatened the order of all civilised nations such as white slave traders.<sup>77</sup>

The *IKV* started to discuss women trafficking (*Mädchenhandel, traite des blanches*) in the meeting of 1899 (Budapest) referring to similar international endeavours that had dealt with the question (as the congresses of 1895 in Paris and London). After reports by Gruber (Budapest) and Dreyfus (Paris), the debate particularly revolved around the question of the legal definition and a possible law to internationally criminalise the trafficking of women. This proved not to be possible, since the existing national provisions varied widely and a legal concept of international crime did not exist. However, the discussants agreed that measures of transnational law as in particular banishment, expulsion, extradition, cross-border prosecution, police cooperation, surveillance and exchange of information should be improved and regulated through international law to repress transboundary operating organised crime. The debate concluded with the proposal that the *IKV* should invite the governments of all ‘civilised nations’ (*les États civilisés*) to take “les mesures opportunes” and to conclude “un traité international relatif à la répression de la traite des blanches, tendant à établir des bases de droit international selon lesquelles, dans les législations des différents États et les règlements d’ordre administratif, seraient à insérer des dispositions conformes à ce traité international”.<sup>78</sup>

The topic was continued in 1902 (St. Petersburg) and 1905 (Hamburg) and the *IKV* was able to notice that international and national conferences were held in Paris (1902) and Germany (Frankfurt 1902, Berlin 1903) and that the *International Agreement for the suppression of the White Slave Traffic* had been concluded in 1904.<sup>79</sup> In 1905, the *IKV* further extended the topic of transnational criminal law with four reports and a resolution that proposed central offices, attached to the national police forces or prosecutors that should collect and directly exchange information on international crime. With the support of von Liszt, the suggestions of Prins was included, which stated that international crime

<sup>75</sup> *MIKV* 6 (1897), pp. 181-183.

<sup>76</sup> Calafato, T., “Gli Anarchici and Lombroso's theory of political crime”, *The Cesare Lombroso handbook* (P. Knepper, P. J. Ystehede, eds.), London, 2013, pp. 47-71; Pick, D., “The Faces of Anarchy: Lombroso and the Politics of Criminal Science in Post-Unification Italy”, *History Workshop* 21 (1986), pp. 60-86.

<sup>77</sup> Liszt, F.v., “Das anarchistische Verbrechen”, *Leipziger Zeitschrift für Deutsches Recht* XIII (1919), pp. 1-6. On the international discourses about anarchism as political or social crime, see Jensen, R.B., “The Rise and Fall of the ‘Social Crime’ in Legal Theory and International Law: The Failure to Create a New Normative Order to Regularize Terrorism, 1880-1930s”, *The Transnationalisation of Criminal Law* (K. Härter, T. Hannappel, J.C. Tyrichter, eds.), pp. 197-211.

<sup>78</sup> *MIKV* 8 (1900), pp. 161-183, 202-213, 346-366, quote p. 366. Cf. Kitzinger, *Die internationale kriminalistische Vereinigung*, pp. 127-131; Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 73-75, 107 s.

<sup>79</sup> *MIKV* 10 (1902), pp. 365 ss. and 11 (1903), pp. 239 ss.; cf. Kitzinger, *Die internationale kriminalistische Vereinigung*, pp. 129 s. On the international conferences see Allain, J., “White Slave Traffic in International Law” *Journal of Trafficking and Human Exploitation* 1 (2017), pp. 1-40.

(*internationales Verbrechen*) had developed as a specific criminal type that required transnational measures to fight it and should be further investigated through the police and positivist criminology. To start this endeavour, the *IKV* suggested an international conference on international crime and transnational measures.<sup>80</sup> Although such a conference never materialised and neither the *IKV* nor von Liszt developed a comprehensive criminological concept of international crime, they nevertheless discussed the related questions of transnational prosecution to defend international legally protected rights that all civilised nations had in common. In this regard, von Liszt and the *IKV* attempted to develop the transnational dimension of *Zweckstrafe* and social defence, that also extended to penal transportation and extradition.

### 5.3. Transnational *Zweckstrafe*: transportation, measures of security and extradition

Regarding the development of *Zweckstrafe* in a transnational context, the nexus between indeterminate sentence, transportation/deportation and forced labour was of particular importance.<sup>81</sup> Already in 1894, the Holtzendorff foundation (affiliated with the *IKV*) announced a prize question on transportation and awarded the prize to the book of the German lawyer Korn about the practical usefulness of deportation. The *IKV* started the debate about transportation/deportation in the meetings of 1897 (Lisbon), in which comprehensive reports by M. Rosenfeld (Berlin), M.J. Leveillé (Paris), F. Freund (Koblenz), M.D. Drill (St. Petersburg), F.F. Bruck (Breslau), A. Fani (Perugia) and J.C.F. Frazão (Lisbon) presented examples from all over the world and elaborated different viewpoints. In particular Bruck advocated transportation as a rational *Zweckstrafe* that would allow the civilised nations to eliminate dangerous criminals, maintain public security, deter offenders and reform delinquents through hard labour. In the debate, the opinions differed regarding the effectiveness, utility and implementation problems. The critical voices argued that the available data would rather demonstrate a failure, that the relation between purposes and types of criminals seemed ambiguous and that many countries would lack the necessary colonies.<sup>82</sup> However, referring to the conclusions of the prison congress of 1895, the *IKV* did approve “la transportation dans son principe. La transportation, en effet, réunit les conditions essentielles de la peine; et, de plus, elle peut aider [...] à l’éclosion des colonies naissantes”.<sup>83</sup> In St. Petersburg (1902), further reports on deportation and transportation in Russia and France (although again differing in its conclusions) unanimously endorsed deportation as a security measure against political, mobile, professional and *gemeingefährliche* criminals.<sup>84</sup> But all in all, the *IKV* could not agree how to systematically integrate transportation, deportation and penal colonies in a dual-tracksystem of criminal punishment and security measures and did not further develop the issue.

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<sup>80</sup> *MIKV* 13 (1905), pp. 419 ss.; cf. Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 107-109.

<sup>81</sup> As already highlighted by Radzinowicz, *The Roots of the International Association of Criminal Law*, p. 34. The international discourse used the expression (penal) transportation whereas Germany preferred ‘deportation’, likewise meaning the punishment of convicts through the transboundary expulsion to a penal colony.

<sup>82</sup> *MIKV* 6 (1897), pp. 280-288, 336-454; cf. Kitzinger, *Die internationale kriminalistische Vereinigung*, pp. 116-121; Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 69-71.

<sup>83</sup> *MIKV* 6 (1897), p. 520. On the debate of the prison congress see Neilson, B., “The Paradox of Penal Colonization: Debates on Convict Transportation at the International Prison Congresses 1872–1895”, *French History and Civilization* 6 (2015), pp. 198–211.

<sup>84</sup> *MIKV* 10 (1902), pp. 103-158, 319-328.

The respective German criminological discourse was closely intertwined with the *IKV* debate. Robert Heindl, a German member of the *IKV*, toured the world to investigate penal colonies and published his findings in a much-considered book, in which he suggested to particularly use transportation/deportation against professional *gemeingefährliche* criminals. Another member of the *IKV*, Hans Gross, proposed the deportation of incorrigible and ‘degenerated’ criminals to penal colonies in Africa.<sup>85</sup> Penal transportation, deportation and penal colonies seemed to be an ideal type of von Liszt’s *Zweckstrafe*, since its transnational dimension served to spatially eliminate delinquents from society. However, the criminological and legal debate revealed controversial issues. Some authors stressed that these penalties would support the colonial policy of the Empire, others – among them the price-winner A. Korn – criticised the effectiveness and the incompatibility with the German criminal code and the systems of penalties. Although von Liszt supported deportation as a means of elimination (*Mittel der Unschädlichmachung*) in the 1903-edition of his *Lehrbuch*, deportation/transportation was not included in the project to reform the German penal code and did not gain any practical importance, since Germany lost all his colonies in World War I.<sup>86</sup>

Likewise, von Liszt and the *IKV* discussed extradition referring to the concept of the *Zweckgedanke*, social defence and transnational crime. Von Liszt had already dealt with extradition in his article on the harmonisation of international criminal law (published in 1882) and had further developed the topics of international criminal law, mutual assistance and extradition in the numerous editions of the *Lehrbuch* and the *Völkerrecht*. In line with the *Zweckgedanke*, he established the principle that international criminal offenses against common *Rechtsgüter* would create a desire or need for international agreements and measures to protect them.<sup>87</sup> Although the *Institut de Droit International* passed a comprehensive resolution on extradition in 1880, the *IKV* hesitated to take up the topic and only in 1906 the German section discussed extradition and recommended to draft an extradition law.<sup>88</sup>

Finally, the meeting of the *IKV* in 1910 took up the debate on international crime (Hamburg 1905) and discussed the regulation of extradition as a transnational security measure to defend society in particular with regard to *gemeingefährliche* professional international criminals.<sup>89</sup> In his report, M. Garraud (Lyon) stressed that nowadays “la criminalité ne connaît ni distance ni frontière: elle tend à s’internationaliser“. To fight internationally organised crime, “une organisation internationale de la répression” would be essential; against these “ennemis de tout ordre social” *la defense sociale* would constitute an

<sup>85</sup> Heindl, *Meine Reise nach den Strafkolonien*; H. Gross, “Zur Deportationsfrage”, *Gesammelte Kriminalistische Aufsätze*, vol. 1, Leipzig, 1902, pp. 64-71; H. Gross, “Degeneration und Deportation”, *Gesammelte Kriminalistische Aufsätze*, vol. 2, Leipzig, 1907, pp. 70-77.

<sup>86</sup> Liszt, *Lehrbuch*, 12<sup>th</sup>/13<sup>th</sup> ed., Berlin, 1903, p. 78 n. 8.; Voigt, J. H., “Die Deportation - ein Thema der deutschen Rechtswissenschaft und Politik im 19. und frühen 20. Jahrhundert”, *Ausweisung und Deportation. Formen der Zwangsmigration in der Geschichte* (A. Gestrich, G. Hirschfeld, H. Sonnabend, eds.), Stuttgart, 1995, pp. 83-101.

<sup>87</sup> Liszt, “Sind gleiche Grundsätze des internationalen Strafrechts für die europäischen Staaten anzustreben”, pp. 50-81; Liszt, *Lehrbuch*, 10<sup>th</sup> ed., Berlin, 1900, pp. 90-93; Liszt, *Völkerrecht*, 10<sup>th</sup> ed., Berlin, 1915, pp. 255-260; cf. Herrmann, *Das Standardwerk*, pp. 217-222.

<sup>88</sup> *MIKV* 14 (1907), pp. 354-390. For a recent overview on extradition and transnational criminal see: Nunes, D., “Extradition and Political Crimes in the ‘International Fight against Crime’: Western Europe and Latin America 1833 – 1933”, *The Transnationalisation of Criminal Law* (K. Härter, T. Hannappel, J.C. Tyrichter, eds.), pp. 41-63; K. Härter, “The Circulation of Transnational Criminal Law between the Americas and Germany (1848-1914) in Extradition Treaties, Juridical Discourses and International Associations”, *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* 74 (2019), pp. 353-378.

<sup>89</sup> *MIKV* 17 (1910), pp. 174-181, 533-569; cf. Bellmann, *Die Internationale Kriminalistische Vereinigung*, pp. 109-111.

international duty of all civilised nations and should be based on the principle *aut dedere aut punire*. Thus, the improvement and harmonisation of extradition as well as the regulation of immediate pursuit could be the first step to establish transnational measures of security. Furthermore, the *IKV* should take steps towards an harmonisation of transnational criminal law – for instance regarding the widely differing extradition treaties – and should as well initiate the implementation of transnational provisions in national criminal law.<sup>90</sup> The second report by Liepmann (Kiel) essentially agreed but stressed expulsion as an alternative administrative means to deal with vagrants and gatherings of foreign offenders that, however, should be more thoroughly legally regulated. The subsequent debate approved the reports but also showed the differences regarding political crimes, the political offence exception and the principle of reciprocity that von Liszt rejected as an impediment of extradition and transnational prosecution. Finally, the *IKV* only agreed to take further steps so that interested governments would initiate agreements about common principles of extradition.<sup>91</sup> In this respect, the efforts once again did not lead to concrete results. Even the German Empire increased the legal diversity of extradition by concluding treaties with Paraguay (1909) and Turkey (1917), which adopted the so-called anarchist clause that excluded anarchists from the political offence exception. In two of his last articles (1917 and 1919), von Liszt criticised these developments and again requested an international harmonisation of extradition principles and a national extradition law, but it was only in 1929 that Germany enacted such a law; von Liszt had already died in 1919.<sup>92</sup>

## 6. Conclusions

At first sight, the impact and importance of von Liszt, the *IKV* and German positivist criminology seems to be limited and varied with regard to the revision of the German penal code or the establishment of transnational criminal law. In the investigated period (1871-1918), the positivist criminological network in fact developed the concepts of the *Zweckgedanke* and social defence in a transnational context, but failed to implement related legal provisions and measures in the first instance. This concerned the typology of criminals, the criteria of dangerousness and the criminalisation of professional, international and *Gewohnheitsverbrecher*; the implementation of *Zweckstrafen* such as the indeterminate sentence or deportation/transportation; the harmonisation of transnational criminal law, mutual legal assistance and extradition; and, above all, the revision of German criminal law according to the concepts of positivist criminology, social defence and the *Zweckgedanke* in particular. Although von Liszt and several protagonists of the criminological network were involved in the revision of the German criminal code and published relevant drafts, books and articles, the draft codes of 1913, 1919 and 1922 were not in principle based on the concepts of von Liszt and positivist criminology.<sup>93</sup> But to some extent they adopted reform proposal and comprises (for instance regarding juvenile delinquency and monetary penalties), some of which had been evolving on the international level of the *IKV*. Above all, the German criminal justice system by and by implemented a dual-tracked system: legally determined criminal punishment and subsequent indeterminate security measures (*Zweigeisigkeit von*

<sup>90</sup> *MIKV* 17 (1910), pp. 174 s.

<sup>91</sup> *MIKV* 17 (1910), 533-569.

<sup>92</sup> Liszt, F.v., “Der deutsch-türkische Auslieferungsvertrag vom 11. Januar 1917”, *ZStW* 38 (1917), pp. 769-782; Liszt, “Das anarchistische Verbrechen”.

<sup>93</sup> Aschrott / Liszt (eds.), *Die Reform des Reichsstrafgesetzbuchs*; Kahl, W. / Lilienthal, K.v. / Liszt, F.v. / Goldschmidt, J., *Gegenentwurf zum Vorentwurf eines deutschen Strafgesetzbuchs*, 2 vols., Berlin, 1911; Vormbaum, T. / Rentrop, K. (eds.), *Reform des Strafgesetzbuchs. Sammlung der Reformentwürfe*, vol. 1: 1909 bis 1919, Berlin, 2008.

*Strafe und Sicherungsverwahrung*) based on the criterion of *Gemeingefährlichkeit*.<sup>94</sup> Finally, in 1933 Nazi Germany enacted a law regarding dangerous habitual criminals and security measures (*Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung*) that claimed to protect or defend society.<sup>95</sup> Furthermore, in 1929 the *Reichstag* passed the German extradition law that von Liszt, von Bar and the *IKV* had requested for many years.<sup>96</sup>

It would be misleading to characterise von Liszt as enabler of Fascist criminal law, since the *Zweckgedanke* and his concept of criminal law were essentially based on the idea of the rule of law and a more or less ‘liberal’ criminal code. From the specific angle of this examination, the network of positivist criminology and the *Zweckgedanke* rather unfolded an ambiguous long-term impact. Security measures, dangerousness, *Berufsverbrecher* and concepts of a utilitarian criminal law that focused on the offender (*Täterstrafrecht*) had long been discussed in Germany and were of relevance for criminal practice. Based on this, von Liszt established his fundamental concept of the *Zweckgedanke im Strafrecht* which he further developed within the international network of positivist criminology that he helped to establish and expand, also with regard to his national supporters as well as other protagonists of German criminology. The types of *gemeingefährliche*, professional/habitual criminals, the concept of *Gesinnung* and dangerousness to the public and a two-tracked system of criminal punishment and indeterminate security measures were rather the outcome of this international network – and the *IKV* in particular – than of a national ‘von Liszt-school’ that clashed with the ‘traditional school’. Although controversial discussions with exponents of established jurisprudence took place, von Liszt and the criminological network barely used a totally new and ‘revolutionary’ methodology. Many concepts, debates and arguments were rarely based on comprehensive empirical research on crime, but rather draw from existing law, international comparison, juridical arguments, judicial practice and established narratives. Hence, the international network rather functioned as an arena and laboratory to integrate a variety of jurists, criminologists, and disciplines, to discuss and develop conceptual elements of the *Zweckgedanke* and social defence, and to establish compromises – or fail with regard to the revision of penal codes.<sup>97</sup>

As a result, the impact of von Liszt and the network of positivist criminology was less on national legislation but rather concerned the internationalisation of criminal policy, social defence and the *Zweckgedanke im Strafrecht*. Especially the *IKV* served to transfer core concepts such as the ‘typology of criminals’, ‘dangerousness’ and ‘*Zweckstrafe*’ to the international criminological discourse and relate them to transnational criminal law with regard to international crimes such as women trafficking and anarchism, transnational penalties and measures of security such as transportation/deportation and extradition and international legally protected rights of ‘civilised nations’ (*internationale Rechtsgüter*), which all became issues of positivist criminology.

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<sup>94</sup> Koch, A., “Binding vs. v. Liszt - Klassische und moderne Strafrechtsschule”, *Der Strafgedanke in seiner historischen Entwicklung. Ringvorlesung zur Strafrechtsgeschichte und Strafrechtsphilosophie* (E. Hilgendorf, J. Weitzel, eds.), Berlin, 2007, pp. 127-145, esp. 142-145; Zabel, B., “Franz v. Liszt und die Reformbewegung des Strafrechts”, *Die Schule Franz von Liszts. Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts* (A. Koch, M. Löhnig, eds.), Tübingen, 2016, pp- 87-118.

<sup>95</sup> Müller, C., *Das Gewohnheitsverbrechergesetz vom 24. November 1933. Kriminalpolitik als Rassenpolitik*, Baden-Baden, 1997.

<sup>96</sup> Wilkitzki, N., *Entstehung des Gesetzes über Internationale Rechtshilfe in Strafsachen (IRG)*, Berlin/New York NY, 2010.

<sup>97</sup> For related assessments see Zabel, “Franz v. Liszt und die Reformbewegung des Strafrechts”, pp. 93 s., 118; Wetzell, “Franz v. Liszt und die internationale Strafrechtsreformbewegung”, pp. 225-227.

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